COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 9228/80

GLASENAPP

against

The Federal Republic of Germany

Report of the Commission

(Adopted on 11 May 1984)

Strasbourg

CONTENTS

I. INTRODUCTION

1. The following is an outline of the case which has been submitted to the European Commission of Human Rights by the parties.

The substance of the application

2. The applicant is a German national born in 1947 and resident in Cologne.

3. The applicant studied at the University of Fine Arts in Berlin, and having taken the state examinations to become a grammar school teacher in 1972 and 1974 respectively, she completed a period of preparatory training to this end on 31 July 1974. She was then qualified to teach arts and applied arts in grammar schools.

4. On 7 May 1974 the applicant applied to the School Board in Münster to be employed as a teacher with civil service status on a probationary basis and confirmed, as part of her application, her allegiance to and preparedness to protect and advocate the free democratic order in the sense of the Basic Law. Her appointment as a grammar school teacher was delayed during investigations carried out through the North Rhine Westphalia Ministry of the Interior into the question whether the applicant had ever been involved in any political extremist activities. The applicant called a press conference to publicise this delay and subsequently sought to correct an impression given by one newspaper as to her political leanings, which arose from her support for, and involvement in, one of the policies advocated by the KPD (Communist Party of Germany).

5. On 24 September 1974, the same day as the press conference, the applicant received her certificate of appointment as a grammar school teacher, and started work. Her readers' letter to a newspaper at the press conference which had portrayed her as anti-communist was published by the communist newspaper, Rote Fahne (Red Flag), and came to the attention of the School Board, which considered that it gave reason to doubt the truthfulness of the applicant's declaration of allegiance to the Constitution. In November 1974 the applicant was heard by the School Board and asked to confirm that she dissociated herself from the KPD, which she declined to do, whilst at the same time confirming her allegiance to the Basic Law . The School Board proposed that her temporary appointment be revoked on the grounds of wilful deceit arising from the contradiction between her declaration of allegiance to the Basic Law and her irreconcilable contemporaneous statements to the press. The appointment was revoked on 20 January 1975. The applicant took legal proceedings to challenge the revocation of her appointment, and to suspend its effect during the period of her appeals, which culminated in an appeal to the Federal Constitutional Court, which was not accepted for decision by an order of 14 July 1980, since it did not offer sufficient prospects of success.

6. The applicant maintains that the revocation of her temporary appointment in the circumstances in which it arose constituted an interference with her right to freedom of expression guaranteed by Article 10 of the Convention read in conjunction with Article 14. In particular she complains that she was dismissed from her provisional appointment as a teacher as a result of the publication of her open letter by the Rote Fahne newspaper, in which she explained her political position.

Proceedings before the Commission

7. The application was introduced with the Commission on 7 November 1980 and registered on 26 December 1980. On 10 July 1981 the Commission decided to give notice of the application to the respondent Government and to invite them to submit written observations on its admissibility and merits pursuant to Rule 42 (2) (b) of the Rules of Procedure before 30 November 1981. On 14 December 1981 the respondent Government requested an extension of the time limit for the filing of observations (which had already expired) until 29 January 1982, which was granted by the President of the Commission on 21 December 1981. The respondent Govervent's written observations on admissibility only, drafted in German, were received on 25 January 1982, an English translation being provided on 15 February 1982. The applicant's representative was invited to submit observations in reply before 8 March 1982, which were submitted on that date.

8. On 6 July 1982 the Commission decided to invite the parties to make oral submissions before it on the admissibility and merits of the application at a hearing pursuant to Rule 42 (3) (b) of its Rule of Procedure, which hearing was held on 14 December 1982. On 14, 15 and 16 December 1982 the Commission examined the admissibility of the application in the light of the submissions it had received and declared the application admissible. The text of the Commission's decision on admissibility is Appendix II to the present Report. On 23 and 28 December 1982 the Commission informed the parties in writing of its decision and invited them in accordance with Rule 45 (2) of its Rules of Procedure to submit further written observations relating to four specific questions on the merits, within a time limit to run for six weeks from the despatch of the Commission's decision on the admissibility to the parties. By letter of 17 January 1983 the Agent of the respondent Government complained at this procedure. On 10 March 1983 the Commission confirmed its procedural decision and the text of the decision on admissibility was despatched on 25 March 1983. The respondent Government were invited to submit the above written observations before 6 May 1983; the applicant's representative, who had submitted observations on admissibility and merits as requested at the admissibility stage, was invited to submit such further observations if he considered it necessary.

9. On 21 April 1983 the respondent Government requested an extension of this time limit until 30 June 1983 to permit consultation with other departments and elements of the administration affected by the case. On 13 May 1983 the Commission granted the extension requested

On 13 July 1983 the Commission examined the state of proceedings in the application, and noted that the extended time limit for the submission of the respondent Government's observations on the merits had expired, but that no observations had been filed, nor had a request for an extension been made. The Commission notified the parties on 27 July 1983 that the application would be included in the Commission's list of cases at its 162nd session commencing on 3 October 1983. On 6 October 1983 the Commission received a letter from the Agent of the respondent Government dated 30 September 1983, referring to the volume of work faced by the Agent both before the Commission, and of a completely extraneous character, and requesting a further extension to allow submissions to be filed "during November 1983".

10. The Commission considered the state of proceedings, including this request, on 8 October 1983 and decided to grant the respondent Government a final extension of the time limit for the submission of their observations on the merits until 7 November 1983. The parties were informed of this decision on 12 October 1983. They were also informed that this date had been chosen to permit the applicant's representative to be given the minimum opportunity commensurate with the proper conduct of proceedings before the Commission in which to reply to any such observations and to ensure that the Commission could resume its examination of the application without further delay in its session beginning on 2 December 1983. The respondent Government's observations in German were submitted on 4 November 1983 and the applicant's observations in reply are dated 17 November 1983. An English translation of the respondent Government's observations was filed in December 1983. In the proceedings before the Commission the applicant was represented by Rechtsanwalt Chuckholowski of Dortmund. The respondent Government were represented by Ms. I. Maier as Agent.

11. After declaring the case admissible the Commission acting in accordance with Article 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction the Commission now finds that there is no basis on which such a settlement can be effected.

The present Report

12. The present report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes in the plenary session, the following members being present:

C. A. Nørgaard, President
G. Sperduti
J. A. Frowein
F. Ermacora
J. E. S. Fawcett
E. Busuttil
T. Opsahl
G. Jörundsson
G. Tenekides
S. Trechsel
M. Melchior
J. Sampaio
J. A. Carrillo
A. S. Gözübüyük
A. Weitzel
J. C. Soyer
H. G. Schermers

13. The text of the Report was adopted by the Commission on 11 May 1984 and is now transmitted to the Committee of Ministers in accordance with Article 31 (2).

14. A friendly settlement of the case has not been reached and the purpose of the present Report pursuant to Article 31 of the Convention, is accordingly:

I. to establish the facts; and

II. to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

15. A schedule setting up the history of the proceedings before the Commission and the Commission's decision on admissibility in the case are attached hereto as Appendix I and II respectively.

16. The full text of the parties' submissions, together with the documents lodged as exhibitis, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

II ESTABLISHMENT OF THE FACTS

17. The applicant is a German citizen born in 1947 and resident in Cologne. She studied at the University of Fine Arts in Berlin from 1966 to 1972, where she completed the first State exam to become a Grammar School teacher in July 1972. In September 1972 she applied to the Land North-Rhine-Westphalia for employment in the preparatory service as a civil servant in the Land school service. She was appointed on 1 December 1972.

18. She completed her preparatory training to become a grammar school teacher in Dortmund in 31 July 1974, having passed the second State exam for such teachers on 7 May 1974. She was then qualified to teach arts and applied arts in grammar schools. On 7 May 1974 she applied to the School Board in Münster to be employed as a teacher with civil servant status on a probationary basis from the end of the preparatory period.

19. All publicly employed teachers in the category of appointment for which the applicant applied are civil servants ("Beamte") in the Federal Republic of Germany. Their appointment, employment and dismissal is therefore regulated by the appropriate legal provisions concerning civil servants and not merely by conditions of employment which may apply elsewhere to various categories of employees in the public sector.

20. With her application form the applicant signed a declaration (1) confirming her allegiance to and preparedness to protect and advocate the free democratic order in the sense of the Constitution and that she did not support any anticonstitutional endeavours or belong to any anticonstitutional organisations. This declaration was in accordance with Section 6 subsection No 2 and Section 55 subsection 2 Civil Servants Act for the Land North-Rhine Westphalia (in the version of the Notice of 6 May 1970, GV NW p344).

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(1) The declaration reads as follows:

> On the basis of the information given to me, I hereby expressly declare that I affirm the principles of a free, democratic fundamental order in the sense of the Basic Law and that I am prepared to recognise the free democratic fundamental order in the sense of the Basic Law at all times by my whole behaviour and to intervene for its preservation.
>
> I expressly confirm that I do not support, nor am I a member of, any organisation or movement which is intended to oppose the free democratic fundamental order. I acknowledge that a breach of this duty of loyalty and service would result in my dismissal from the service.

21. The declaration was accompanied by an explanatory text which referred to the following as fundamental principles of the free democratic basic order as set out by the Federal Constitutional Court:

'Respect for the human rights laid down in the Basic Law, the sovereignty of the people, the separation of powers, the legality of the administration, the multiparty principle and equal chances for all political parties, the right to establish an opposition and to practice opposition in accordance with the Constitution.'

22. This text further pointed out that participation in activities intended to violate these principles was incompatible with the duties incumbent upon civil servants.

23. On 11 June 1974, in accordance with the usual administrative practice (under Sections 6 and 7 Civil Servants Act for North-Rhine Westphalia in conjunction with Section 4 Federal Civil Servants Law Skeleton Act), the School Board of the Land President's office in Münster asked the Land Ministry of the Interior for information about any extremist activities carried out by the applicant hostile to the Constitution.

24. On 3 September 1974 the Land Ministry informed the Board as follows:

> "From 1970 to 1972 the applicant lived in a commune in Berlin; which included also members of Maoist-Communist organisations.
>
> At that time at least 4 members of the League against Imperialism lived in that commune. The League is a Maoist-Communist organisation which is assimilable to the KPD (Communist Party of Germany).
>
> The telephone of one of the commune's members is a contact number for the "Zentrale der West Berliner Oberschüler" which was guided by the Communist Students Association (KSV).
>
> (The applicant) has not come to notice by virtue of her own activities."

