



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

FIRST SECTION

CASE OF GÜTL v. AUSTRIA

(Application no. 49686/99)

JUDGMENT

STRASBOURG

12 March 2009

FINAL

12/06/2009

This judgment may be subject to editorial revision.

In the case of Gütl v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 17 February 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 49686/99) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Markus Gütl (“the applicant”), on 25 May 1999.

2. The applicant was represented by Mr R. Kohlhofer, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Mr F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that he had been discriminated against in the exercise of his rights under Articles 4 and 9 of the Convention on the ground of his religion as he was liable for civilian service whereas members of recognised religious societies holding religious functions comparable to his functions were exempt.

4. By a decision of 1 February 2005 the Court declared the application partly admissible.

5. Neither the applicant nor the Government filed further written observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1977 and lives in Belgrade (Serbia).

7. On 6 July 1991 the applicant was baptised in accordance with the ceremonial rite of the Jehovah's Witnesses and became an active member. On 1 December 1995 he assumed the function of a preacher ("special full-time servant" or "regular pioneer" – *Sondervollzeitdiener, allgemeiner Pionier*).

8. On 20 December 1995 the Styrian Military Authority (*Militärkommando*) found the applicant fit to perform military service. It subsequently called him up (*Einberufungsbefehl*) to begin his military service on 1 July 1996. That order was later revoked.

9. The applicant, on 13 January 1997, filed a request with the Federal Minister for Internal Affairs (*Bundesminister für Inneres*) for recognition as a conscientious objector (*Zivildiensterklärung*).

10. Subsequently, on 14 April 1997, the Minister for Internal Affairs recognised the applicant as a conscientious objector. Accordingly, he was exempted from the duty to perform military service but liable to perform civilian service (*Zivildienst*).

11. From 28 July 1997 until 1 July 1998 the applicant lived in a community of preachers ("Bethel family" – *Bethelfamilie*), which, in the applicant's view, is similar to a religious order (*Orden*) and is called the Religious Order of the Jehovah's Witnesses (*Orden der Sondervollzeitdiener der Zeugen Jehovas*).

12. On 1 April 1998 the Ministry for Internal Affairs ordered the applicant to commence his civilian service (*Zuweisungsbescheid*) with the Styrian Regional Fire Brigade (*Landesfeuerwehrkommando Steiermark*) on 2 June 1998.

13. On 17 April 1998 the applicant became a deacon ("ministerial servant" – *Diakon, Dienstamtgehilfe*) within the Jehovah's Witnesses.

14. On 30 April 1998 the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*) against the Ministry's order of 1 April 1998, also requesting the suspension of its effect. The applicant submitted that he had been living in a community of preachers since 28 July 1997 and devoted all his time to religious activities. On 17 April 1998 he had become a deacon and aspired to assume the function of an elder within the Jehovah's Witnesses. Referring to German law (section 10(1)(3) of the German Civilian Service Act) and the case-law and practice of the Federal Administrative Court (*BVerwG*, 29 September 1989, Zl. 8 C 53.87), he argued that persons in a similar situation (preachers and deacons) were exempt from compulsory military or civilian service. Further,

the applicant complained that section 13a(1) of the Civilian Service Act exempted only members of recognised religious societies performing specific services relating to worship or religious instruction from the obligation to perform civilian service, whereas he held a comparable clerical position within the Jehovah's Witnesses. Furthermore, section 11(1) of the newly introduced Federal Act on the Legal Status of Registered Religious Communities (*Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften*, hereafter referred to as the "1998 Act"), which had entered into force on 10 January 1998, established that recognition under the Recognition Act was only possible after ten years' existence as a registered religious community. Therefore this new provision precluded any recognition during the following ten years and made the Recognition Act inapplicable until 2008. The applicant requested the Constitutional Court to revoke the restriction limiting the application of section 13a(1) of the Civilian Service Act to "recognised religious societies", and in the alternative to revoke the ten-year' requirement laid down in section 11(1) of the 1998 Act.

15. On 8 June 1998 the Constitutional Court refused to deal with the applicant's complaint for lack of prospects of success. It further dismissed the applicant's request for his complaint to have suspensive effect.

16. Subsequently, on 24 June 1998, the applicant agreed with the Ministry for Internal Affairs that he would begin his civilian service in an institution for disabled persons on 1 July 1998, and he consequently left the community of preachers.

17. On 7 July 1998 the applicant requested the Constitutional Court to transmit his complaint of 30 April 1998 to the Administrative Court (*Verwaltungsgerichtshof*).

