AS TO THE ADMISSIBILITY OF

Application No. 24630/94
by Waldo J.-P. HEUDENS
against Belgium

The European Commission of Human Rights sitting in private on 22 May 1995, the following members being present:

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

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 12 April 1994 by Waldo J.-P. HEUDENS against Belgium and registered on 19 July 1994 under file No. 24630/94;

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 applicant is a Belgian national, born in 1962, and resides in Kortenberg, Belgium. He is a Jehovah's witness. Before the Commission he is represented by Mrs. L. Versluys, a lawyer practising in Leuven, Belgium.

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

In March 1986 the applicant, being eligible for compulsory military service pursuant to Section 2 of the Co-ordinated Laws on Military Service of 30 April 1962 (Gecoördineerde Dienstplichtwetten

van 30 april 1962), informed the Minister of Defence in writing that, as a Jehovah's witness, he would refuse to perform military service or substitute civilian service.

On 5 August 1987 the applicant was questioned by the judicial police (gerechtelijke politie) of Turnhout in respect of his refusal to fulfil his military obligations. It appears that between 1986 and the beginning of 1992 the applicant was engaged in proceedings concerning the question whether he could be regarded as a conscientious objector within the meaning of the statutory rules on military service, a status which he refused to accept for being too closely linked with military service.

By letter of 16 March 1992 the applicant informed the Provincial Governor of Antwerp that he would not comply with the invitation he had received to present himself within 15 days after 6 April 1992 at the Recruitment and Selection Centre for the purposes of fulfilling his military duties.

The applicant did not present himself at the Recruitment and Selection Centre within the prescribed time-limit. He was therefore regarded as a deserter by virtue of Section 107 para. 1 of the Co-ordinated Laws on Military Service of 30 April 1962. Under Section 107 para. 2, infringements of the first paragraph of that provision are tried by military courts and are liable to the penalties laid down in the Military Penal Code.

On 19 August 1992 the applicant, after having reported himself to the Belgian national police (Rijkswacht), was apprehended. On the same day, after having heard the applicant, the Judicial Board of Inquiry of the Court Martial (Rechterlijke Commissie van de Krijgsraad) of Brussels noted the charge of desertion against him and ordered his detention on remand.

On 1 September 1992 the applicant requested the Court Martial (Krijgsraad) of Brussels to order his release.

On 8 September 1992, following adversarial proceedings in which the applicant was represented by a lawyer and in which he had stated not to be willing to perform ordinary military service or substitute civilian service, the Permanent Court Martial (Bestendige Krijgsraad) of Brussels, consisting of four military and one civilian judge, rejected the applicant's release request, convicted him of desertion in peace-time and sentenced him to 24 months' imprisonment.

The applicant's appeal was rejected on 28 October 1992 by the Courts Martial Appeal Court (Militair Gerechtshof) of Brussels, consisting of four military and one civilian judge, following adversarial proceedings. It upheld the judgment of 8 September 1992. The Courts Martial Appeal Court rejected, inter alia, the applicant's complaint of a violation of Section 6 of the Constitution (Grondwet), which provision guarantees equal treatment for everyone. On this point it held on page five, fifth paragraph, of its judgment:

[translation]

> " Considering that the accused can derive no argument from Section 6 of the Constitution, as the principle of equality implies, inter alia, that everyone, who concretely is in a same situation, shall be treated equally; that the mere fact that compulsory service, either military or civil, only exists for the male part of the Belgian citizens does not alter this finding, as this applies without distinction to this part of the population;"

The applicant's subsequent appeal in cassation was rejected on 19 October 1993 by the Court of Cassation (Hof van Cassatie). The Court of Cassation rejected the applicant's argument that, since the acts

with which he was charged should be classified as a "political" offence, he should have been tried by a civilian criminal court (Hof van Assisen) and not by a military court.