25. The applicant points out that she was in fact a tenant of one room in a 13 roomed house in Berlin. She did not live in a commune, nor did a commune live in the house where she was a tenant. On 19 September 1974 the Board interviewed the applicant and showed her a copy of the above report. She stated that she wished to comment on it in writing after taking legal advice.

26. The applicant's lawyer provided these comments on 20 September 1974, pointing out that the applicant had not come to notice by virtue of any of her own actions and could not be held responsible for those of others who may have rented other rooms in the same house as her in Berlin. He referred to the applicant's affirmation of her allegiance to the Constitution in her application form and called upon the Board to decide upon her application within a week, failing which she would institute legal proceedings.

27. On 20 September 1974, in the light of the delay over her appointment the applicant invited representatives of the Dortmund daily papers to a press conference to be held on 24 September 1974, the purpose of which was to publicise the delay and the fact that it arose from doubts not directly inspired by the applicant's activities but by where she had lived.

28. Meanwhile on 23 September 1974 the School Board considered the applicant's lawyer's comments and held that any doubts which there might have been as to the applicant's allegiance to the Constitution had been removed. The Board wrote to the applicant on the same day asking her to report to a grammar school in Dortmund as a grammar school teacher with civil service status on a probationary basis. The applicant's lawyer was informed of this decision by telephone.

29. On 24 September 1974 the applicant attended the grammar school and received a certificate of appointment. At the school she distributed copies of a 'personal statement' and during the morning break discussed the question of the decree concerning the employment of extremists in the civil service ("Radikalenerlass") with pupils outside the school. Thereafter she attended the press conference with her lawyer.

30. The local press reported the position fully, but the applicant sought to correct the impression given by one paper that she did not support the policies of the KPD. Part of the report in question, to which the applicant took exception, stated:

> "As this art teacher, who leaves in no doubt that she is neither a member of the KPD nor a sympathiser with any communist organisation, puts it: 'These events clearly show how necessary personal altertness to the erosion of basic democratic freedoms is.'"

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31. In an open reader's letter to the paper's editor the applicant stressed that she did support an aspect of the KPD's policy, in particular in respect of a proposal for a "People's Kindergarten" in a part of Dortmund. Her letter ran as follows:-

> "With reference to the story 'Living under one roof with Communists' in the edition of 25 September 1974.
>
> Your correspondent Mr L. makes use of the delay in my appointment as a teacher on probation - which arose from the Ministry of the Interior's unlawful behaviour - as an excuse to conduct anti-communist propaganda. My statement that 'I am not a member of the KPD' was taken to mean that I dissociate myself from the KPD and its policies. This is not the case. During the discussion I have rather made it clear that I support the policy of the KPD, for example in the northern party of Dortmund. I am a member of a committee to form an international peple's kindergarten. Mr H and the Social Democratic Party's city council are responsible for the predicament of children in the northern part of Dortmund. The KPD is the only party which is concerned about the problem.
>
> In my opinion those who get involved in such matters are better teachers than candidates for the National Democratic Party of Germany (NPD) in the regional elections, or teachers who beat children, as children from O street tell us happens to them."

32. The newspaper to which this open letter was addressed did not publish it, but the applicant copied it and distributed it herself to various organisations which were concerned with the so-called 'Berufsverbot' problem (debarment from pursuing one's profession or occupation). This open letter was subsequently pubished on 2 October 1974 by the "Rote Fahne" (Red Flag) communist newspaper.

33. During October 1974 the School Board heard of the publication of the various articles concerning the applicant and considered whether the statutory requirements for her appointment had in fact been fulfilled or whether her appointment might have to be revoked for wilful deceit pursuant to Section 12 subsection 1 No 1 of the North Rhine Westphalia Civil Servants Act.

34. The applicant was invited to a meeting on 4 November 1974 with the School Board in Münster, the agreed minutes of which state that she was informed that:

> "the open letter which was published in 'Rote Fahne' on 2 October 1974 raised the question for the School Board whether the applicant's appointment as a civil servant on a probationary basis had arisen from wilful deceit. The School Board also considered itself required to decide whether this publication must lead to the applicant's dismissal".

35. The applicant stated that she objected to the enquiry being based on her open letter, the distribution of which she regarded as an expression of her democratic rights. Nevertheless she expressly confirmed her declaration of allegiance to the Basic Law which she considered to be in harmony with her open letter. She asserted that she could not comment on the KPD's programme and had not intended to in her letter, save as regards the kingdergarten project, as she was not a member of that party.

36. On 6 November 1974 the applicant was asked in writing by the head of the School Board to explain the apparent contradiction between her various statements, and warned in the following terms:-

> "Unless you expressly state in writing that you do not support the policies of the KPD, (the Board) will have to assume that you are not prepared to stand by your declarations of 7 May and 20 September 1974."

37. By letter of 22 November 1974 the applicant expressly affirmed her declarations of allegiance and the discussion on 4 November 1974 but refused to dissociate herself from the KPD in the manner demanded, since she contended that the Constitution protected her from being required to answer such a question. Instead she referred again to her declaration of allegiance and the explanations given at the meeting on 4 November 1974.

38. In the light of this reply the School Board proposed that the applicant's temporary appointment be revoked (pursuant to Section 12 subsection 1 No 1 of the Civil Servants Act for the Land North Rhine Westphalia), on the grounds of wilful deceit arising from the contradiction between her declaration of allegiance and her irreconcilable contemporaneous statements to the press and her open letter confirming her support for the KPD. The Ministry of Culture Education and Church Affairs confirmed this proposal on 8 January 1975 and on 20 January 1975 the School Board revoked the appointment.

39. The applicant's objection to this decision was rejected by the city administration on 12 August 1975 and the applicant appealed from this decision to the Administrative Court of Gelsenkirchen, which dismissed her appeal on 29 July 1976. The Court held that it was common knowledge that communist ideologies, whether of a strict 'Moscow-line' or otherwise, were incompatible with the German constitutional system, which identifies individual personal and political freedom as a fundamental value. Thus an individual who was a member of such an organisation, or was associated with its activities, where it was an organisation whose membership details are secret, could not offer the appropriate assurance of their commitment to the free democratic basic order.

40. Despite the applicant's declarations of allegiance therefore she had refused to dissociate herself from the policies of such an organisation and in so doing revealed that she had deceived the authorities in those declarations. Furthermore the Court found the applicant's grounds for her refusal to pronounce on the KPD's policy unconvincing. Taking account of her educational background and the general level of public awareness of the political restrictions on employment in the civil service, the court concluded that the applicant was sufficiently aware of the implications of communism to have been legitimately required to dissociate herself from the KPD, since association with it was wholly incompatible with allegiance to the Basic Law. the applicant therefore failed to fulfil a sine qua non for her appointment, which appointment was therefore properly revoked.

41. The applicant's appeal from this decision to the Regional Administrative Court of North Rhine Westfalia in Munster was similarly dismissed on 21 April 1978. The Court of Appeal considered that the political aims and means of the KPD ran counter to the basic principles of the democratic basic order as contained in the Basic Law. The party's advocacy of the removal of the existing democratic structure by force without recourse to the provisions for change set out in the Constitution confirmed this. The Court agreed with the School Board's assessment that the applicant's remarks about her knowledge of the nature of the KPD and her support for its policies were irreconcilable with her declaration of allegiance to the constitutional order, and that she must therefore be considered to have been objectively untruthful. It emphasised in this respect that the applicant's remarks concerning the KPD had been entirely voluntary and arose from her own initiatve.

42. The Court further found that the applicant had been subjectively dishonest. It concluded that, given her educational background it was proper to assume that she had contemplated the full implication of her open letter, which was prepared to a certain extent for publication. Nor was it credible for the applicant to claim not to be familiar with the KPD's policies, having twice specifically stated that she supported them. In particular however, the applicant had been given ample opportunity at the meeting on 4 November 1974 to qualify the earlier remarks at the press conference or in the open letter, if, on mature reflection, she thought they did not satisfactorily set out her views. However her statement on that occasion that she did not wish and could not pronounce on the party programme of the KPD and that her support for it was limited to only one of its activities, was irreconcilable with the actual terms of her open letter. In such circumstances the School Board were entitled to an explanation as to how the applicant could resolve these divergent statements.

43. It would have been open to the applicant to affirm that her apparent support for the KPD in general was not her true position and that her only connection with that Party was with its kindergarten project. This she did not do however. Instead she declined to answer the question put to her by letter on 6 November 1974 as to whether or not she supported the KPD's policy. Clarification of this issue was fundamental for the applicant's continued position as a civil servant on probation but she did not provide it. Leave to appeal to the Federal Administrative Court was not given by the Regional Administrative Court and the applicant applied to the Federal Administrative Court for leave to appeal and at the same time applied for legal aid.

44. The applicant also took proceedings to prevent the School Board's decision from being implemented pending the outcome of her appeals. Her final appeal to this effect was rejected by the Higher Administrative Court of Northrhine-Westphalia on 16 June 1975. During this period the applicant, who therefore remained employed until her provisional suspension on 16 June 1975, demonstrated at the school where she had been employed and distributed leaflets concerning the "Berufsverbot" prepared by a "Komitee gegen Berufsverbote und Unvereinbarkeitsbeschlüsse" (Committee against debarment from pursuing one's profession and incompatibility decisions), which referred to her case as an example of the socalled "Berufsverbot".

45. The Federal Administrative Court refused legal aid on 4 December 1979 on the basis that the applicant's appeal in the substantive proceedings had insufficient prospects of success.
The applicant appealed to the Federal Constitutional Court.

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46. The constitutional complaint challenging the notice of the School Board and the decisions of the Administrative Courts was not accepted for decision by the Order of 14 July 1980 of the three-judge-committee competent under Section 93 of the Federal Constitutional Court Act on the ground that it did not offer sufficient prospect of success. The judges held that, as far as the courts had regarded the applicant's behaviour as wilful deceit, this was the application of a provison of civil service law, i.e. of ordinary law; that in this connection a violation of the prohibition under constitutional law to treat people arbitrarily (Article 3 paragraph 1 of the Basic Law) could not be established and that the basic rights under Article 33 paragraph 2 (equal eligibility for any public office), Article 3 paragraph 3 (prohibition of discrimination because of political opinions) and article 12 paragraph 1 (right freely to choose one's trade, occupation or profession) of the Basic Law had not been violated either.