18. On 23 July 1998 the Constitutional Court granted the applicant's request.

19. On 18 August 1998 the applicant supplemented his complaint and requested the Administrative Court to institute proceedings to review the constitutionality (*Gesetzesprüfungsverfahren*) of the wording "recognised religious societies" in section 13a(1) of the Civilian Service Act. In the alternative, he requested that the provision at issue be interpreted in conformity with the principle of equality. He thus argued that, in view of his position as a deacon in the Jehovah's Witnesses, he should be dispensed from the obligation to perform civilian service as his position involved supporting elders by guiding the communities, carrying out clerical work in cooperation with other fellow Jehovah's Witnesses, giving Bible readings, speeches and commentaries during worship and offering guidance for prayers; accordingly, his functions were equivalent to those of members of registered religious societies who provided services relating to spiritual welfare or clerical teaching after graduating in theological studies, or to

those of students of theology who were preparing to assume a clerical function.

20. By a decision of 10 November 1998 the Administrative Court dismissed his complaint. It noted that the 1998 Act and in particular section 11(1) had not been applied and were not to be applied by the Ministry for Internal Affairs in the applicant's case. Rather, the Ministry had to apply section 13a(1) of the Civilian Service Act, requiring recognition of a religious society as a precondition for exemption from civilian service. The provision as such raised no concerns as regards constitutionality, since its objective was not to grant an exemption from the obligation to perform civilian service to every functionary of a religious community, whether or not it was recognised. It further held that the impugned provision, on account of its explicit wording, could not be interpreted in the manner suggested by the applicant. The decision was served on the applicant's counsel on 15 January 1999.

21. On 30 June 1999 the applicant ended his civilian service and, on 1 July 1999, he rejoined the Religious Order of the Jehovah's Witnesses, where he stayed until the end of July 2000. Subsequently, he left the community of preachers, continued to work as a preacher and received further clerical training.

22. In September 2003 the applicant began to do missionary work as a preacher in Serbia and Montenegro.

II. RELEVANT DOMESTIC LAW

A. The Civilian Act

23. Section 13a(1) of the Civilian Service Act (*Zivildienstgesetz*) provides as follows:

“An exemption from the obligation to perform civilian service shall apply to the following members of recognised religious societies:

1. ordained priests,
2. persons involved in spiritual welfare or in clerical teaching after graduating in theological studies,
3. members of a religious order who have made a solemn vow, and
4. students of theology who are preparing to assume a clerical function.”

B. Religious societies and religious communities

24. For a detailed description of the legal situation in Austria in this field see *Löffelmann v. Austria* (no. 42967/98).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 9

25. The applicant complained that the fact that he was not exempt from military service while assuming a function with the Jehovah's Witnesses which was comparable to those of members of recognised religious societies who were exempt from military service constituted discrimination on the ground of his religion, prohibited by Article 14 of the Convention taken together with Article 9.

Article 14 of the Convention provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 9 provides as follows:

“1. 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.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

A. Submissions by the parties

26. The Government pointed out that the obligation to perform civilian service was a substitute service for conscientious objectors who refused military service. Section 13a(1) of the Civilian Service Act provided for exemptions from the obligation to perform civilian service under certain circumstances. The Government argued that the documents submitted by the applicant did not disclose whether or not the applicant's function as a preacher within the community was comparable to those functions of members of recognised religious societies who were exempt from the

obligation to perform civilian service under section 13a(1) of the Civilian Service Act. Therefore, no assessment could be made. Furthermore, the applicant had failed to prove, notwithstanding his religious denomination, that he complied with any of the four criteria set out in the above-mentioned provision. Thus, there was no need to consider whether or not the applicant had been discriminated against on the ground of his faith. In addition, members of recognised religious societies who did not comply with the criteria laid down in section 13a(1) of the Civilian Service Act were not exempt from civilian service.

27. The Government submitted further that, as the Contracting States were under no obligation to accept a refusal to perform military service for religious reasons, non-exemption of a person from military or alternative civilian service did not raise any concerns under Article 9 of the Convention. In any event, the applicant's submissions did not indicate that the obligation to perform military or alternative civilian service entailed any concrete interference with his rights under Article 9.

28. The applicant contested this view and maintained that if the relevant domestic legislation provided for exemptions from military or alternative civilian service, it should do so without any discrimination. During the time of his civilian service he had had to work forty hours a week and, thus, had been unable to perform his functions as a deacon and preacher and had had to limit the practice of his religion to his spare time.

29. While it was true that the Jehovah's Witnesses had neither universities nor faculties within State or church universities, they nonetheless offered intensive clerical training which consisted of theoretical studies and practical experience. Elders and deacons were in charge of spiritual welfare, guided the community's worship, provided social assistance, celebrated mass, baptisms, marriages and funerals, and supervised missionary work. The Religious Order of the Jehovah's Witnesses had already existed for many decades and had about 160 members in Austria. Most of its members lived and worked in a community of preachers who took part together in morning worship, prayer and studies; other members were "special pioneers" (Sonderpioniere) and "travelling overseers" ("episcopoi" or bishops) who visited communities to perform missionary work and ensure spiritual welfare. The applicant claimed that he himself worked full time as a deacon, whereas the provision in issue did not explicitly require full-time clerical work. The Austrian authorities and courts only linked the granting of an exemption from civilian service to membership of a recognised religious society and did not examine whether or not the person concerned performed comparable functions for the purposes of section 13a(1) of the Civilian Service Act.

