EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 19600/15
R.S.
against Germany

The European Court of Human Rights (Fifth Section), sitting on 28 March 2017 as a Chamber composed of:
Erik Møse, *President,*
Angelika Nußberger,
André Potocki,
Yonko Grozev,
Síofra O'Leary,
Carlo Ranzoni,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar*,
Having regard to the above application lodged on 20 April 2015,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr R.S., is a German national who was born in 1979 and lives in Berlin. He was represented before the Court by Mr M. Manzel, a lawyer practising in Berlin.

A. The circumstances of the case

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

1. Background to the case

3. The applicant was a soldier in the German armed forces from 1 March 2001 until 28 February 2013. On the first day of his service, he was

formally instructed that, pursuant to the pertinent internal regulation of the armed forces, the consumption of drugs was prohibited both on duty and off duty and was subject to disciplinary sanctions (see paragraph 25 below). From July 2002 until March 2009, the applicant consumed cannabis in his spare time on several occasions.

4. After another soldier had informed the applicant's disciplinary superior (*Disziplinarvorgesetzter*) about this, the latter confronted the applicant with the accusation on 20 March 2009. The applicant denied having consumed drugs and agreed to have a rapid drug test carried out that same day. As the test turned out to be positive, the applicant was questioned a second time. The disciplinary superior informed the applicant of his right to remain silent by virtue of Section 32 of the Disciplinary Code of the German Armed Forces (see paragraph 26 below), but did not tell him about the possibility of contacting a lawyer, as this right was not laid down in the said provision. The disciplinary superior also told the applicant that, if he chose not to remain silent, he was obliged to make true statements under the Disciplinary Code. The applicant then confessed to having consumed cannabis.

5. On 26 March 2009 the disciplinary superior informed the Public Prosecutor, who launched preliminary criminal proceedings against the applicant. On 30 June 2009 these proceedings were discontinued because the applicant's guilt was considered to be of a minor nature and because prosecution was not in the public interest.

2. The proceedings at issue

6. On 26 March 2009 the applicant's disciplinary superior informed the Prosecutor of the armed forces (*Wehrdisziplinaranwalt*) that he had referred the matter to the Public Prosecutor. On 21 April 2009, in an internal document, the Prosecutor of the armed forces ordered a preliminary investigation.

7. On 22 April 2009 the applicant, of his own motion, went to see the deputy of the disciplinary superior. He again admitted to having consumed cannabis.

8. Following the applicant's second confession, his disciplinary superior advised him to see the *Vertrauensperson* ("person of confidence", see paragraph 27 below) so as to give him the opportunity to convince the latter to make a statement that was favourable to him. The disciplinary superior informed the applicant of his right to object to the *Vertrauensperson* being part of the proceedings. As the applicant did not object, the disciplinary superior also asked the *Vertrauensperson* to talk to the applicant. Shortly after, the applicant went to see the *Vertrauensperson* and told him about the background of his drug consumption.

9. On 28 April 2009, after the Prosecutor of the armed forces had asked the disciplinary superior to do so, the applicant was informed for the first

time of his right to contact a lawyer. He was also asked whether he agreed to the *Vertrauensperson* being given access to the file. The applicant gave his consent without asking a lawyer for advice.

10. On 11 May 2009 the applicant was formally questioned for the first time. He remained silent. The same day, the *Vertrauensperson* was questioned and gave evidence about the applicant's statements during their conversation, as the applicant had not objected to the *Vertrauensperson* being heard (see paragraph 27 below).

11. On 27 May 2009 disciplinary court proceedings against the applicant were opened. This decision was served on the applicant on 8 June 2009.

12. On 7 October 2009 the Prosecutor of the armed forces charged the applicant with the disciplinary offence of having breached his duties with intent by regularly consuming cannabis from 2002 to 2009.

13. On 29 July 2010 the Northern Military Court found the applicant guilty of a disciplinary offence pursuant to Section 23 § 1 of the Act on the Legal Status of Soldiers (see paragraph 25 below). It ordered that the applicant be banned from promotion for the next thirty months and that his salary be cut by a twentieth (i.e. five per cent) for a period of ten months. It considered the pecuniary fine to be necessary for educational reasons, as the applicant had no realistic prospect of promotion (see paragraph 25 below).