III. SUBMISSIONS OF THE PARTIES

47. The parties' submissions over and above those made at the admissiblity stage, which are summarised in the decision on admissiblity (Appendix 11) may be summarised as follows:

Respondent Government's Submissions

1. Applicability of Article 10

48. The respondent Government contend, notwithstanding the Commission's decision on admissibility, that Article 10 is not at issue in the present application. They submit that the application exclusively concerned the applicant's right under German law to access to employment as a civil servant, a right not guaranteed by the Convention. They submit in particular that the applicant has neither claimed in detail nor proved that her right to freedom of expression has been affected, nor that her right to hold or express, or not express, her political opinions has been restricted. In this respect they point out that the applicant did not need to be a civil servant in order to hold her opinions or to express them, and the termination of her provisional appointment resulted from the fact that her opinions revealed that she was not eligible to continue to be so employed, and thus was in no way a sanction for the expression of a particular opinion, or at all.

49. In support of this analysis the respondent Government refer to the Universal Declaration of Human Rights of 10 December 1948 and in particular Article 21 thereof, and point to the ommission of the right of access to the civil service for nationals from the express rights contained in the Convention. Furthermore this intentional ommission is apparent from the drafting of other agreements to which the respondent Government is a party, and from the negotiations for the extension of the Convention by further Protocol.

2. As to the exhaustion of domestic remedies

50. The respondent Government contend, notwithstanding the Commission's decision on the admissiblity of the application that the applicant failed to exhaust her domestic remedies and in particular that the subject of her litigation in the domestic jurisidiction was exclusively her right of access to employment in the civil service, a right not guaranteed by the Convention. In addition, the applicant's pleadings before the Federal Constitutional Court were inadequate to raise the question of freedom of expression at that instance. She has therefore failed to comply with the requirements of Article 26.

3. The merits

51. The respondent Government contend that no question of a sanction arises in the present case by virtue of the termination of the applicant's temporary appointment. There is no more a sanction here than in the instance where a newspaper editor is temporarily appointed and subsequently his appointment is terminated in the light of the material which he has published. No question arose in the present case of disciplinary proceedings against the applicant, but rather of a straight forward factual assessment by an administrative instance that the applicant did not fulfil one of the necessary requirements for her continued employment.

52. The respondent Government point out that in regulating the question of access to employment in the civil service it has taken account of the recent German past, and in particular the collapse of the Weimar Republic and the introduction of the National Socialist dictatorship. In keeping with the German legal tradition, measures have therefore been introduced to prevent, at least as far as civil servants are concerned, the recurence of any such phenomenon. This has prevented the respondent Government from accepting international obligations which might apply a regional, European, or broader-based notion of legal conformity upon the strict requirements which are necessitated by these special circumstances. In addition the fact that Germany is divided and that the two German states lie on either side of the dividing line between member states of the Council of Europe and the East-bloc countries is a special circumstance which must be taken into account in evaluating the necessity for the precautions of allegiance to the fundamental principles of democracy and the free democratic process, which are required of civil servants in the Federal Republic of Germany.

53. Nor can it be alleged that the applicant has been discriminated against or in any way unfairly treated, since the same requirement of unconditional allegiance to the free democratic basic order was required of her as of any other civil servant. This prerequisite for employment in the civil service is no different from a requirement of sufficient competence.

54. With regard to the question whether the applicant's reader's letter, which was ultimately published in Rote Fahne, was a reason for the termination of her employment, the repondent Government submit that this letter was merely an example of the applicant's opinions, and operated by way of evidence to show reason to doubt the authenticity of her committment to the free democratic basic order. Nor could the termination of the applicant's appointment be considered a condition for an expression of opinion, since whether or not she was a civil servant was in no way relevant to the opinions which she held. Nor was it a restriction on her freedom of expression that her appointment was terminated, since in order to express or hold or not express any particular opinion the applicant did not need to be a civil servant. Thus removal of this status could in no way restrict her freedom of expression.

55. Freedom of expression is an individual attribute exercised by the individual as such, and is in no way linked to that individual's status, for example as a civil servant, or otherwise.

56. Finally the termination of her appointment was not a punishment or any other form of sanction, and specifically was not consequent upon any breach of any duty or law imposed on the applicant but merely resulted as a matter of fact from the inadequacy of her qualifications.

4. Justification of any interference under Article 10 (2) of the Convention

57. Should any interference with the applicant's right to freedom of expression have arisen, it would in any event have been justified under Article 10 (2) of the Convention as necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the following reasons:

a. it must be expected of any teacher that the children whom he or she teaches should be educated in the spirit of the Constitution and with respect for fundamental and human rights. In particular children of an impressionable age, who might otherwise be exposed to indoctrination, must be assured of instruction which is not politically biased, and which expressly supports and shows committment towards the values of a free democracy.

b. In the present case doubts arose as to the suitability of the applicant as a teacher following her response to the press conference and press comment thereon in her reader's letter. In particular it appeared that the applicant espoused certain policies of the KPD, a party committed to the abolition of parliamentary democracy

by force and the imposition of the dictatorship of the proletariat. The activities of the KPD could not have escaped public knowledge and included violent street demonstrations and riots. The applicant's refusal to distance herself from such a party justified doubts as to her constitutional allegiance, which she declined to remove, although the opportunity was given to her to do so.

Applicant's submissions

58. The applicant has not chosen to make any further submissions on the merits beyond those made at the admissibility stage and summarised in the decision on admissibility (Appendix 11 hereto) and those made in reply to the respondent Government's submissions of 2 November 1983 which may be summarised as follows.

1. As to the applicability of Article 10 and the question of exhaustion of domestic remedies

59. The applicant contends that the question of the compatibility of the present application with the Convention as also the question of the applicant's compliance with the requirements of Article 26 as to the exhaustion of domestic remedies, has been conclusively determined by the Commission in its decision on the admissibility of the application, which is final. The applicant nevertheless points out that the exercise of her freedom of expression by way of the reader's letter, and the requirement that she distance herself from the KPD, were the basis for the proceedings taken before the domestic courts, as they are equally the basis of the proceedings before the Commission, raising directly the question of the applicant's freedom of expression

2. The position of teachers in the Federal Republic of Germany

60. The applicant refers to the virtual monopoly on the employment of teachers exercised by the State in the Federal Republic of Germany in the light of the very small number of private schools. In consequence a prospective teacher must expect to be required to become a civil servant and he will therefore be financially dependent upon fulfilling the relevant requirements. In the present case the applicant was denied the opportunity of continuing employment because she refused to express her opinion under compulsion, with the practical result that she became unable to exercise her vocation. She has in practice become an "outlaw" in a similar way to Soviet dissidents. To fail to take account of the restrictions on the applicant's exercise of her freedom of expression would be equivalent to saying that someone who was imprisoned for having expressed their opinion was nevertheless free to express such an opinion both before, and indeed after their imprisonment, unless their mouth was gagged.

3. Considerations under Article 10 (2) of the Convention

61. The applicant contends that the requirements of allegiance to which she was subject were vague and required evaluation in each individual case by the relevant administrative authority. In consequence it was inadequately forseeable what opinion she might and what she might not express without fear of the consequences.

62. In addition there is no law which adequately or comprehensively defines the duty of allegiance, which has been developed by the case law of the Federal Constitutional Court. A case law development of this kind is capable of constituting "law" within the meaning of the Convention in principle, but in practice has resulted in the necessity of each case being tested on its merits through successive instances of appeal. It is however the applicant's contention that she cannot be required to express her opinion or, as she was in this case, required to distance herself completely from all aspects of a given party or opinion. She was never specifically requested to dissociate herself from or express an opinion upon specific acts of the KPD, although she would have been prepared to do so.

63. The indiscriminate requirement to dissociate herself from the KPD was unjustified and contrary to the applicant's right not to express her opinion, implicity guaranteed by Article 10 (1).

64. As far as the necessity of the interference in quesiton is concerned, the applicant points out that she was working in a grammar school with children who were for all practical purposes mature. Furthermore she stresses the abstract nature of the risks which she is alleged to have represented and points out that it has never been alleged that she at any time abused her position during her employment, or exerted any negative influence on any pupil with regard to the Constitution. Nor was this to be expected bearing in mind the applicant's subject - art.

4. Article 14 of the Convention

65. The applicant contends that her appointment in the civil service was terminated directly as a result of the political opinions attributed to her and that this operated by way of political discrimination against the opinions which she held. This is made apparent by the fact that the applicant has not once been reproached with any action which she committed as a teacher.

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IV. OPINION OF THE COMMISSION

Points at issue

66. The principal points at issue in the present application are:-

A. Whether the revocation of the applicant's post in the circumstances in which it arose was a "condition, restriction or penalty" on the exercise of her freedom of expression guaranteed by Art 10 (1) of the Convention, and, if so,

B. Whether such a condition, restiction or penalty was justified under the terms of Article 10 (2) of the Convention.

A. Interference with rights under Article 10

67. The applicant's appointment was revoked because of specific incidents relating to the expression or withholding of her political opinions. The expression of opinion at issue was a letter to the editor of a newspaper after a press conference, following which the applicant declined to clarify her position when this was required of her by the School Board, to confirm her loyalty to the Basic Law.

68. The Commission has already indicated in its decision on the admissibility of the application why the reaction of the School Board must be seen as an interference with the applicant's rights under Article 10, para. 1.

69. The applicant had been provisionally appointed as a civil servant. Under the relevant provisions of the civil service law of North Rhine Westfalia, she, like every civil servant, owed an obligation of loyalty and allegiance to the Basic Law. This obligation was a condition for her appointment and for her continuing employment in the civil service. It resulted in the introduction for her of a condition on her freedom of opinion and expression, since she could only avoid the consequences of the loyalty appraisal system if she expressed such opinions as were compatible with the obligation of loyalty which she had assumed. Her job as a civil servant was therefore conditional on the opinions she held or expressed.

70. The fact that this condition or restriction in German law arose as a result of the applicant's appointment as a civil servant is comparable with restrictions, such as requirements of confidentiality, which are imposed by employment in the professions. They are conditions which arise by virtue of the status or circumstances of an individual, and fall to be examined under Article 10 (2) because they directly circumscribe and impinge upon the right guaranteed by Article 10 (1) of the Convention. In the present case these conditions resulted in restrictions on the freedom of expression of the applicant, a civil servant.