The Court of Cassation further rejected the applicant's argument that military courts, the majority of whose members are military officers, do not objectively have the independence and impartiality required by Article 6 para. 1 of the Convention to try an offence resulting from a persons's refusal to fulfil military obligations for moral reasons. On this point it noted that the military officers exercising judicial powers as members of a military court are not only exempt from the hierarchical and supervisory authority of political, administrative and military authorities, but are also bound to remain independent vis-à-vis the said authorities and the parties to the trial or any de facto authority since in the oath taken before they take up their duties, in accordance with Sections 54 and 114 of the Law of 15 June 1899, these officers make a public and solemn undertaking to abide by the obligations of independence and impartiality. It therefore found that it cannot be derived from the mere composition of military courts that they lack the required independence and impartiality within the meaning of Article 6 para. 1 of the Convention. It further did not find it established that the military courts were biased in the way they dealt with the applicant's case.

Insofar as the applicant complained that the principle of equality of arms had been violated as a consequence of the very large impact the "krijgsauditeur", the military prosecutor, appears to be able to have on decisions of military courts, whereas the applicant is unable to have the same impact, the Court of Cassation held that it had not appeared that the relevant statutory regulations in respect of proceedings before the Courts Martial Appeal Court had been violated. The Court of Cassation, after having noted that the applicant had failed to substantiate his allegations that the "krijgsauditeur" could exercise, and in his case in fact had exercised, more influence than the defence and that the conviction and the sentence imposed had exclusively been decided by the judges involved, dismissed this complaint as too vague.

As regards the applicant's complaint that the Courts Martial Appeal Court had failed to properly answer his complaint on the alleged violation of his right to equal treatment with women by the practice to reserve compulsory military service only for the male part of the population, the Court of Cassation, inter alia, held:

[Dutch]

" Overwegende dat aldus geen schending door een wet, een decreet of een in artikel 26bis van de Grondwet bedoelde regel van de artikelen 6 en 6 bis van de Grondwet wordt opgeworpen, maar een schending van die bepalingen door de door eiser aangevochten praktijk ;

(...)

Overwegende dat eiser te dezen bij de appelrechters slechts concludeerde zoals in de stukken 41 en 42 van het strafdossier is weergegeven ;

Dat de appelrechters door hun overwegingen op de bladzijde vijf, vijfde overweging, van het bestreden arrest, eisers aanvoeringen verwerpen, de conclusie beantwoorden en hun beslissing naar recht verantwoorden ;

Dat de grief niet kan worden aangenomen ;"

[translation]

" Considering that thus no violation by an Act, a Decree or a rule, referred to in Section 26bis of the Constitution, of the Sections 6 and 6bis is alleged, but a violation of those provisions by the practice challenged by petitioner [of cassation] ;

(...)

Considering that, on this point, before the appeal judges petitioner only argued as described in the documents 41 and 42 of the criminal case-file ;

That the appeal judges by their reasoning on page five, fifth consideration, of the challenged judgment reject the petitioner's submissions, reply to the argument and base their decision on the law ;

That the complaint cannot be accepted ;"

The Court of Cassation also rejected the applicant's other complaints which concerned, inter alia, Articles 5 para. 3, 9, and 10 of the Convention.

On 24 February 1994 the applicant was imprisoned at Leuven.

In February 1995 Belgium abolished compulsory military service.

Where it is alleged that a statutory rule is contrary to the Constitution, an appelant in cassation may request the Court of Cassation to put a preliminary question to the Court of Arbitration (Arbitragehof). Pursuant to Section 26 para. 2 and Section 28 of the Special Act of 6 January 1989 on the Court of Arbitration (Bijzondere Wet van 6 januari 1989 op het Arbitragehof), the Court of Cassation cannot refuse an appelant's request to put such a question to the Court of Arbitration and is bound by the latter court's finding.

COMPLAINTS

1. The applicant complains under Article 5 para. 3 of the Convention that he was not brought to trial within a reasonable time, as he had informed the Minister of Defence already in 1986 of his refusal to perform military service and substitute civilian service, but it was not until 1992 that the Court Martial dealt with his case.