14. In the proceedings before the Military Court, the applicant remained silent. The court, therefore, based its findings on the result of the drug test and, mainly, on statements made by the applicant's disciplinary superior. Emphasising the difference between criminal proceedings and disciplinary proceedings, it considered that admitting these pieces of evidence did not violate the applicant's right to a fair trial. It pointed out that, when the applicant had first confessed his drug consumption to his disciplinary superior on 20 March 2009, after the latter had informed him about his right to remain silent, the proceedings were at the stage of a disciplinary investigation by a soldier's disciplinary superior; the Prosecutor of the armed forces had not yet opened a preliminary investigation. It considered that a soldier only had to be informed of his right to contact a lawyer once the latter proceedings were opened. Hence, the evidence obtained from the applicant's first confession of 20 March 2009 could be admitted (see paragraph 4 above). However, the applicant's second confession of 22 April 2009 (see paragraph 7 above) could not be admitted as evidence because the prosecutor of the armed forces had ordered the initiation of a preliminary investigation prior to that date, which was why the applicant had to be informed of his right to contact a lawyer.

15. On 28 June 2012, the Federal Administrative Court rejected the applicant's appeal against the decision of the Northern Military Court. It found that neither the applicant's first confession of 20 March 2009 nor his second confession of 22 April 2009, nor the statements by his disciplinary superior, respectively the superior's deputy – to whom he had confessed on

those occasions – could be admitted as evidence, because the applicant had not been informed of his right to contact a lawyer in advance. The court reasoned that such instruction, which was not required for minor disciplinary measures imposed by the disciplinary superior himself, was always required for evidence to be admitted in disciplinary court proceedings so as to ensure the fairness of the latter.

16. However, the court considered that the finding that the applicant had consumed cannabis in his spare time, in breach of his duties as a soldier, could be based on three pieces of evidence. First, the statement of a witness who had known about the applicant's drug consumption prior to the commencement of any proceedings. Second, the drug test to which the applicant had agreed after the initial questioning by his disciplinary superior on 20 March 2009. The court noted, however, that the examining physician had indicated that the positive result could also have been caused by passive smoking of cannabis and was not in itself sufficient to prove the applicant's cannabis consumption. Third, the statement of the *Vertrauensperson* about the conversation he had had with the applicant.

17. The court found that he did not have a right to refuse to give testimony. The *Vertrauensperson* did not belong to the persons listed in either Section 53 or Section 53a of the Code of Criminal Procedure (see paragraph 28 below) who could refuse testimony on professional grounds. It was constant case-law of the domestic courts that this provision did not extend to employee representatives or staff council members, and there was no reason to treat the *Vertrauensperson* more favourably than those persons. A right to refuse testimony did not follow from Section 54 of the Code of Criminal Procedure (see paragraph 28 below) either, as the pertinent internal regulations of the armed forces authorised the *Vertrauensperson* to testify before Military Courts.

18. The Federal Administrative Court further found that hearing the *Vertrauensperson* as a witness did not violate Article 136a of the Code of Criminal Procedure (see paragraph 28 below). The fact that the applicant's disciplinary superior had advised him to contact the *Vertrauensperson* did not amount to "deception" within the meaning of Article 136a. When giving this advice, the disciplinary superior had not been aware of the fact that the *Vertrauensperson* might be heard as a witness in court proceedings against the applicant and had no intention of deceiving the applicant as to the lack of confidentiality of his statements to the *Vertrauensperson*. No pressure had been exerted on the applicant to confess his drug consumption to the *Vertrauensperson*. Referring to Section 27 of the Participation of Soldiers Act (see paragraph 27 below), the court took into account that the role of the *Vertrauensperson* in disciplinary proceedings was a neutral one and not comparable to a defence lawyer acting on behalf of the accused soldier. The intention behind advising the applicant to talk to the *Vertrauensperson* was,

thus, to give him the opportunity to convince the *Vertrauensperson* to make a statement that was favourable to him.