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71. The respondent Government argue that what is at issue in the present application is access to the civil service and not a restriction or condition on freedom of expression or opinion. They consider that in its leading decision of 22 May 1975 and subsequently, the German Federal Constitutional Court has held that Article 5 of the Basic Law does not concern a general restriction resulting from the legal obligation of loyalty to the Basic Law. However, a careful reading of the Federal Constitutional Court's decision of 22 May 1975 (BVerfGE 39, 334, 360) does not support the respondent Government's position in this respect.

72. The Federal Constitutional Court starts its lengthy argument concerning Article 5 of the Basic Law ("GG"), which protects freedom of opinion, with the following words:

> "The legal situation as established so far is not in contradiction with the fundamental rights of the Basic Law: 1. Of prime importance is here the right to freedom of opinion (Article 5 Abs. 1 und 2 GG). a) The relationship between freedom of opinion and the obligation of loyalty of a civil servant has its history ..."

73. This shows clearly that the Federal Constitutional Court approached the question whether or not Article 5 of the Basic Law was of relevance to restrictions on freedom of opinion and expression resulting from the obligation of loyalty. It appears therefore that the Federal Constitutional Court itself accepts that a degree of restriction of freedom of opinion and expression arises from the obligation of loyalty. This becomes evident from one of the last sentences concerning Article 5 GG (p. 367):

> "Behaviour which can be described as the expression of a political opinion is constitutionally covered by Article 5 GG only where it is not incompatible with a civil servant's obligation of political loyalty, laid down in Article 33 para 5 GG"

74. This shows again that the Federal Constitutional Court itself sees a restriction of Article 5 through Article 33, para. 5 of the Basic Law. The Federal Constitutional Court also expressly qualifies the civil service legislation as a general law in the sense of Article 5, para. 2 of the Constitution ,which restricts freedom of expression.

75. However, whereas the Federal Constitutional Court must weigh this restriction on freedom of expression against the duty of constitutional loyalty which is also provided for in the Basic Law, the Commission must examine the conditions and restrictions which operated on the applicant's freedom of opinion and expression under the criteria of Article 10 of the Convention.

76. In finding that the conditions and restrictions which arise from the obligation of loyalty constitute an interference with the right to freedom of expression and opinion the Commission recognises that they are conditions and restrictions of a specific sort, which relate to the applicant's status as a civil servant. They are not applicable to other citizens. They arise, however, from the choice of a particular type of employment and are part of the conditions which attach to the employment over which an individual has no measure of control, beyond the choice of acceptance or refusal of employment subject to this condition. The condition is rendered particularly important in the Federal Republic of Germany because under the German system the number of civil servants is comparatively high, especially in the teaching professions,where a high proportion of school and university teachers are in fact civil servants. (See para 19 supra).

77. The Commission must therefore consider the conformity of these conditions and restrictions which the obligation of loyalty imposed on the applicant with the requirements of Article 10 (2) of the Convention. In so doing, the Commission is not called upon to examine the whole system of loyalty control or its application in the Federal Republic of Germany and its conformity with the Convention. Under Article 19 of the Convention the Commission's task to examine specific complaints, inter alia introduced by individuals under Article 25 (1) of the Convention, and to decide whether the facts of such applications disclose a violation of the provisions of the Convention.

B. Whether the conditions and restrictions in question were justified under Article 10 (2) of the Convention

78. The Commission must therefore consider first whether the conditions and restrictions which applied to the applicant complied with the requirements of Article 10 (2) of the Convention. This requires an examination of whether the conditions and restrictions which applied to the applicant were "prescribed by law", and whether they pursued a legitimate aim recognised by Article 10 (2). In the light of this examination the Commission must then decide whether the conditions and restrictions could be regarded as necessary in a democratic society, by way of an examination of "not only the basic legislation but also the decision applying (it), even one given by an independent court" (Sunday Times case, Series A Vol 30 para 59). The Commission must thus consider the proportionality of the particular measures which applied to the applicant in order to reach its conclusion under Article 10 (2) of the Convention as to whether or not they were justified.

1. Are the restrictions "prescribed by law"

79. The Commission will consider first the extent to which the conditions in question were "prescribed by law" within the meaning of Article 10 (2) of the Convention. This provision refers primarily to domestic law but, as the Commission and the Court have recognised in their previous case law, such law must be adequately accessible and formulated with sufficient precision to enable a citizen to regulate his conduct in accordance with it (ibid para 49).

80. In the present case the condition of loyalty to the Constitution was imposed by Section 6 subsection no. 2 and Section 55, subsection 2 of the Civil Servants' Act of North Rhine Westphalia (in the version of the Notice of 6 May 1970, GV NW page 344). Furthermore, the revocation of the applicant's appointment for wilful deceit was provided for by Section 12 subsection 1 No. 1 of the Civil Servants' Act of North Rhine Westphalia.

81. There is no doubt that the text of these provisions were readily accessible to the applicant and could be generally consulted. However, the Commission must also consider whether the norm of allegiance to the Constitution was formulated with sufficient precision to allow the applicant to regulate her conduct in accordance with it and to foresee, if necessary with advice, the consequences which a given action might entail. In so doing it must consider whether the law and the surrounding circumstances made the applicant aware of the relevance of the obligation of allegiance for her freedom of opinion and expression.

82. The applicant's immediate contact with the condition in question was through the terms of the declaration which she signed on her original appointment, in which she expressly declared that she affirmed the principles of the free democratic fundamental order "at all times" and "by her whole behaviour".

83. The terms of this commitment are very broad and therefore necessarily require a certain degree of interpretation, but the fact that the applicant was given a specific declaration to sign to some extent defined the scope of the obligation which she was acknowledging. Furthermore, it was accompanied by an explanatory text which referred to the fundamental principles of the free democratic basic order as identified by the Federal Constitutional Court. The declaration also contained the express affirmation that she did "not support nor was she a member of any organisation or movement which is intended to oppose the free democratic fundamental order", whose principles were thereby explained. The express terms of the applicant's declaration referred to support for and membership of political organisations with an antagonistic attitude to the free democratic basic order, the attributes of which were identified for the applicant.

84. This explanation made clear to the applicant not only that she was subject to an obligation of loyalty, but expressly informed her that activities or attitudes and opinions which were antagonistic to the Basic Law were incompatible with that obligation. Thus the applicant was made aware of the manner in which this obligation of loyalty impinged on her freedom of opinion and expression, and in these circumstances the Commission finds that the conditions and restrictions in question were sufficiently accessible, forseeable and certain to be prescribed by law within the meaning of Article 10 (2).

2. The aim of the restrictions

85. According to Article 10, (2) the applicable restrictions must pursue one of the specific aims mentioned in Article 10 (2). The requirement at issue in the present case that a civil servant must be loyal to the concept of the pluralist democracy enshrined in the Basic Law, is based on the idea that the civil service to some extent represents the constitutional system. It also recognises the risk that the civil service is in a powerful position to undermine the Constitution if its members are actively antagonistic to it.

86. The respondent Government have contended that this legislation is intended to protect national security within the meaning of Article 10 (2). Furthermore, it is true that the Court has recognised that the defence of democracy is one of the main justifications of restrictions "in the interests of national security", where democratic societies are threatened by highly sophisticated forms of espionage and terrorism (case of Klass and others, Series A Vol. 28, p 22-23).

87. The Commission recalls that the present case is not directly concerned with security considerations in their usual sense, but with restrictions on the freedom of opinion and expression of a teacher and a civil servant. The requirement of loyalty which imposes these restrictions is intended to ensure the protection of the democratic fabric of society and is one of the bulwarks erected in the light of the experience of the National Socialist State in Germany, to institutionalise democratic structures and render totalitarianism impossible in the Federal Republic of Germany. In this sense, therefore, the security of the democratic constitutional system is at issue.

88. The Commission recalls the terms of the preamble of the Convention, which affirm that an effective political democracy is intimately linked with the protection of fundamental freedoms. In the member States of the Council of Europe, where the protection of the individual rights guaranteed by the Convention depends upon the existence of such effective political democracies, the protection of the latter must also be considered as the protection of the rights of others within the meaning of Article 10 (2) of the Convention.

89. This approach is also required by the terms of the Convention, Article 17 of which expressly prohibits any group or person from relying on Convention rights in order to engage in any activity or perform any act aimed at the destruction of any of these rights and freedoms. This provision confirms that activities aimed at the destruction of the pluralistic system of democracy cannot be supported on the basis of the Convention. It follows therefore that the loyalty requirement, which operated as a condition and restriction on the applicant's freedom of opinion and its expression pursued an aim recognised as legitimate by Article 10 (2) of the Convention.

3. Necessity for the restrictions in a democratic society

90. Article 10 (2) of the Convention further requires that the conditions and restrictions in question were "necessary in a democratic society". This provision has been held by the Court to require that the interference corresponds to "a pressing social need"; the level of this requirement is not as great as a measure which is "indispensible", but exceeds that which is merely "useful", "reasonable" or "desirable" (The Sunday Times case, decision of 27 October 1978, Series A no. 30 para 59). In addition, the necessity requirement involves a review of the proportionality of the measure in the case at hand.

91. It is also established, in the same case, that the initial responsibility for evaluating the necessity of a given interference falls upon the domestic authorities, who in the Court's view, therefore enjoy a "margin of appreciation". The review of the necessity by the Convention organs nevertheless covers "not only the basic legislation but also the decision applying it, even one given by an independent Court" (ibid). The scope of the domestic "margin of appreciation" varies depending upon the aim which is being protected under Article 10 (2) of the Convention. Whereas the Contracting States may be in a better position to give an opinion on such questions as morals than the Court (ibid), in relation to the more objective aims identified in Article 10 (2), the domestic discretion is reduced and the scope of review under the Convention is enhanced.

92. This review of necessity may also be facilitated by a comparative analysis of comparable legal provisions in other member States of the Council of Europe. A certain degree of constitutional loyalty is required of civil servants in a number of regulations governing various civil services, either by inclusion in statutory form or in the contractual terms or conditions of employment. Although there is no general loyalty requirement in certain other countries, specified categories of civil servants remain subject to restrictions upon their freedom of expression, and in certain cases of their opinion, depending often upon the nature of their functions. A duty of moderation, which is a widespread feature of the regulation of the civil services of members States of the Council of Europe, arises from the duties and responsibilities which civil servants have as the agents through which the state operates. The restriction as to moderation is similarly reflected in the Staff Regulations of the Council of Europe and other international organisations.