2. The applicant complains under Article 6 para. 1 of the Convention that he did not receive a hearing by an impartial and independent tribunal. He submits that, as a civilian conscientious objector, he should have been brought before a civilian court and not before military courts, the majority of whose members are military officers, the more so as military courts in general impose higher sentences than ordinary courts and as the detention regime for sentenced military persons is more strict than for sentenced civilians. He also complains that the position and influence of the office of the "krijgsauditeur", who performs investigating functions without combining these with prosecuting functions, violate the principle of equality of arms. The applicant states he does not wish to complain of the activities of the "krijgsauditeur" in the pre-trial stage of the proceedings against him, but of the impact that the military prosecutor's department (het krijgsauditoriaat) appears to be able to have on the decisions of military courts, whereas the applicant is not able to have the same impact.

3. The applicant complains under Articles 9 and 10 of the Convention that, as a Jehovah's witness, he was not exempted from performing military service and substitute civilian service. He submits that in certain other European countries special measures have been taken in respect of Jehovah's witnesses, such as full exemption from military service, a symbolic sentence that is not executed or arrangements for a military service performed in a way which is compatible with the beliefs of Jehovah's witnesses.

4. The applicant finally complains under Article 14 of the Convention that he is discriminated against on the basis of his religion, as for different forms of conscientious objections against military service certain alternatives have been created, such as performing military service without having to carry arms and different kinds of substitute civilian service. However for conscientious

objectors who on moral grounds fully refuse to fulfil their military obligations ("totaalweigeraars") no specific measure has been taken. They are sentenced to prison for their convictions. The applicant also submits that he is discriminated against as a man, as female Jehovah's witnesses are not punished for their convictions. He finally complains that for failure to fulfil military obligations military courts impose higher sentences than civilian criminal courts in cases concerning conscientious objectors who have failed to perform substitute civilian service.

THE LAW

1. The applicant complains under Article 5 para. 3 (Art. 5-3) of the Convention that, given the period which elapsed between his initial letter to the Minister of Defence and the proceedings before the Court Martial, he was not brought to trial within a reasonable time.

Article 5 (Art. 5) of the Convention, insofar as relevant, reads:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(...)
c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (...)

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall (...) be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
(...)."

The Commission considers that the applicant's initial letter of March 1986 cannot be taken as the starting point when calculating whether he was brought to trial within a reasonable time for the purpose of Article 5 para. 3 (Art. 5-3) of the Convention. The starting point is the day on which the applicant was arrested, i.e. 19 August 1992. The applicant was brought to trial already on 8 September 1992.

In these circumstances the Commission finds that the applicant was brought to trial within a reasonable time for the purposes of Article 5 para. 3 (Art. 5-3) of the Convention.

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

2. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that he did not receive a hearing by an impartial and independent tribunal. He submits that, as a civilian conscientious objector, he should have been brought before a civilian court and not before military courts, the majority of whose members are military officers, and which generally impose higher sentences than civilian criminal courts for failure to fulfil military obligations. He also complains that the position and influence of the office of the "krijgsauditeur" violate the principle of equality of arms in proceedings before military courts.

Article 6 para. 1 (Art. 6-1) of the Convention, insofar as relevant, reads:

"In the determination of (...) any criminal charge against him,

everyone is entitled to a (...) hearing (...) by an independent and impartial tribunal established by law. (...)."

As regards the question whether the applicant was correctly brought before a military court as opposed to a civilian criminal court, the Commission recalls that, in accordance with Article 19 (Art. 19) of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with applications alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (cf. No. 17722/91, Dec. 8.4.91, D.R. 69 p. 345).

As regards the substance of the present complaint, the Commission recalls that, in order to establish whether a judicial body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressure and to the question whether the body presents an appearance of independence. As to the question of impartiality, a distinction must be drawn between a subjective test, whereby it is sought to establish the personal conviction of a given judge, and an objective test aimed at ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. In this respect even appearances may be of a certain importance. The standpoint of the accused in this respect is important but not decisive. What is determining is whether this fear can be held to be objectively justified (cf. Eur. Court H.R., Langborger judgment of 22 June 1989, Series A no. 155, p. 16, para. 32; Fey judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 30; and Holm judgment of 25 November 1993, Series A no. 279-A, p. 14, para. 30).

As to the subjective test, the applicant has not alleged that the judges involved in the proceedings at issue acted with personal bias. In any event the personal impartiality of a judge must be presumed until there is proof to the contrary and in the present case there is no such proof.