19. Moreover, Section 8 of the Participation of Soldiers Act did not prevent hearing the *Vertrauensperson* as a witness. Noting that the provision obliged him to observe professional secrecy vis-à-vis third parties and that the German legislator, as a rule, distinguished between the obligation to observe secrecy and the right to refuse testimony, the Federal Administrative Court observed that courts were not a third party within the meaning of that provision, which, in addition, did not contain a right to refuse testimony. The term "*Vertrauensperson*" could not lead to a different result. This formulation reflected the fact that he was elected by the soldiers, hence he had the confidence of the majority of voters, and was entrusted with the task of representing their interests. This did not imply that soldiers accused of wrongdoing could rely, without restriction, on the *Vertrauensperson* to remain silent in proceedings of which he was made part. Rather, Section 27 § 2 of the Participation of Soldiers Act showed that the *Vertrauensperson* had an independent role in disciplinary court proceedings and his task was to provide the perspective of a fellow soldier, so as to allow for an informed exercise of discretion. The interests of the accused soldier were sufficiently protected by his right to object to the participation of the *Vertrauensperson* in the disciplinary court proceedings prior to their opening. Sections 8 and 27 § 2 of the Participation of Soldiers Act did not give the accused soldier the right to object, at a later stage, to the *Vertrauensperson* being heard with retroactive effect.

20. Furthermore, the Federal Administrative Court found that admitting the statement of the *Vertrauensperson* as evidence did not violate constitutional law. The applicant's right to protection of personality rights and his right to a fair trial had not been violated because, although advised to do so by his disciplinary superior, he had freely chosen to inform the *Vertrauensperson* about his drug consumption. He had also been aware that he was not legally obliged to talk to the *Vertrauensperson*. Moreover, neither his disciplinary superior nor the *Vertrauensperson* had told the applicant that the *Vertrauensperson* would treat the information as confidential. On the contrary, the applicant had repeatedly been asked whether he objected to the *Vertrauensperson* being part of the disciplinary proceedings and had decided not to object. He could thus not rely on the content of his statements made to the *Vertrauensperson* remaining confidential.

21. The court noted that, prior to making his statement to the *Vertrauensperson*, the applicant had already confessed his drug consumption to his disciplinary superior and the superior's deputy without having been instructed about his right to consult a lawyer. It acknowledged that the applicant may thus have decided to talk to the *Vertrauensperson* because he was under the impression that he could no longer undo his

earlier self-incriminatory statements. The *Vertrauensperson* did not instruct him that none of his earlier confessions could be used as evidence against him (so-called "qualified instruction"). However, the conversation the applicant had had with the *Vertrauensperson* could not be compared to a situation of questioning an accused, for its purpose was not to further the investigation of the matter. As the *Vertrauensperson* was, therefore, not obliged to instruct the applicant that he could be heard as a witness in the court proceedings, he was even less obliged to provide a qualified instruction to the applicant.

22. Finally, the Federal Administrative Court found that admitting the statement of the *Vertrauensperson* as evidence did not violate the applicant's right to a fair trial guaranteed by Article 6 of the Convention, noting that it could be left open whether the disciplinary proceedings at issue fell under the criminal or under the civil limb of the provision. Noting that Article 6 of the Convention did not lay down any rules on the admissibility of evidence as such, which was therefore primarily a matter for regulation under national law, the question which had to be answered was whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. Referring to, *inter alia*, the judgment in the case of *Bykov v. Russia* [GC] (no. 4378/02, § 92, 10 March 2009), it pointed out that the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures, and the use to which any material so obtained was put had to be assessed when examining whether a procedure had extinguished the very essence of the privilege against self-incrimination. The applicant had talked to the *Vertrauensperson* voluntarily, his confession had not been elicited through subterfuge and there were no elements of oppression or coercion. The court also noted that the applicant could raise his arguments as to why the statement of the *Vertrauensperson* should not be admitted as evidence before domestic courts and that he could question him in person at the appeal hearing. Emphasising that the statement of the *Vertrauensperson* was not the only piece of evidence used and that all three pieces of evidence used were consistent with each other, it concluded that the proceedings, taken as a whole, were not unfair.