93. The Commission must therefore consider the restrictions applicable to the applicant by virtue of the operation of the relevant civil service law in the Federal Republic of Germany. It is clear first that the requirement of loyalty, which operates by way of a condition upon freedom of opinion, applies to all civil servants in the Federal Republic of Germany and that this is unusual, but not unique. Furthermore, the legal regulation of the German civil service is detailed and to some extent complex, but this reflects in turn the availability of a judicial remedy for disputes relating to individual questions of civil service law.

94. The last sentence of Article 11 (2) implies that the civil service is in a special position concerning the exercise of some political freedoms. Article 11 (2) permits certain restrictions on the exercise of freedom of assembly and association on members of the armed forces, of the police or of the administration of the State. No similiar rule is expressly contained in Article 10 (2) and it may be argued that the drafters of the Convention did not intend to impose specific restrictions of that sort on freedom of opinion. This approach is not wholly convincing, however, since the effect of this provision in Article 11 (2) may be to limit some forms of expression of opinion, such as membership of political organisations by certain categories of public employees.

95. The Commission considers that this limitation is reflected in the reference in Article 10 (2) of the Convention to "duties and responsibilities". Hence this reference must imply that permissible conditions affecting freedom of expression and opinion can only arise where they are necessary in a democratic society in the light of the actual duties and responsibilities which are implied by the exercise of freedom of expression and opinion by a given individual. The necessity for the conditions or restrictions must therefore flow from the applicant's circumstances.

96. The Commission must also take account in this connection of the recent Germany history which has created a specific set of circumstances which are relevant for the protection of democracy in the Federal Republic of Germany. One of the causes for the development of the Weimar Republic into a national-socialist dictatorship was the failure of the civil service to be loyal to the democratic constitutional system. They did not accept the new constitutional order after 1918 and were prepared to support a change away from a pluralist democracy. While the Government of Prussia decided in 1930 that membership of the national-socialist, and the communist party was not compatible with loyalty to the democratic Prussian Constitution, the courts were willing to accept such membership, although specific activities for those parties could constitute a disciplinary offence (compare BVerfGE 39, p. 362/364). After the founding of the Federal Republic of Germany under the Basic Law, the civil service legislation sought to make clear that active loyalty of the civil service was of the utmost importance for the constitutional system.

97. Nor can the Commission ignore the special geographic and political position of the Federal Republic of Germany as one state of a divided nation. In the other state, which is not a party to the Convention, the guarantees of political freedom and the protection of freedom of expression and opinion are not secured as they are in Article 10 of the Convention and in practice in its application; there, they are conceived and limited by an entirely different political system. As a result, the concept of "national allegiance" could mask a certain degree of ambiguity and it is in this specific context that the Federal Republic of Germany imposes a positive requirement of loyalty to the democratic principles of the Basic Law.

98. It appears therefore that the operation of restrictions and conditions on the freedom of expression and opinion of civil servants is a feature of many laws of the member States of the Council of Europe and reflects the implementation of an aim recognised by Article 10 in the specific circumstances prevailing in the Federal Republic of Germany. The Commission is not, however, required to examine the conformity with the Convention of the system of loyalty appraisal of civil servants in the Federal Republic of Germany in the abstract with the Convention, but to decide whether the specific restrictions and conditions which applied to the applicant operated within the requirements of Article 10.

99. In conducting their assessment of the conformity of the applicant's actions and opinions with the loyalty requirement imposed by domestic civil service law, the courts of the Federal Republic of Germany were called upon to assess whether or not the applicant had confirmed her positive loyalty to the Constitution. This obligation of loyalty is the same under German Civil Service Law for all civil servants regardless of their actual functions. However, in examining the present application under the terms of Article 10 of the Convention, the Commission's task differs from that of the domestic courts. The Commission is not called upon to decide whether or not the applicant showed sufficient allegiance to the Constitution, but whether the response of the authorities, including the courts, in the evaluation of this question was in conformity with Article 10 of the Convention. In examining the conformity of this response with Article 10 (2), which refers to duties and responsibilities, the Commission must therefore take account of the actual responsibilities which the applicant assumed in her job, the nature of her opinions and the circumstances of their expression, notwithstanding that these questions did not have to be examined under German law.

4. Necessity and Proportionality of the measures applied to the applicant

100. The condition imposed on the applicant's freedom of expression by the requirement of allegiance must therefore be examined in the context of the functions she performed as a teacher and the operation of the condition in question to the particular facts of her case. The foreseeability of the extent of the alleged interference with the

applicant's freedom of expression which the condition in question imposed upon her is inseparable from an examination of the necessity of that condition in a democratic society.

(a) Factors relevant to the justification issue

101. The Commission considers that the following factors are relevant to the examination of this aspect of the justification issue and to deciding whether the restrictions as they affected the applicant were proportionate:-

(i) The nature of the applicant's post;

(ii) The applicant's conduct in that post;

(iii) The circumstances of the expression of opinion at issue

(iv) The nature of the opinions ascribed to the applicant.

(i) The applicant's post

102. The applicant was appointed on a probationary basis as a grammar school teacher. Her subject was arts and applied arts, for which she was qualified by her degree course in the same subject and by passing the relevant state examinations. In addition the applicant spent the period from 1 December 1972 to 31 July 1974 at a grammar school in Dortmund, carrying out her preparatory service, which was an essential element of her qualifications for the post to which she was appointed on 23 September 1974, taking up her duties the following day.

103. It is also of particular significance that the applicant's appointment was in the civil service. The restrictions to which she was subject governed her appointment to such status and are to be distinguished from more general restrictions upon the public at large or from restrictions which are backed by criminal sanctions.

104. The applicant has contended that in the light of the organisation of school education in the Federal Republic of Germany a would-be teacher has no alternative prospective employer than the State. Although there are a certain number of private schools, the applicant contends that their influence on the pool of available employment is negligible. The Commission has no reason to doubt the relative non-availability of alternative employers for teachers. However this in no way alters the duties and responsibilities of an individual in exercising freedom of expression both as a civil servant and as a teacher. It was clearly forseeable that both these aspects of the applicant's status would impose various duties and responsibilities upon her, not least in the realm of her freedom of expression.

105. The Commission does not find that the existence of conditions relating to the applicant's employment as a civil servant and a teacher was a wholly extraneous factor which could not be expected to flow directly from the job for which she applied and to which she was directly appointed. Bearing in mind that the right to employment in general, or in any specific capacity is not guaranteed by the Convention the Commission is not called upon to consider the applicant's contention that she had no alternative prospective employer. The Commission's task is merely therefore to examine whether in the facts which actually occurred, the operation of the restrictions and conditions upon the applicant's freedom of opinion and its expression were or were not justified under the terms of Article 10 (2) of the Convention.

(ii) The applicant's conduct in that post

106. In the light of the applicant's short tenure of the post in question the conclusions which can be drawn under this heading are limited. However, it appears that until after the investigation of the applicant's allegiance was resumed the applicant did not express or display her opinions at the school and she is not reproached with having conducted her classes or herself by way of political indoctrination or extremism. However when she was notified of the revocation of her post she did react to that decision and introduced the issue of the revocation into the school environment.

(iii) The circumstances of the expression of opinion at issue

107. The press conference and the applicant's open letter occured in the public sphere. Although they were directly related to the applicant's candidature for employment, the press conference was not conducted at the school and had no direct relevance for the applicant's teaching. As far as the expressions of opinion which were requested of the applicant by the School Board, these were given in private in the context of the latter's enquiry.

(iv) The applicant's opinions

108. The basis of the revocation of the applicant's appointment was the doubts entertained by the School Board as to the applicant's ultimate allegiance to the constitutional basic order and the ambiguity of her attitude to the KPD, whose anti-constitutional aims appeared to the Board not to be in doubt, and in respect of which she was charged with wilful deceit. The Board sought an unequivocal dissociation from that party from the applicant which she declined to give, and as a result they did not accept her specific confirmation of her allegiance to the constitutional order. The applicant herself maintained that she identified with one particular political cause and not with the general political aim of the KPD.

(b) Measures applied to the applicant

109. The Commission must therefore decide whether the requirement that the applicant expressly dissociate herself from the KPD was a restriction on her freedom to hold an opinion which was justified as necessary in a democratic society for protection of the rights of others and in the interests of national security, and whether it was proportionate to the consequences which holding such an opinion implied.

110. Where a Government seeks to achieve the ultimate protection of the rule of law and the democratic system the Convention itself recognises in Article 17 the precedence which such objectives take, even over the protection of the specific rights which the Convention otherwise guarantees. Nevertheless, precisely because of the cardinal importance to be attached to the preservation of the rule of law and the democratic system, the Convention requires a clearly established need for any interference with the rights it guarantees, before such interference can be justified on that basis. This is especially true in the context of freedom of expression which is the cornerstone of the principles of democracy and human rights protected by the Convention.

111. In the present case the Commission must decide whether requiring the applicant to dissociate herself expressly from a specific political party, which it had not been alleged she belonged to, but one of whose policies she expressly supported, corresponded with a pressing social need in this sense. It is in just these circumstances that a risk arises that the overzealous pursuit of certainty in the application of a wide test of conformity with a civil servant's duty of allegiance to the democratic order may discourage the free expression of diverse opinions, which is expressly guaranteed by the Convention. An individual may be intimidated by the personal risks of self expression where the operation of the restrictions on opinion entail severe consequences, which are justified by reference to insufficiently precise criteria.

112. The Commission takes account of the importance to be attached to the opinion and influence of teachers who, in a free society, have a key role in the development and dissemination of ideas. This is particularly relevant in the present case, where the applicant was a teacher in a grammar school an in daily contact with pupils of an impressionable age and at a stage of intellectual development when the vulnerability of some to indoctrination is a factor which cannot be ignored. In these circumstances the applicant was subject to special duties and responsibilities in relation to her opinions and their expression, both directly at the school and to a lesser degree, as a figure of authority for her pupils, at other times. While this environment imposed special duties on the applicant, her job as a teacher equally imposed special responsibilities on the School Board, which was responsible for her appointment, to ensure the free exchange and development of ideas in the context of freedom of expression within the school, since overprotection from one form of indoctrination may constitute an indoctrination of another kind.

(c) Evaluation of the measures applied to the applicant in the light of these factors

113. In evaluating the proportionality of the measures applied to the applicant, the Commission's function is primarily supervisory, especially in respect of the evaluation of the danger that a particular exercise of the freedom safeguarded by Article 10 (1) could entail for the interests listed in Article 10 (2) and the choice of measures intended to avoid that danger. Nevertheless this supervision covers not only the basic legislation but also the decision applying it, even one given by an independent court (Handyside case, Series 1 p 23 para 49). In the present case the courts of the Federal Republic of Germany have examined the conformity of the School Board's actions with domestic law. The Commission's task is not to take the place of these national instances, but to review the decisions which they took in the light of Article 10 of the Convention.

