

COUNCIL OF EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY

Application No. 5591/72
by Dr. G. Z
against Austria

The European Commission of Human Rights sitting in private on 2 April 1973, the following members being present:

MM. J. E.S. FAWCETT, President
G. SPERDUTI
T. B. LINDAL
E. BUSUTTIL
L. KELLBERG
B. DAVER
T. OPSAHL
K. MANGAN
J. CUSTERS

Mr. A. B. McNULTY, Secretary to the Commission

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

Having regard to the application introduced on 11 June 1972 by Dr. G. Z against Austria and registered on 15 June 1973 under file No. 5591/72;

Having regard to the report provided for in Rule 45, 1 of the Rules of Procedure of the Commission;

Having deliberated,

Decides as follows:

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THE FACTS

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

The applicant, an university lecturer, was born in 1943 and resides in Vienna. His application concerns a conviction by an Austrian court for having refused to serve compulsory military service in Austria.

On 3 July 1970 the applicant began his regular military service in the Austrian army, and after three months of initial training his request for one year's leave of absence in order to settle family affairs was granted. His leave ended on 30 September 1971 and on 18 October 1971 he was called to the army. The applicant, who had originally not objected to military service, then asked to be exempted from it claiming that as a Roman Catholic it was impossible for him to serve as an armed combatant. The applicant, who had, during his three months of service, already participated in activities against compulsory military service, then refused to accept the uniform from the commander of his unit and to carry out his other instructions, although the latter repeatedly warned him about the consequences of his behaviour. The officer subsequently arrested the applicant on 18 October 1971 and criminal proceedings under the Military Penal Code (Militärstrafgesetz) were opened against him by the Vienna Regional Court (Landesgericht). An ordinary warrant of arrest under Sec. 175, para. 1, sub-section 4 was made out against him for danger of repetition and flight and he was remanded in custody on 19 October 1971. On 29 October 1971 he was transferred back to the barracks where his unit was stationed, and detained there. It appears that the applicant subsequently changed his attitude and served in the army until his release on 27 January 1972.

On 22 December 1971 the applicant appeared before a single judge of the Regional Court (Einzelrichter des Landesgerichtes) and was convicted of insubordination under Sec. 12, para. 1, sub-section 2 of the above Military Penal Code. He was given a suspended sentence of six weeks' imprisonment. The Court found that, under Austrian law, substitute civilian service had not yet been introduced and that the applicant had, before being called-up, not objected to military service for reasons of religion or conscience.

On the applicant's appeal, under Sec. 489 of the Code of Criminal Procedure ("full appeal"), the Vienna Court of Appeal (Oberlandesgericht) confirmed the lower Court's decision. On 7 July 1972, however, the applicant was informed that the execution of the sentence and all the consequences thereof were suspended.

It appears that on 9 April 1972 the applicant formally requested the Vienna military command to release him from his obligation under the Armed Forces Act (Wehrgesetz) to take part in military exercises at regular intervals. On 6 June 1972, however, the above command refused this. The applicant appealed, on 13 June 1972, against this decision, but no further decision has yet been given. In this connection the applicant indicates that a Bill on Substitute Civilian Service is now under consideration in Austria, and that this should be soon enacted by the Austrian Parliament.

The applicant states that his right to freedom of conscience and religion has not been respected and that he has been discriminated against, and that he has no effective remedy under Austrian law against this violation of his rights. He complains that the Austrian Government has thereby violated his human rights as guaranteed by the Austrian Constitution, the Austrian State Treaty of 1955, the Charter of the United Nations, the Universal Declaration of Human Rights and Arts. 9 and 13 of the European Convention on Human Rights.

THE LAW

1. The applicant has complained that he was punished for having refused to carry out his military service in the Austrian army although he had objected to military service on the ground of his religious convictions. He alleges that thereby his right to freedom of conscience and religion, as is provided for under Art. 9 of the Convention, had been violated. The Commission, in this respect, had first regard to the provisions of this Article according to which "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion as belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance". In interpreting this provision the Commission also took into consideration the terms of Art. 4 (3)(b) of the Convention which states that forced or compulsory labour shall not include "any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service". This provision clearly shows that, by including the words "in countries where they are recognised" in Art. 4 (3)(b), a choice is left to the High Contracting Parties to the Convention whether or not to recognise conscientious objectors and, if so recognised, to provide some substitute service for them.

The Commission, for this reason, finds that Art. 9, as qualified by Art. 4 (3)(b) of the Convention, does not impose on a State the obligation to recognise conscientious objectors

and, consequently, not to make special arrangements for the exercise of their right to freedom of conscience and religion as far as it affects their compulsory military service. It follows that these Articles do not prevent a State, which has not recognised conscientious objectors, from punishing those who refuse to do military service. Consequently, the application is, as regards this complaint, manifestly ill-founded under Art. 9 of the Convention and must be rejected under Art. 27 (2).

2. The applicant has further complained that he had no effective remedy under Austrian law against the alleged violation of his rights guaranteed under the Convention in regard to the facts complained of above. He alleges in this respect a violation of Art. 13 of the Convention which provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority...". The Commission, however, has found above that the applicant's rights under the Convention, and in particular under its Art. 9, had not been violated in the applicant's case; consequently, Art. 13 of the Convention is not applicable to the applicant's respective complaint.

It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Art. 27 (2).

For these reasons, the Commission

DECLARES THIS APPLICATION INADMISSIBLE

Secretary to the Commission

President of the Commission

(A.B. McNULTY)

(J. E.S. FAWCETT)