23. On 30 July 2012 the applicant lodged a constitutional complaint with the Federal Constitutional Court.

24. On 15 October 2014 the Federal Constitutional Court declined to consider the applicant's complaint, without giving reasons. The decision was served on the applicant on 23 October 2014.

B. Relevant domestic law and practice

25. Section 23 § 1 of the Act on the Legal Status of Soldiers (*Gesetz über die Rechtsstellung der Soldaten*) provided that a culpable breach of a

soldier's duties constituted a disciplinary offence. Pursuant to the internal regulation of the German Armed Forces (*Zentrale Dienstvorschrift*) 10/5, no. 404, the consumption of drugs was prohibited both on duty and off duty and was subject to disciplinary sanctions. According to the constant case-law of the domestic courts, the consumption of drugs would normally be sanctioned by a promotion ban or, in severe cases, by a demotion (see Federal Administrative Court, 2 WD 44/09, judgment of 12 October 2010). Pursuant to Section 58 § 4 of the Disciplinary Code of the German Armed Forces (*Wehrdisziplinarordnung*), a salary cut may be imposed in addition to a promotion ban, if it appeared that the promotion ban did not have an impact on the soldier's career in the armed forces.

26. Section 32 of the Disciplinary Code of the German Armed Forces provided that, where facts become known that justified the suspicion of a soldier's breach of duty, the disciplinary superior of that soldier had to establish the facts by conducting the necessary investigations. The soldier was to be informed about the investigation as soon as possible without putting the purpose of the investigation at risk, and had to be informed at the beginning of the first questioning of which breaches of duty he was accused. At the same time, he had to be advised that he was free to remain silent. If he chose to speak, he had to give a truthful account in relation to official matters. If the instruction required was omitted or not properly given, the statement given by the soldier could not be used to his detriment. In cases warranting the opening of disciplinary court proceedings, the disciplinary superior had to refer the matter to the Prosecutor of the armed forces (Section 41). Pursuant to Section 91 § 1 of the same Code, the provisions of the Code of Criminal Procedure were to be applied to disciplinary court proceedings in addition to the provisions of the Disciplinary Code, unless the nature of the proceedings was opposed to this.

27. The status of the *Vertrauensperson*, including the mode of his designation, his competencies and powers, and his role within the hierarchy, were laid down in the Participation of Soldiers Act (*Soldatenbeteiligungsgesetz*). At the material time, that Act, which has since been amended, provided that the *Vertrauensperson* was elected by groups of soldiers for a period of two years. He was tasked with contributing to the good cooperation between superiors and subordinates and the consolidation of comradely trust. He closely cooperated with the disciplinary superior, both in the interests of the soldiers and those of the armed forces. The *Vertrauensperson* had to be informed and heard with regard to measures falling within the scope of his mandate and, in certain scenarios, had a right to make suggestions to the disciplinary superior. He had to be heard with regard to day-to-day matters of service and should be heard on a variety of matters concerning staff. Where no agreement could be reached, it was possible to refer certain matters to a more senior level within the hierarchy. The *Vertrauensperson* was also concerned with staff welfare and offered

counselling sessions to fellow soldiers as needed. At the material time, Section 8 § 1, which has since been changed, provided that the *Vertrauensperson* had to observe professional secrecy vis-à-vis third parties in relation to facts and matters he learned about in the exercise of his functions. Section 27 § 2 provided, at the time, that the *Vertrauensperson* had to be heard about the soldier concerned and the facts at issue where the opening of court proceedings against a soldier for a disciplinary offence was intended, unless the soldier objected to such hearing. That hearing served the purpose to ensure that the soldier's interests were taken into account prior to a decision being taken on the opening of court proceedings against him (see Federal Administrative Court, 2 WDB 1/98, decision of 31 August 1998). Section 27 § 4 stated that a transcript of that hearing had to be recorded.

28. The pertinent provisions of the Code of Criminal Procedure read, in so far as relevant, as follows:

Section 53 [Right to Refuse Testimony on Professional Grounds]

"(1) The following persons may also refuse to testify:

1. clergymen, concerning information that was entrusted to them or became known to them in their capacity as spiritual advisers;

2. defence counsel of the accused, concerning information that was entrusted to them or became known to them in this capacity;

3. attorneys, patent attorneys, notaries, certified public accountants, sworn auditors, tax consultants and tax representatives, doctors, dentists, psychological psychotherapists, psychotherapists specialising in the treatment of children and juveniles, pharmacists and midwives, concerning information that was entrusted to them or became known to them in this capacity. ...