114. The Commission must therefore consider the way in which the restriction was applied to the facts of the applicant's case. It is relevant to note first that the applicant was not obliged as a matter of law to become subject to this restriction upon her freedom of opinion. She chose to train for and subsequently applied for a post in, a teaching career. It appears from her own submissions as to the limited number of posts for teachers outside the public service that she must have known from the time she chose this training path that it led to employment opportunities mainly in the public sector and substantially in the civil service, to which special conditions applied.

115. In examining the proportionality of the operation of conditions on the applicant's freedom of expression, the Commission considers that the words "duties and responsibilities" in Article 10 (2) necessarily imply that such conditions must relate directly to the circumstances in which the freedom of expression arose. In the present case the operation of the conditions on the applicant's freedom of expression arose in connection with her participation in the press conference and in her subsequent open letter. These were not directly connected with the applicant's work, nor with the school where she worked, although the press conference was concerned with the reasons which had delayed her appointment.

116. The applicant's open letter did not relate to the performance of her functions as a teacher either, nor was it apparently distributed at the school where she worked, or otherwise referred to there. Had it been, the School Board would no doubt have become aware of its existence earlier than they did. In the open letter the applicant expressed her support for one of the political causes sponsored by the KPD, which was broadly in the educational sphere, namely a project to create an "international peoples' kindergarten".

117. It was this expression of support for a specific political cause which gave rise to doubts as to the adequacy of the applicant's allegiance to the Constitution and prompted the School Board's enquiry into this question. Furthermore the open letter was a response to an article which had described the applicant as leaving in no doubt that she had "no time for communism", whereas the applicant evidently preferred to describe herself as "anti-anticommunist". The press conference and open letter were thus very clear examples of expressions of the applicant's opinions, and the applicant relied upon this fact in the subsequent investigation and proceedings by claiming that they were the exercise of her democratic rights guaranteed by the Basic Law.

118. It is not clear from the submissions of the parties what the kindergarten project, to which the applicant referred, involved, but there is nothing in the case file to imply that it involved actions which were unlawful. These actions might even have been protected to some extent by the terms of Article 11 of the Convention or Article 2 of the First Protocol, but this is not a question which the Commission is called upon to pursue in the present case.

119. The essence of the Commission's control under Article 10 of the Convention is to assess the operation of the loyalty control machinery as it applied to the applicant in order to evaluate the proportionality of the response and its necessity under Article 10 (2). The Commission has recognised that loyalty control mechanisms affect civil servants in various member states of the Council of Europe and that in this case an interference arose with the applicant's freedom of expression and opinion.

120. The School Board considered that the applicant had not resolved the ambiguity which she had created on the one hand by her declaration of allegiance to the constitutional order, and on the other by her open letter. The Court of Appeal pointed out that the opportunity was given to the applicant to clarify her open letter but that her explanation of it, and specifically that the example of the kindergarten project was intended to be the sole instance of her support for the KPD, was not credible. However the Commission notes that the applicant had from the outset objected to an assessment being made of her political opinions based on her press conference and open letter, which she considered to be the exercise of her democratic rights. She had also readily confirmed her declaration of allegiance to the Constitution. Although she contends that she was prepared to answer any specific questions about the KPD's policies she refused to dissociate herself from that party on a blanket basis, having stated that she was not a member of it.

121. She was not therefore formally compelled to explain her views more fully and her various remarks were in this sense respected as the exercise of her democratic right of freedom of opinion and expression. Nevertheless, as a result of her status as a civil servant, her remarks were scrutinised to establish their conformity with the requirements of loyalty and the Commission must therefore examine whether this examination and its consequences were proportionate to the legitimate aim of loyalty control in the civil service.

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122. The applicant's letter was open to different interpretations. However it appears from the Court of Appeal's judgement that they considered the letter to be irreconcilable with the applicant's employment in the civil service. They referred to the fact that the applicant could easily have indicated that the letter rashly exaggerated her views and thereby satisfied the School Board as to her allegiance to the constitutional order. Nevertheless the Court rejected the applicant's actual explanation of the letter namely that she intended by it to indicate her support for the kindergarten project and not more.

123. This attitude illustrates the severity of the condition which applied to the applicant's freedom of expression. It appears that little less than a retraction of the open letter would have satisfied the School Board as to the applicant's allegiance, despite her specific confirmation of her declaration. In this context it is relevant to recall that there are other mechanisms of loyalty control, including the option available under German civil service law, of disciplinary proceedings being implemented in response to actions which are not compatible with the proper performance of the civil servant's duties. Such disciplinary proceedings, which are not limited to employees in the civil service, but which are widely known in the member states of the Council of Europe, enable an employer to respond by an investigation with possible sanctions where a breach of duty has arisen. No such proceedings arose in the present case and no breach of duty, such as the advocacy or indoctrination of an extreme political view, took place at the school or elsewhere. Nevertheless the result of the operation of the loyalty control machinery was as serious for the applicant as such disciplinary proceedings would have been. This consequence arose from the conclusion of the School Board, supported by the decisions of the Courts concerned, that the applicant had failed to illustrate her allegiance to the Constitution conclusively. The demonstration of such allegiance apparently required that she publicly and formally renounce opinions with which she maintained she was not familiar in detail.

124. The Commission has recognised that in a number of member states of the Council of Europe there is a duty on civil servants to exercise restraint in their expressions of opinion. Nevertheless this duty is frequently dependent upon the nature of the functions performed by the employee in question. By contrast the present restriction applied on the applicant's opinion because she was a civil servant and no qualification of the condition appears to have arisen from the fact that she was a teacher, rather than a senior executive in a sensitive Ministry, or an unskilled worker employed in the public sector. The general nature of this restriction reflects the historical reasons which lay behind the introduction of this system of civl servant loyalty control in the Federal Republic of Germany.

125. It appears however that the system of loyalty control which applied to the applicant resulted in her being required to adopt an unequivocal stance not merely on the loyalty issue itself, but also in relation to her attitude to a specific political party. Thus she was asked to completely dissociate herself from a party of which it was not alleged that she was a member, but one political activity of which she had clearly stated she supported. The applicant contended that it was open to her, and indeed a right protected, inter alia, by the Convention, to identify with one objective of a party whose full political programme she did not accept nor fully know. She claimed to be allowed to identify with part only of the political programme of a lawful, but extreme party. However this choice does not appear to have been allowed her. The situation in which the applicant was by virtue of the investigation of her loyalty did no permit of this combination of views, but required her to draw, and express, an unqualified distinction between opinions which fulfilled the loyalty requirement and those which in the School Board's opinion, did not.

126. Furthermore, although the applicant's attitude to the political activities of the KPD was ambiguous, she does not appear to have been questioned by the School Board about specific aspects of its policy. The minutes of the School Board's interview with her do not record that they explored the details of the kindergarten project, although this appears to have been a local intitiative in a depressed part of the city, the immediate relevance of which to the question of constitutional loyalty in unclear. Instead the applicant was asked for a blanket condemnation of a party which it was not alleged that she belonged to and although her hesitation in replying might have been open to the interpretation that she was deceitful and supported the party to the hilt, it was also open to other interpretations, which do not appear to have been evaluated in an evenhanded way. In particular there appears to be nothing in the case file which convincingly invalidates the applicant's own explanation of her position, namely that she was not a member of the KPD, although she did support the kindergarten project.

127. The latter project may have concerned matters related to education, including the education of young children, and it is possible that this may even have given rise to potential political indoctrination. However the School Board not only did not base its decision on such a conclusions, but did not apparently investigate the possibility that involvement in this project might have repercussions for the applicant's work activities. The Board was solely concerned with the requirement that the applicant dispel the ambiguity which they found in her statements of opinion, which they concluded were incompatible with the degree of loyalty required of her as a civil servant.

128. The Commission recalls the very wide terms of the obligation undertaken by the applicant in her declaration of allegiance. However it must recognise the vital role played by the protection of freedom of expression in the democratic structure of member states of the Council of Europe. It cannot find that the requirement that the applicant dissociate herself completely from a party with which she apparently had such limited connection, can be considered a "necessary" condition and restriction on her freedom of opinion and on its expression. This is the more so in the absence of any other aspect of the applicant's conduct could suggest that any divergent opinion which she might have held would, or might be, or had ever been, expressed by her in the context of her work as a teacher. The Commission considers rather that the School Board owed a duty to the applicant to permit her to exercise her freedom of expression where this was being done wholly outside her work context and where it is not established that her opinions were in themselves a threat to the democratic order. The operation of loyalty control in the present case did not correspond to a "pressing social need" and the response of the control mechanism was disproportionate, and it follows that its was not necessary in a democratic society for any of the purposes referred to in Article 10 (2) of the Convention.

Conclusion

129. The Commission therefore concludes by nine votes to eight that there was a violation of Article 10 in the present case.

Secretary to the Commission

(H. C. KRUGER)

President of the Commission

(C. A. NØRGAARD)

Dissenting Opinion of Mr Sperduti

I adhere to the minority who find that no violation of the Convention in the present case. Nevertheless I must clarify the principal elements of the reasoning of my point of view which lead me to conclude that there was no violation.

The points at issue basically concern the conditions of access, employment and dismissal from the civil service in the Federal Republic of Germany, having regard in particular to the safeguarding of the democratic system established by the Basic Law of the Federal Republic.

Amongst these conditions one must refer in particular to the obligation of strict loyalty of civil servants to the Constitution, an obligation which they freely enter into. The requirements of this strict loyalty, the observance of which is encumbant on all civil servants by virtue of their status as such, must be seen in the context of the position of the Federal Republic in its historical development, as well as from the geo-political point of view, which aspects are described in the Commission's report.

As far as the expression of opinion and, more generally, the behaviour of civil servants is concerned, one must distinguish, in my opinion, between the requirement of restraint, which is normally imposed on civil servants, and breaches of which may be sanctioned on a disciplinary basis by measures which correspond to the degree of the seriousness of the matters alleged, and the question of loyalty, the scope and implications of which must be analysed according to the legal system concerned.