As regards the objective test, the Commission has previously examined the question whether military courts in Belgium comply with the requirements of Article 6 para. 1 (Art. 6-1) of the Convention as regards the independence and impartiality of tribunals (No. 12717/87, Dec. 8.9.87, D.R. 57 p. 196).

In that case it held that:

"The Commission recalls that although the civilian member of the court martial is appointed for three months and although the civilian President of the Military Court cannot be removed, the four military members of these courts are appointed for sessions of one month. The requirement for a judge to be independent does not necessarily imply that he should be appointed for life or that he should have security of tenure in law (in other words, that he cannot be given other duties without his consent). It is essential, however, that he should not be subject to any authority in the performance of his duties as a judge (No. 8209/78, Dec. 1.3.79, D.R. 16 p. 166). The military members of the military courts cannot be removed for the duration of their mandate. Even though, as members of the armed forces, they are subject to the authority of their hierarchical superiors in their respective units, when they sit as judges they are not answerable to anyone about the way in which they administer justice. They are not subject to any authority in the exercise of their judicial functions, and these take priority, except in

cases of force majeure, over all other military services (Article 148 of the Code of Military Criminal Procedure). Their independence is further guaranteed by the fact that the part each member plays in the taking of the decision remains secret, because the decision is taken by the whole bench and the members are obliged under oath to keep the deliberations secret.

There is therefore nothing to cast doubt on the fact that the court martial and the Military Court were, in this case, independent and impartial tribunals within the meaning of Article 6 para. 1 (Art. 6-1)."

The Commission finds no reason to take a different view in the present case as regards the independence and impartiality of the military courts which dealt with the applicant's case.

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.

3. Insofar as the applicant complains that the position and influence of the office of the "krijgsauditeur" violate the principle of equality of arms in proceedings before military courts in view of the influence this office appears to be able to exercise in decisions by military courts, the Commission notes that this complaint is unsubstantiated. The Commission does not find that the facts of the case disclose any indication justifying the conclusion that in the proceedings at issue the "krijgsauditeur" was placed in a more advantageous position than the applicant.

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

4. The applicant complains under Articles 9 and 10 (Art. 9, 10) of the Convention that, as a Jehovah's witness, he was not exempted from performing military service and substitute civilian service.

The Commission recalls that the Convention and its Protocols do not guarantee, as such, any right to conscientious objection and that Article 9 (Art. 9) of the Convention, which provision guarantees to everyone the right to freedom of thought, conscience and religion, does not give conscientious objectors the right to be exempted from military or substitute civilian service. It does not prevent a Contracting State from imposing sanctions on those who refuse such service (cf. No. 7705/76, Dec. 5.7.77. D.R. 9 p. 196; No. 10600/83, Dec. 14.10.85, D.R. 44 p. 155; and No. 17086/90, Dec. 6.12.91, D.R. 72 p. 245).

Insofar as the applicant relies on Article 10 (Art. 10) of the Convention, which provision guarantees to everyone the right to freedom of expression, the Commission finds no indication in the present case that there has been any interference with the applicant's exercise of this right.

It follows that this part of the application must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant complains under Article 14 (Art. 14) of the Convention that he is discriminated against on the basis of his religion, as for the different forms of conscientious objections against military service certain alternatives have been created, such as performing military service without having to carry arms and different kinds of substitute civilian service. However for conscientious objectors who fully refuse to fulfil their military obligations ("totaalweigeraars") no specific measure has been taken.

Article 14 (Art. 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."

According to the established case-law, Article 14 (Art. 14) of the Convention 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 (Art. 14) does not necessarily presuppose a breach of those provisions, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (cf. No. 19819/92, Dec. 5.7.94, D.R. 78-A p. 88).

The Commission accepts that the applicant's complaint falls within the ambit of Article 9 (Art. 9) of the Convention, although the Convention does not guarantee, as such, a right to conscientious objection. Article 14 (Art. 14) of the Convention is, therefore, applicable.