3b. drugs dependency counsellors in a counselling agency recognised or set up by an authority, a body, an institution or a foundation under public law, concerning the information that was entrusted to them or became known to them in this capacity; ...

Section 53a [Right of Professional Assistants to Refuse Testimony]

(1) Persons assisting, and persons involved in the professional activities of those listed in Section 53 subsection (1), numbers 1 to 4, as part of their training, shall be considered equivalent to such persons. ...

Section 54 [Authorisation for Judges and Officials to Testify]

(1) The special provisions of the law concerning public officials shall apply to the examination of judges, officials, and other persons in the public service as witnesses concerning circumstances covered by their official obligation of secrecy, as well as to permission to testify. ...

Section 136a [Prohibited Methods of Examination]

(1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. ...

(3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused consents to their use."

COMPLAINT

29. The applicant complained under Article 6 §§ 1 and 3 of the Convention that the disciplinary proceedings against him were unfair, because the statement of the *Vertrauensperson* was admitted as evidence, despite the fact that the applicant had not been informed about his right to contact a lawyer prior to confessing to the *Vertrauensperson*.

THE LAW

30. The applicant argued that his rights under Article 6 §§ 1 and 3 of the Convention were violated, first, by the absence of a defence lawyer at the initial stage of the disciplinary proceedings, which were conducted by his disciplinary superior. Second, these rights were violated because his disciplinary superior had advised him to talk to the *Vertrauensperson*, who informed him neither about his right to remain silent nor about his right to contact a lawyer. Relying on *Stojkovic v. France and Belgium* (no. 25303/08, 27 October 2011), he argued that his conversation with the *Vertrauensperson*, whom, he alleged, acted on the instruction of his disciplinary superior, resembled official questioning. The statement of the *Vertrauensperson* should not have been admitted as evidence as the applicant had a legitimate expectation that any statement he made to him would remain confidential. The Federal Administrative Court, which was the first to rely on the statement of the *Vertrauensperson*, wrongfully dismissed his objection, raised before that court, against admitting that statement as belated. The applicant asserted that he would not have been found guilty of a disciplinary offence if the statement of the *Vertrauensperson* had not been admitted, as the other pieces of evidence relied on were not sufficiently conclusive as to his guilt.

31. Article 6 of the Convention, in so far as relevant, reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing ..."

32. With regard to the applicability of the criminal limb of Article 6 of the Convention, the Court reiterates that the concept of a "criminal charge" has an "autonomous" meaning, independent of the categorisations employed by the national legal systems of the member States, and that its established case-law sets out three criteria, commonly known as the "Engel criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22) to be considered in determining whether or not there was a "criminal charge" (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 53, ECHR 2009). The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (*ibid*.).

33. The Court observes that the applicant was sanctioned for a culpable breach of his duties as a soldier which, by its nature, was an administrative rather than criminal offence, and was classified as such in domestic law. Even though the applicant's conduct underlying that offence – the consumption of drugs – was a criminal offence for the population as a whole and preliminary criminal proceedings against the applicant were initiated, those proceedings were discontinued shortly after because the applicant's guilt was considered to be of a minor nature and because prosecution was not in the public interest (see paragraph 5 above). The Court notes that the sanction imposed depended on a preliminary finding of guilt (*Benham v. the United Kingdom*, 10 June 1996, § 56, *Reports of Judgments and Decisions* 1996-III). However, it considers that the penalty which the applicant risked incurring – primarily a promotion ban and a salary cut (see paragraph 25 above) – was more lenient than a discharge from the armed forces and that not even such discharge could be regarded as a criminal penalty for the purposes of Article 6 § 1 of the Convention (*Suküt v. Turkey* (dec.), no. 59773/00, 11 September 2007, with further references). The domestic courts ordered that the applicant be banned from promotion for the next thirty months and that his salary be cut by five per cent for a period of ten months (see paragraph 13 above). The pecuniary sanction was meant to have educational effects, as the applicant had no realistic prospect of promotion (see paragraph 13 above). In light of the above, the Court concludes that the criminal limb of Article 6 is not applicable to the present case.