May the position where the conduct of a civil servant is assessed by the competent authorities in an objective manner and without any element of arbitrariness, be incompatible with the aim of the safeguarding of the constitutional order. May one envisage in other words, that the action of such authorities may result in generating requirements of care and vigilence which must be applied, under the domestic legal order, in order to guarantee that the constitutional values and ideals are properly protected against attacks which might, in the particular circumstances of the State in question, threaten them.

It appears to me that the State is only exercising its inherent freedom to regulate the conditions of access to and removal from the civil service in a manner which it considers necessary and appropriate if it implements measures of this kind in appropriate cases.

Where a dismissal, or the refusal of an appointment in the civil service is implemented following an objective evaluation which was reasonable in the relevant circumstances, no question can arise of a violation of any of the provisions of the Convention.

In my opinion the freedom to express even one's political opinions is not effected by such measures for two reasons: first, the measure does not constitute a punitive sanction, but is a preventative measure, with a view to preventing a danger which could threaten the established constitutional order; secondly, the opinion or opinions which have been expressed by the civil servant who has been dismissed may subsequently freely be re-expressed by him.

It should also be noted that no problem of proportionality between the behaviour of the civil servant and the measures taken in respect of such behaviour appears to arise here. Indeed, the decisive question for a refusal of recruitment of a civil servant, or his dismissal, is that the person concerned is not considered to offer the guarantee of loyalty towards the Constitution which is required of a civil servant.

Having said that, I must add that a problem of a violation of the Convention could arise in a case where the measures in question were taken in respect of behaviour, or the expressions of opinion, which could not, objectively, be considered as illustrative of a lack of loyalty towards the democratic constitutional order of the State; in other words if it appeared that these measures could not be considered as having been taken with a view to the protection of such constitutional order.

By the very fact that the rules and principles controlling access and terminations of civil servants' appointments would not be at issue, the expressions of opinion in question would have to be examined from a legal point of view, on the basis of the rights guaranteed by Article 10 of the Convention. It would follow that in the absence of any justification under the second paragraph of this provision, the measures taken against the person concerned would have to be regarded as violations of Article 10. I conclude, however, that on the facts of the present case there has been no violation of the Convention.

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Dissenting Opinion of Mr Frowein, joined by MM. Ermacora, Carrillo and Soyer

1. We agree with the general approach of the majority as outlined in para 66-99 of the report. We are however, unable to find a violation of Article 10. The sanction applied by the authorities in the case is in our view covered by Article 10 (2).

2. The German system of loyalty requirements for members of the civil service is independent of the specific post a civil servant holds. Therefore, it seems impossible to take into account whether or not the activities of the applicant had any relationship with her post as a teacher. The question which may be put under Article 10 (2) is whether it can be considered necessary that teachers as a general rule be included in the civil service. The Commission's majority does not seem to question that. We also see no reason to doubt that it is within the discretion of the state to give teachers, who perform the important function of educating the society of tomorrow, the status of civil servants.

3. The question then to be decided is whether the authorities could reasonably come to the conclusion that the applicant did not show the loyalty required for the constitutional system.

4. In the case of the applicant the authorities had first investigated whether any doubts existed and had come to the conclusion that this was not the case. Then the letter to the editor by the applicant was published. This letter clearly implied that she supported to some extent the policy of the KPD. The extent of that support was left in the vague. The KPD was at the time an extremist and violent communist fringe party. It must have been clear to the applicant that this letter would cast some doubt on her position as to loyalty. After the letter had been published the authorities did not come to any conclusion immediately. However, they asked the applicant to comment upon the letter and her position. When she refused to take a stand as to her position towards the KPD she was asked by letter to make clear that she did not support the policy of the KPD. She refused to do so.

5. This shows that the applicant had fully the opportunity to make her position clear and to remove any doubts as to her loyalty. It is not possible to find out why she refused to do so. But it seems clear that a system which requires the loyalty of every civil servant cannot accept that somebody gives the impression at the same time to support a violent group which works for overthrowing the constitutional system.

6. Had the applicant been willing to discuss her position vis-à-vis the KPD, any possible misunderstanding on her part could have been clarified. The Administrative Court of Appeal expressly refers to the possiblity for her to clarify that she only supported the initative concerning the kindergarten. Under the circumstances the authorities were forced to draw the conclusion that she wanted to leave the impression with the general public that a schoolteacher could to some extent support KPD-policy without coming into conflict with the obligation to be loyal to the Constitution. It is essentially this impression which the authorities were bound to destroy if the rule of loyalty was to be upheld.

7. This shows that this is not one of those cases where one might ask whether statements made are still of relevance at a much later time. It is a case where the applicant is unwilling to give a clear explanation as to her understanding of the meaning of loyalty as compared to an organisation which advocates the overthrow of the constitutional system. Since a strategy of those groups was to infiltrate the civil service, the necessity to clarfiy the matter was evident. That the treatment was proportionate is shown by the fact that the authorities did not act immediately after the letter was published. They acted only after the applicant had refused to clarify her position. It is impossible to know whether she chose to behave in that manner because she in fact supported the position of the KPD in a more general manner. Since she was not willing to reveal her attitude, doubts remained concerning her loyalty.

8. When judging whether a sanction of the kind here in question is or is not proportionate its seems important also to realise in what respect the applicants' freedom of expression was restricted. She was not under any restriction concerning her support for the kindergarten as the Administrative Court of Appeal clarified. She was, however, as a civil servant, under the obligation not to create the impression that she generally supported the policy of a party working for the overthrow of the constitutional system. After having created that impression she refused to clarify the matter.

9. This shows that there was not any specific opinion which she could not express. Rather, she was asked to explain her position as to the fundamental aspects of free and pluralist democracy. When she was not willing to take a stand, her appointment was revoked.

10. Article 10 (2) covers the position that loyalty to "political democracy", in the sense of the preamble to the Convention and of Article 17, be required of a civil servant. The failure of the applicant to clarify her position after the letter to the editor was not an expression of an opinion. What was asked from her was a confirmation of pluralist democracy, principles clearly not recognised, but denied, by the KPD.

11. Under those circumstances we find that the revocation of her appointment when she refused to reveal her attitude could be considered to be necessary and proportionate by the authorities and therefore was justified under Article 10 (2) of the Convention.

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Separate Opinion of Mr Opsahl

As regards the points at issue, the facts show in my view that the present case does not really concern freedom of expression in its general sense, but more particularly the freedom to hold opinions, and the consequences which arose for the applicant from opinions it was believed that she may have held. Article 10 (1) protects specifically, as one of the rights which freedom of expression "shall include", the freedom to hold opinions, even if they are not expressed openly, or are withheld.

Hence the first question is whether the system of loyalty control as it applied to the applicant interfered with her right to hold or withhold opinions. On this understanding I concur with the finding of the Commission that such was, indeed, the case.

Also I agree that the outcome of this interference resulting from the enquiry into her opinions was not justified because it was lacking in necessity and proportionality. The most striking aspect of this particular case is, in my opinion, how doubtful the factual basis was (above, paras 24-37) for concluding that her behaviour amounted to "wilful deceit" as regards her duty of loyalty (above, paras 28-46). As para 125 of the Commission's opinion implies, the authorities may have overreacted in making this finding. If tension and fear prevailed at the time, this may be understandable, but is not sufficient. In fact, the applicant's attitude, even if defiant, could equally well be interpreted as acting in defence of her constitutional rights, including freedom of opinion. Once she had expressly declared her loyalty to the Constitution and maintained this declaration, the fact that at the same time she in a way challenged the system of loyalty control, and later apparently took part in a campaign against it, cannot in my opinion justify the findings against her and their consequences. The requirement of loyalty to the Constitution must be limited in order not to be abused. It cannot be made to comprise loyalty to every aspect of the system of loyalty control, and include a requirement to distance oneself completely from all aspects of a given party or opinion. The applicant's attitude could well be seen as a kind of lawful defence, or at most civil disobedience, against the loyalty control system. In these circumstances it was not necessary, and therefore not justified, to hold this attitude as evidence proving the much more serious charge of breach of the duty of loyalty which she had expressly and repeatedly accepted.

On this view I do not find it necessary to examine or express any opinion on all the other considerations put forward by the Commission, since, like Mr Trechsel, I have some difficulty with parts of the argument.

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Concurring Opinion of Mr Trechsel

The majority of the Commission has approached the issue raised by the present application in the light of Article 10, the focus being placed on the question of whether any interference with the right to freedom of expression of the applicant was justified under paragraph 2 of that Article. While sharing the opinion expressed by the majority of the Commission as to the ultimate result, I do not agree with its line of argument.

In my view the right approach to the case, was to be found in Article 14 of the Convention which deals with differentiations in the enjoyment of rights and freedoms set forth in the Convention and must be read as forming an integral part of Article 10 (cf Belgian Linguistic Case, Series A, Volume 4, p. 34).

While the method followed by the majority and that proposed here may often lead to the same result, I do wish to point out the differences and the reasons why in my view the reasoning based on Article 14 is to be preferred.

The starting point in this discussion must be an examination of the difference between "formalities, conditions, restrictions or penalties" in the sense of Article 10 (2) and "distinctions" in the sense of Article 14. In my view paragraph 2 of Article 10 relates to limitations of the freedom of expression which apply to everyone. What is referred to there are interferences aimed at the form and contents of the opinion expressed. It is with reference to specific opinions and information that the different aims were drafted, e.g. "national security" for military and political secrets; "morals" for pornography; "the protection of the reputation or rights of others" for libel etc. However, if a restriction is primarily tied to a limited category of persons, we are faced with a distinction in the sense of Article 14. That distinction is then focussed on the characteristic features of the category in question and not primarily on the contents of the opinion expressed. Whenever an interference with the freedom of expression is aimed at a limited group of persons, while the same behaviour would be permitted to everyone else, we are faced with a distinction in the enjoyment of that right and the question arises as to whether the said distinction amounts to a discrimination in the sense of Article 14.

If one compares the requirements for the justification of interferences on the one hand and distinctions on the other hand, important differences become apparent. The conditions for justification under Article 10 (2) which apply to everyone are understandably much stricter than those applying to specific categories of persons. Restrictions must be based on law, pursue one of the limitatively ennumerated aims and satisfy the test of necessity. As for distinctions in the sense of Article 14, in order to be discriminatory they must fail to have an: "objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised" (Belgian Linguistic Case, loc. cit. p. 34).

The Court makes no reference to lawfulness, but this omission may be due to the fact that in the specific case at issue no problem of lawfulness arose. As the same applies here, the question may remain open. In both cases, furthermore, the principle of proportionality has to be respected.

