

(TRANSLATION)

THE FACTS (Extract)

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

The applicant, a Swiss national born in 1954, lives at Rickenbach (Canton of Schwyz). He is represented by Mr. M. Pestalozzi, a lawyer practising in Rüti (Zurich).

The applicant attended a recruit training course in 1974 and refresher courses (Wiederholungskurs) in 1975 and from 1978 to 1982. He refused to obey an order to report to his unit for a refresher course from 31 January to 17 February 1983. He informed his commanding officer that he would not report for the course and that it was his intention no longer to perform military service.

In a judgment of 3 October 1983 the Divisional Court (Divisionsgericht) sentenced the applicant to six months' imprisonment for refusal to serve in the armed forces (Dienstverweigerung) within the meaning of Article 81, ch. 1, para. 1 of the Military Criminal Code. The Court dismissed him from the armed forces. It refused to acknowledge that he had acted as a result of a serious moral dilemma (schwere Gewissensnot). Article 81 provides that :

"1. Whoever refuses, with the intention of evading recruitment or military service, to obey an order to report to his unit (ordre de marche), a general order to report for duty (ordre de mise sur pied) or an order to report for recruitment shall be sentenced to a term of imprisonment.

If the offender did not act with the intention of evading recruitment or military service, the penalty shall be a term of imprisonment not exceeding six months. If the offence is a minor one, it shall be punished by disciplinary measures.

2. The penalty shall be a term of imprisonment not exceeding six months or close arrest if the offender, on account of his religious or moral convictions, acted as a result of a serious moral dilemma. The court may dismiss him from the armed forces.

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The applicant appealed. On 13 March 1984 the Military Court of Appeal upheld the conviction, but reduced the penalty to five months' imprisonment.

The applicant appealed to the Military Court of Cassation to set aside the challenged decision on the ground that military courts were not impartial within the meaning of Article 6 para. 1 of the Convention.

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LAW (Extract)

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2. The applicant complains that the law requires a conscientious objector to have acted as a result of a serious moral dilemma in order to receive a lighter penalty. He relies on Article 9 of the Convention.

Article 9 para. 1 of the Convention provides that :

"Everyone has the right to freedom of thought, conscience and religion ; this right includes freedom to change his religion or 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.”

The applicant considers that the refusal to grant him the mitigating circumstances provided for under Article 81 para. 2 of the Military Criminal Code constitutes discrimination within the meaning of Article 14 of the Convention, which provides that the enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... opinion.

The Commission notes that the applicant's complaint under Article 9 in conjunction with Article 14 challenges the distinction made by the legislator between those who refuse to perform military service for reasons which are not of a religious or moral nature and those who, on account of their religious or moral convictions, act as result of a serious moral dilemma: the former are liable to a term of imprisonment ranging from three days to three years (Article 81 para.1 and Article 29 of the Military Criminal Code), while the latter are liable to a term of imprisonment not exceeding six months or a period of close arrest ranging from one day to three months (Article 81 para. 2 and Article 29 (a) of the Military Criminal Code).

According to the case-law of the Convention organs, the criteria for assessment of differences in treatment within the meaning of Article 14 are as follows: a measure must have an objective and reasonable justification and the means employed must have a reasonable relationship of proportionality to the aim sought to be realised (cf. No 8701/79, Dec. 3.12.79, D.R. 18 p. 250).

The Commission finds that the legal requirement that a conscientious objector should act as a result of a serious moral dilemma in order to receive a lighter penalty is objective and reasonable. In addition, the penalties prescribed by law in respect of the two categories of conscientious objector are proportionate to each other. In this respect the Commission points out that in sentencing the applicant to five months' imprisonment despite a legal upper limit of three years, the courts did not impose a particularly severe penalty.

An examination by the Commission of this complaint as it has been submitted does not disclose any appearance of a violation of the rights and freedoms set forth in the Convention and in particular in Articles 9 and 14.

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