34. As to the civil limb of Article 6 of the Convention, the Court has held that, in principle, there can be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies (*Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II). In *Bayer v. Germany*, no. 8453/04, §§ 38-39, 16 July 2009, and in *Vanjak v. Croatia* (no. 29889/04, §§ 31-33, 14 January 2010), the Court found that the civil limb of Article 6 was applicable to the disciplinary proceedings in question concerning the civil-servant applicants. In the present case, like in the case of *Bayer*, the applicant had the right to challenge the charges brought against him before the administrative courts at two levels of jurisdiction. The German system thus secured the applicant's "right to a court" of which the right of access constitutes one aspect. It follows that Article 6 is applicable under its civil head, that is to say, the various guarantees embodied therein (see *Baka v. Hungary* [GC], no. 20261/12, § 106, ECHR 2016), to the disciplinary proceedings in question.

35. The Court reiterates that, although the provisions of Article 6 §§ 2 and 3 have a certain relevance outside the strict confines of criminal law, notably as regards disciplinary proceedings falling under the civil limb of Article 6 § 1 (see *Albert and Le Compte v. Belgium*, 10 February 1983, § 39, Series A no. 58), the national courts have "greater latitude" when dealing with cases concerning civil rights and obligations as the requirements of Article 6 § 1 are less onerous in these cases (*McKevitt and Campbell v. the United Kingdom* (dec.), nos. 61474/12 and 62780/12, § 60, 6 September 2016, with further references). Article 6 does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (*Bykov v. Russia* [GC], no. 4378/02, § 88, 10 March 2009). It is not the role of the Court to determine the admissibility of certain pieces of evidence, but rather to determine whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. In determining whether the proceedings as a whole were fair, the issue of whether the applicant was given the opportunity of challenging the evidence and of opposing its use must be examined. In so far as the privilege against self-incrimination was concerned, the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained was put, had to be assessed when examining whether a procedure had extinguished its very essence (*ibid*., §§ 89, 90 and 92).

36. The Court notes that the Federal Administrative Court's finding that the applicant had consumed cannabis in his spare time in breach of his duties as a soldier had been based on the statement of a witness who had

known about the applicant's drug consumption prior to the commencement of any proceedings; on the result of the drug test; and on the statement of the *Vertrauensperson* about the conversation he had had with the applicant (see paragraph 16 above). It found that neither the applicant's first confession of 20 March 2009 nor his second confession of 22 April 2009 could be admitted as evidence. In so far as the applicant complained about the absence of a defence lawyer at the initial stage of the disciplinary proceedings, which were conducted by his disciplinary superior, the Court notes that the only piece of evidence relied on by the Federal Administrative Court in which this aspect could come into play was the statement of the *Vertrauensperson*.

37. It is undisputed that the applicant was not informed of his right to contact a lawyer prior to his decision to speak to the *Vertrauensperson* and to confess his drug consumption to him.

38. However, the Court observes that the *Vertrauensperson* was first questioned on 11 May 2009 and that the applicant did not object to the participation of the *Vertrauensperson* in the proceedings after he was informed about his right to contact a lawyer on 28 April 2009 (see paragraphs 9 and 10 above). Furthermore, he had the possibility to challenge the admissibility of the statement of the *Vertrauensperson* as evidence and the Federal Administrative Court, unlike the domestic courts in *Vanjak* (cited above, §§ 59-61), provided thorough and substantial reasoning as to why it was admissible, both under domestic law and under the Convention (see paragraphs 17-22 above). Moreover, the applicant could examine the *Vertrauensperson*, with the assistance of a lawyer, as a witness before the Federal Administrative Court (compare and contrast *Vanjak*, cited above, §§ 51-56).