The essential difference, therefore, lies with the aims legitimately pursued. While Article 10 (2) contains an enumeration which, while wise, still remains limited, Article 14 as interpreted by the Court does not name any such specific aim but refers to the principles prevailing in democratic societies and to the specific problems at issue.

While both tests may finally lead to the same conclusion of violation or non-violation of rights guaranteed under the Convention, one road may be easier than the other. The present case is, in my view, a striking example.

The majority accepts that the interference was "in the interest of national security". However, it is rather far-fetched to relate the political opinions of a local schoolteacher to national security, a fact which is openly admitted by the majority in paragraph 18. I do not find it necessary for the purpose of my argument to examine whether the reasoning in paragraph 16 to 20 of the majority opinion is convincing. I find it very important, however, to stress the danger inherent in that method. In fact, "national security" is an argument which is open to abuse. The approach taken by the majority facilitates such abuse in giving a very broad meaning to the "interests of national security" (cf. the Commission's Report in the case of Pat Arrowsmith v. the United Kingdom, DR 19.5 at p. 22, which is much closer to the natural meaning of that term). There is no way to narrow that construction in cases where interferences with the freedom of expression are applied to "ordinary" persons who are not or

who do not wish to become civil servants. In effect, the application of Article 10 (2) to the present case unnecessarily leads to a corrosion and devaluation of a Convention term intended to limit interferences.

There is one further obstacle to anchoring the interference on the aim of the "interest of national security". While the Commission has dealt with the application under Article 10, freedom of expression, it might also be regarded as alleging an interference with Article 9, freedom of thought. In approaching this aspect of the case I am bound to base my argument upon a hypothesis for which I cannot offer, in the present context, a reasoning in depth. This hypothesis consists in assertaining that "freedom of opinion"/"liberté d'opinion", in contrast to "freedom of thought"/"liberté de pensée", must be read as referring to the freedom of expression of opinion, as otherwise it would be impossible clearly to distinguish between Article 10 and 9, there being no criterion permitting "opinion" and "thought" to be distinguished in clear, legally applicable terms from one another.

My view according to which the applicant is actually complaining of a violation of Article 9 rather than of Article 10 seems to be supported by the fact that the applicant was not really sanctioned for having expressed a certain opinion, but rather for haivng refused to do so. However, it would appear reasonable to define opinions not expressed as thoughts. And indeed what the measures complained of are concerned with is the general attitude of civil servants vis-à-vis the basic values of the "Grundgesetz", which is a matter of thought, or even conscience. However, Article 9 (2) does not admit interference with the right to freedom of thought in the interest of national security.

In any event, the argument followed by the majority also leads to a methodological confusion, as it directly confronts two issues to be answered; two unknown quantitites, so as to speak: Was it justified to interfere in view of the contents of the opinion expressed? and: Was it justified to interfere in view of the special situation of the civil servant in question? What makes this combination of questions particularly difficult is the fact that the status of a civil servant is not only referred to under the test of necessity, but already in connection with the aim of the restriction;

If one follows the approach suggested in the present opinion, one accepts at the outset that the opinions expressed or thoughts held could not as such be sanctioned. This has not been contested by the respondent Government. The question then arises whether it was justified to limit the enjoyment of the freedom of expression or thought with regard to persons under the "other status" of a civil servant.

I agree that the distinction in question pursues a legitimate aim. I refer to the opinion of the majority which, in the light of Article 14, is undoubtedly convincing.

As to the reasonable relationship of proportionality, I also agree with the majority of the Commission that it was lacking. As I understand the facts of this case, the applicant wished to take a differentiated attitude - not full allegiance to the KPD, but support for one of their causes in a field which fell within her professional competence. The authorities, however, wanted her to take an extreme position and fully to reject the KPD. I do not find it established that it was reasonable to require such blunt rejection as a condition for employing the applicant as a schoolteacher. She was therefore, in my opinion, a victim of discrimination contrary to Article 14 in conjunction with Article 10 or rather Article 9 of the Convention.

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Dissenting Opinion of Mr Schermers

In the present case, the freedom to impart information is not at stake. The applicant was permitted to express her opinion without restriction.

It is inevitable that the expression of specific opinions influences the reputation which others will hold of a person. Someone who express religious ideas will be considered as a religious person, someone who propagates communist ideas will be seen as a communist person, etc. This is a normal consequence of the expression of ideas.

The question in the present case is not whether the applicant was restricted in expressing her ideas. No such restriction has been alleged. The question is not either whether the conclusion of others that the applicant sympathised with the ideas of the KPD limited her freedom of expression, because that was the normal consequence of her imparting particular ideas.

The real question is whether the non-appointment (*) to a position of someone who holds particular ideas is covered by Article 10. In general, this is not the case. In all proceedings for filling vacancies employers will take account of opinions which the applicants hold in order to evaluate who will fit best in the position. Normally, an employer cannot be blamed for preferring an applicant holding particular opinions over an applicant who holds different opinions.

The question arises to what extent this may be different for government positions. Again, it cannot be contrary to Article 10, if for a particular post someone holding or not holding particular opinions is preferred.

A problem under Article 10 arises, however, if a goverment systematically bans persons holding particular opinions from all government service, irrespective of the question whether the opinion is relevant for performing the specific post or not. In that case the banning can be seen as a sanction against the holding of a particular opinion, rather than as a criterion for selecting the person who fits best to the specific post.

If in the present case a post were involved for which the political opinions of the candidates were irrelevant, then the banning of applicants holding particular opinions would be contrary to Article 14 in connection to Article 10 and the question should be posed whether Article 10, para 2 would justify such discrimination.

(*) Temporary appointments are normally meant for obtaining more information about an applicant before a permanent appointment is considered. The non-continuation of a temporary appointment on grounds which were not (yet) known at the time of the application, should therefore, be assimilated to the non-appointment to a vacancy.

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In the present case, however, there is a relationship between the post involved and the political opinions of the candidates available to it. It is not contrary to Article 10, nor to Article 14 if for a teaching post persons holding particular political opinions are considered less desirable than others.

The relationship is even stronger than in the case of Application No. 9704/82, K v. the Federal Republic of Germany as it may be expected that the applicant's pupils could be more easily influenced than the more mature students of the applicant K. Unlike in the case of Application No. 9704/82, there was no recommendation for appointment by the competent teaching authority.

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APPENDIX I

HISTORY OF PROCEEDINGS

Item	Date	Participants
Examination of admissibility		
Introduction of the application	7 November 1980	
Registration of the application	26 December 1980	
Preliminary Examination by a Rapporteur (Rule 40 of the Rules of Procedure)	March 1981 May 1981	
Commission's deliberations and decision to communicate the application to the respondent Government and to invite them to submit written observations on its admissibility and merits pursuant to Rule 42 (2) (b) of the Rules of Procedure	10 July 1981	Fawcett (President) Sperduti Nørgaard Ermacora Kellberg Frowein Tenekides Trechsel Kiernan Sampaio Carrillo Gözübüyük Weitzel Soyer
Expiry of time-limit for observations	30 November 1981	
Respondent Government's request for extension of time	14 December 1981	
Extension granted by the President	21 December 1981	
Respondent Government's observations on admissibility only	25 January and 15 February 1982	

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Item	Date	Participants
Applicant's observations in reply	8 March 1982	
Commission's deliberations and decision to invite the parties to make oral submissions on admissibility and merits pursuant to Rule 42 (3) (b) of the Rules of Procedure	6 July 1982	Nørgaard (President) Sperduti Frowein Ermacora Fawcett Kellberg Tenekides Trechsel Kiernan Sampaio Carrillo Gözübüyük Weitzel Soyer Schermers
Hearing of the parties pursuant to Rule 42 (3) (b) of the Rules of Procedure, followed by deliberations and decision on admissibility and deliberations on future proceedings	14-16 December 1982	Nørgaard (President) Sperduti Frowein Ermacora Fawcett Busuttil Kellberg Opsahl Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer Schermers

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Item	Date	Participants
Examination on the merits		
Commission's first deliberations on the merits and decision to invite the parties to make written submissions on specific questions with a time-limit of six weeks from despatch of the decision on admissibility	16 December 1982	Nørgaard (President) Sperduti Frowein Ermacora Fawcett Busuttil Kellberg Opsahl Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer Schermers
Parties informed of this procedure and of the questions	28 December 1982	
Respondent Government object to procedure adopted	17 January 1983	
Commission confirms the procedural decision	10 March 1983	Nørgaard (President) Sperduti Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Carrillo Weitzel Soyer Schermers
Admissibility decision despatched to the parties	25 March 1983	

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Item	Date	Participants
Respondent Govermnent requests extension of time	21 April 1983	
Commission deliberation. Extension of time granted	13 May 1983	Sperduti (Acting President) Frowein Ermacora Opsahl Jörundsson Tenekides Kiernan Melchior Weitzel Soyer Schermers
Expiry of extended time-limit requested by the respondent Government	30 June 1983	
Deliberations of the Commission on the state of proceedings in the absence of the respondent Government's pleadings. Decision to list the application for the subsequent session	13 July 1983	Nørgaard (President) Sperduti Frowein Fawcett Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Soyer Schermers
Parties informed accordingly	27 July 1983	
Respondent Government's request for a further extension of time	30 September 1983	

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Item	Date	Participants
Commission's deliberations on state of proceedings and decision to grant a final extension until 7 November 1983	8 October 1983	Nørgaard (President) Sperduti Frowein Fawcett Busuttil Opsahl Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Soyer Schermers
Parties informed accordingly	12 October 1983	
Respondent Government's observations submitted	4 November 1983	
Applicant's observations in reply submitted	17 November 1983	
Commission's deliberations on the merits	15 December 1983	Nørgaard (President) Sperduti Frowein Ermacora Jörundsson Trechsel Kiernan Gözübüyük Weitzel Schermers

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Item	Date	Participants
Commission's further deliberations on the merits and vote	7 and 10 March 1983	Nørgaard (President) Sperduti Frowein Ermacora Fawcett Busuttil Opsahl Jörundsson Tenekides Trechsel Melchior Carrillo Sampaio Gözübüyük Weitzel Soyer Schermers
Commission's further deliberations and adoption of the present Report	11 May 1984	Nørgaard (President) Sperduti Frowein Ermacora Fawcett Busuttil Jörundsson Tenekides Kiernan Melchior Sampaio Carrillo Gözübüyük Weitzel Soyer Schermers