The Convention organs have constantly held that a difference in treatment between individuals, placed in similar situations, is discriminatory within the meaning of Article 14 (Art. 14) if it "has no objective and reasonable justification, that is, if it does not pursue a "legitimate aim" or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (cf. Eur. Court H.R., Hoffmann judgment of 23 June 1993, Series A no. 255-C, pp. 58-59, paras. 31 and 33).

It must first be examined whether the applicant can claim to have undergone a treatment different from others, placed in a similar situation.

The Commission notes that the applicant, a so-called "total objector" refusing to perform both military service and substitute civilian service on moral grounds, seeks to compare himself with conscientious objectors who are prepared to fulfil their military obligations, but who, on moral grounds, either refuse to carry arms or who refuse to serve in the military forces, as such, but are prepared to fulfil their military obligations by opting for substitute civilian service.

The Commission considers that these two situations cannot be regarded as comparable for the purposes of Article 14 (Art. 14) of the Convention.

Moreover, the Commission notes that any system of compulsory military service imposes a heavy burden on the citizens. The burden may be regarded as acceptable only if it is shared in an equitable manner and if exemptions from the duty are based on solid grounds. If some citizens were to be exempted without convincing reasons, a question of discrimination against the other citizens would arise. These considerations apply with particular force when exemption from military service is not accompanied by an obligation to perform substitute civilian service.

The Convention does not prevent a Contracting State from taking measures to enforce performance of substitute civilian service, or from imposing sanctions on those who refuse such service (cf. No. 10600/83, Dec. 14.10.85, D.R. 44 p. 155). The Commission notes that for conscientious objectors in Belgium different options were offered in order to enable them to fulfil their military obligations while

respecting their moral convictions as much as possible, a possibility of which the applicant chose not to avail himself. The fact that no exemption for both military service and substitute civilian service can be obtained in Belgium is, in the Commission's view, not in conflict with Article 14 (Art. 14) of the Convention.

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

6. The applicant further claims to be the victim of discrimination contrary to Article 14 (Art. 14) of the Convention on the ground of sex, as female Jehovah's witnesses are not punished for their convictions.

The Commission observes that it does not appear that the applicant availed himself of the possibility to request the Court of Cassation to put a preliminary question to the Court of Arbitration on the compatibility of Section 2 of the Co-ordinated Laws on Military Service of 30 April 1962, on which provision the compulsory military service for male Belgian nationals is based, with the constitutional right to equality. The Commission further observes that, pursuant to Section 26 para. 2 and Section 28 of the Special Act on the Court of Arbitration, the Court of Cassation cannot refuse a request to put such a question to the Court of Arbitration and is bound by the latter court's finding.

Consequently, a request to the Court of Cassation to put a question to the Court of Arbitration on the compatibility of the statutory rule that compulsory military service only exists for male nationals with the constitutional right to equal treatment must in principle be regarded as an effective remedy for the purposes of Article 26 (Art. 26) of the Convention.

It follows that the applicant has not satisfied the condition laid down in Article 26 (Art. 26) of the Convention and that this part of the application must be rejected in accordance with Article 27 para. 3 (Art. 27-3) of the Convention.

7. The applicant has also complained under Article 14 (Art. 14) of the Convention that, for failure to fulfil military obligations, Belgian military courts impose higher sentences than Belgian civilian criminal courts in cases concerning conscientious objectors who have failed to perform substitute civilian service..

The Commission recalls that complaints concerning the length of sentence passed after due process of law by a judge in possession of the facts do not generally fall within the scope of the Convention. However, where a settled policy appears to affect individuals in a discriminatory fashion issues may arise under Article 5 read in conjunction with Article 14 (Art. 5+14) of the Convention (No. 11077/84, Dec. 13.10.86, D.R. 49 p. 170).

In this respect the Commission notes that the applicant has failed to submit any information indicating that the factual and legal situation of persons having obtained the status of conscientious objectors and who are convicted by civilian criminal courts for subsequently having failed to perform substitute civilian service can reasonably be regarded as comparable to the factual and legal situation of persons, who, like himself, have been convicted by a military court for failure to fulfil military obligations.

This complaint must, therefore, also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)