39. As to the circumstances of the applicant's confession to the *Vertrauensperson*, the Court considers it doubtful whether the applicant can be said to have freely chosen to inform him about his drug consumption (see paragraph 20 above), given that he was not aware that the *Vertrauensperson* might be heard as a witness in court proceedings against him. Nonetheless, the Court notes that the applicant was neither legally obliged to talk to him, nor pressured into doing so, let alone into confessing his drug consumption (see *Bykov*, cited above, § 102). Even though the applicant was advised to speak to the *Vertrauensperson* by his disciplinary superior, the Court considers that the present case differs from that of *Stojkovic* (cited above), in which the applicant was suspected of having taken part in a criminal offence and was questioned by the police following a request by the investigating judge. The Court furthermore notes that the Federal Administrative Court found that the applicant's disciplinary superior, when advising him to contact the *Vertrauensperson*, had not been aware of the fact that the *Vertrauensperson* might be heard as a witness in court proceedings against the applicant and had no intention of deceiving the

applicant as to the lack of confidentiality of his statements (see paragraph 18 above).

40. In addition, the applicant was only subjected to disciplinary proceedings falling under the civil limb of Article 6 § 1 of the Convention (see paragraph 34 above). The Federal Administrative Court considered that the role of the *Vertrauensperson* was in substance that of a staff representative (see paragraphs 18-19 and 27 above) and that the purpose of the conversation between the applicant and the *Vertrauensperson* was not to further the investigation of the matter (see paragraph 21 above). While this is true, the Court notes that the statement of the *Vertrauensperson* constituted an important piece of evidence for finding the applicant guilty of a disciplinary offence, and was thus unfavourable to him. This illustrates the ambiguity and the dilemma of the role of the *Vertrauensperson* in disciplinary court proceedings against soldiers.

41. In so far as the applicant alleged that he had a legitimate expectation that any statement he made vis-à-vis the *Vertrauensperson* would remain confidential, the Court notes that the Federal Administrative Court thoroughly examined this argument. It noted that the *Vertrauensperson* was obliged to observe professional secrecy vis-à-vis third parties, but not entitled to refuse testimony in court under domestic law, and that the term "*Vertrauensperson*" did not imply that soldiers accused of wrongdoing could rely on him to remain silent in proceedings of which he was part, as the role of the *Vertrauensperson* in disciplinary court proceedings was to provide the perspective of a fellow soldier on the accused to allow for an informed exercise of discretion (see paragraph 19 above). It also considered that neither the applicant's disciplinary superior nor the *Vertrauensperson* had told the applicant that the *Vertrauensperson* would treat the content of their conversation as confidential (see paragraph 20 above). Nothing prevented the applicant from asking a question about that prior to talking to the *Vertrauensperson* or to confessing his drug consumption.

42. As regards the applicant's submission that the Federal Administrative Court wrongfully dismissed his objection against admitting the statement of the *Vertrauensperson* as belated, the Court notes that that court analysed the role of the *Vertrauensperson* in disciplinary court proceedings and reasoned why the interests of the accused soldier were sufficiently protected by his right to object to the participation of the *Vertrauensperson* in the proceedings prior to their opening (see paragraph 19 above). It also explained why the *Vertrauensperson* was not required to provide a qualified instruction to the applicant (see paragraph 21 above). The Court takes note of this observation, but also observes that the rights of an accused soldier in disciplinary proceedings would be more effectively ensured if he were informed that conversations with the *Vertrauensperson* are not necessarily confidential, as the latter may be heard as a witness in subsequent court proceedings and give statements that may be favourable or

unfavourable to the soldier. Such advance information would make it easier for the soldier to take an informed decision as to whether he should make self-incriminating statements in a conversation with the *Vertrauensperson* and whether he should object to the participation of the *Vertrauensperson* in the court proceedings prior to their opening.

43. Taking into account notably that the disciplinary proceedings at issue fell under the civil limb of Article 6 § 1 of the Convention, that the statement of the *Vertrauensperson* was not the sole and decisive piece of evidence, that there were no elements of coercion, oppression or deception, and that the applicant could challenge the admissibility of the statement of the *Vertrauensperson* and examine him as a witness before the Federal Administrative Court, the Court finds that the proceedings, considered as a whole, were not contrary to the requirements of a fair trial.

44. Accordingly, the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 20 April 2017.

Milan Blaško
Deputy Registrar

Erik Møse
President