

Summer 2004 - Issue 1

**MEMORIAL - EHRAC**
BULLETIN:EUROPEAN HUMAN RIGHTS ADVOCACY CENTRE
EHRAC

International Human Rights Advocacy

Jurisprudence of the European Court of Human Rights On Alternative Civilian Service

Kirill Koroteev

Lawyer, HRC Memorial

The approach of the European Court of Human Rights (the "Court") to alternative civilian service (ACS) has been developing for a long time, and the process is not yet complete. The jurisprudence of the European Commission of Human Rights (the "Commission") is therefore important. Art. 4 § 3(b) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") states that, for the purposes of Art. 4, service exacted in place of compulsory military service is not forced or compulsory labour in countries that recognize conscientious objection. For a long time the Commission has taken this norm as *lex specialis* (a specific rule of law which prevails over the general) in relation to Articles 9 and 14 of the Convention and declared complaints relating to ACS inadmissible. Even in 1996, in considering the application *Olcina Portilla v. Spain*, (No. 31474/96, 14.10.96) the Commission insisted that the Convention "does not guarantee as such the right to conscientious objection and the substitution of civilian service for military service¹".

However, the Commission has often delivered important judgments in its admissibility decisions. For example, in *Autio v. Finland* (No. 17086/90, 6.12.91) the Commission considered a law which abolished the inquiry procedure, intended to establish the genuineness of an objector's convictions, but prolonged the term of ACS from 11 to 16 months (compared to 8 months of military service). The applicant complained

that such legislation amounted to discrimination on the basis of his convictions, which prevented him from bearing arms. The Commission noted that this application fell within Art. 9 of the Convention (although a state is not obliged to grant ACS) and thus, Art. 14 also applied. The Commission established a link between the length of the ACS and the presence of the inquiry procedure: the extension of the ACS term in comparison to the term of the military service was not disproportionate given that the inquiry procedure had been abolished².

The Court's Grand Chamber judgment in the case of *Thlimmenos v. Greece* (2000) represented a turning point. The applicant was convicted and imprisoned for refusing to undertake military service and demanding to be allowed to substitute ACS. After his release he was refused the right to become a chartered accountant as he had been convicted of an offence. The Commission declared the application admissible under both Art. 9 and Art. 14 in conjunction with Art. 9. The Commission's report, submitted to the Court on the basis of former Art. 31 of the Convention, as well as the partially dissenting opinion of six of its members (C.L.Rozakis, J.Liddy, B.Marxer, M.A.Nowicki, B.Conforti, N.Bratza), are of particular interest. The majority of the Commission found a violation of Art 14 (taken together with Art. 9) because the consequences of the conviction were disproportionate, given the absence of any link between the conviction and the profession of accountant³. The Commission found that the Greek authorities had failed to justify, on an objective and reasonable basis, the equal treatment of people who had committed different crimes in treating the applicant like any other convicted criminal. The majority also found that it was unnecessary to consider whether the conviction was necessary in a democratic society or whether it had been a violation of Art. 9⁴. It is also necessary to analyze the joint dissenting opinion of six members of the Commission as, in its decision on the merits, the Court followed some of their reasoning. The minority suggested that Art. 9 and Art. 11 of the Convention (freedom of assembly and association) would be applicable in the case of compulsory military service. Because refusal to undertake military service may give rise to criminal responsibility, an objector is forced to join an association with values that are alien to him. The minority opinion held that the freedom to practise one's religion in public, while refusing to do military service, fell within Art. 9 § 1 of the Convention, subject to limitations of Art. 9 § 2. The minority thought it necessary to analyze the case from the perspective of Art. 9 of the

Convention. In their view, the consequences of the applicant's conviction amounted to an interference with his freedom to practise his religion.

Since the law, excluding convicted criminals from the accountancy profession, pursued the objective of maintaining public order and protecting the rights and freedoms of others, the issue of whether the interference was necessary in the democratic society also had to be considered.

In its judgment on the merits the Court established that the applicant's complaint fell within the terms of Art. 9. It did not consider the arguments of the Commission regarding interference with his freedom to practise his religion on the basis of the consequences of his criminal conviction. The Court found that he objected to military service solely by virtue of his religion.

As a consequence, he was treated as any other person convicted of a serious crime, even though his conviction resulted from the exercise of the right to religious freedom guaranteed in Article 9 itself⁵.

The Court noted that "unlike other convictions for criminal offences, a conviction for refusing, on religious or philosophical grounds, to wear military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise [the] profession"⁶.

The lack of differential treatment was found to violate Art. 14 taken together with Art. 9 of the Convention. To achieve this conclusion, the Court almost exactly followed the argument of the Commission's minority (§ 8 of the joint dissenting opinion).

The Court did not consider the question whether the refusal to undertake military service can be a violation of Art. 9 of the Convention, despite the wording of Art. 4 § 3 (b). This question was not put before the Court even though the applicant asked the Court to rule that "the Commission's case-law, to the effect that the Convention did not guarantee the right to conscientious objection to military service, had to be reviewed in the light of the presentday conditions. Virtually all Contracting States now recognised the right to alternative civilian service"⁷.

Analysis of the Federal Law of 25 July 2002 No. 113-FZ "On Alternative Civil Service"⁸, especially in relation to the possibility of undertaking ACS in military units, without the citizens' consent, gives grounds to assert that after its coming into force the Court will expand its practice on this problem, in connection with complaints submitted by Russian applicants.

Endnotes

1 *Olcina Portilla v L'Espagne* (dec. de la Comm. Eur. D. H.), no. 31474/96, 14.10.96

2 *Autio v Finland* (Eur. Comm. H.R. dec.), no. 17086/90, 6.12.91. In our view, the decision does not imply that, in a

case where an objector has proved he has personal convictions, which prevent him from undertaking military service, the term of his ACS cannot exceed the term of military service. However that is a possible interpretation of the decision.

3 Eur. Comm. H.R. the Thlimmenos v Greece report of 4 December 1998 p 48

4 Ibid pp 48,52

5 Thlimmenos v. Greece [GC], judgement of 6 April 2000, Reports 2000-IV, p 42

6 Ibid., p 47

7 Ibid., p 50

8 Russian Federation legislation summary—2002—No. 30.—P.3030