B. The Court's assessment

30. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports of Judgments and Decisions* 1997-I, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 34, ECHR 2000-X).

31. Further, the freedom of religion as guaranteed by Article 9 entails, *inter alia*, freedom to hold religious beliefs and to practise a religion. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see, as a recent authority, *Leyla Şahin v. Turkey* [GC], no. 44774/98, §§ 104-105, ECHR 2005-XI, with further references).

32. In the Court's view the privilege at issue – namely the exemption from the obligation to perform military service and also, consequently, civilian service, afforded to religious societies in respect of those who are part of their clergy – shows the significance which the legislature attaches to the specific function these representatives of religious groups fulfil within such groups in their collective dimension. Observing that religious communities traditionally exist in the form of organised structures, the Court has repeatedly found that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 62, ECHR 2000-XI).

33. As the privilege at issue is intended to ensure the proper functioning of religious groups in their collective dimension, and thus promotes a goal protected by Article 9 of the Convention, the exemption from military service granted to specific representatives of religious societies comes within the scope of that provision. It follows that Article 14 read in conjunction with Article 9 is applicable in the instant case.

34. According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be

realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, among other authorities, *Willis v. United Kingdom*, no. 36042/97, § 39, ECHR 2002-IV).

35. In the instant case, the Court first observes that the exemption from civilian service under section 13a(1) of the Civilian Service Act is exclusively linked to members of recognised religious societies performing specific services of worship or religious instruction. The applicant, a member of the Jehovah's Witnesses, claimed that he performed similar services. However, the Jehovah's Witnesses was at the time a registered religious community and not a religious society, and there was thus no room for an exemption under the above-mentioned legislation.

36. The Government argued that the applicant had not been discriminated against, because the criterion that a person applying for exemption from civilian service must be a member of a religious society was only one condition among others and the applicant would not, in any event, have fulfilled the further conditions as he had not completed a course of theological studies at university or at a comparable level of education. The Court is not persuaded by this argument. Since the Administrative Court in its decision of 10 November 1998 explicitly relied on the ground that the applicant did not belong to a religious society, there is no need to speculate on what the outcome would have been if the decision had been based on other grounds.

37. The Court has to examine whether the difference in treatment between the applicant, who does not belong to a religious group which is a religious society within the meaning of the 1874 Recognition Act, and a person who belongs to such a group has an objective and reasonable justification.

38. In doing so the Court refers to the case of *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (no. 40825/98, 31 July 2008), in which the first applicant, the Jehovah's Witnesses in Austria, had been granted legal personality as a registered religious community, a private-law entity, but wished to become a religious society under the 1874 Recognition Act – that is, a public-law entity. The Court observed that under Austrian law, religious societies enjoyed privileged treatment in many areas, including, *inter alia*, exemption from military service and civilian service. Given the number of these privileges and their nature, the advantage obtained by religious societies was substantial. In view of these privileges accorded to religious societies, the obligation under Article 9 of the Convention incumbent on the State's authorities to remain neutral in the exercise of their powers in this domain required therefore that if a State set up a framework for conferring legal personality on religious groups to which a specific status was linked, all religious groups which so wished must have a fair opportunity to apply for this status and the criteria

established must be applied in a non-discriminatory manner (ibid., § 92). The Court found, however, that in the case of the Jehovah's Witnesses one of the criteria for acceding to the privileged status of a religious society had been applied in an arbitrary manner and concluded that the difference in treatment was not based on any "objective and reasonable justification". Accordingly, it found a violation of Article 14 of the Convention taken in conjunction with Article 9 (ibid., § 99).

39. In the present case, the refusal of exemption from military and alternative civilian service was likewise based on the ground that the applicant was not a member of a religious society within the meaning of the 1874 Recognition Act. Given its above-mentioned findings in the case of *Relionsgemeinschaft der Zeugen Jehovas and Others*, the Court considers that in the present case the very same criterion – whether or not a person applying for exemption from alternative civilian service is a member of a religious group which is constituted as a religious society – cannot be understood differently and its application must inevitably result in discrimination prohibited by the Convention.

40. In conclusion, section 13a(1) of the Civilian Service Act, which provides for exemptions from the obligation to perform civilian service exclusively in the case of members of a recognised religious society, is discriminatory and the applicant has been discriminated against on the ground of his religion as a result of the application of this provision. There has therefore been a violation of Article 14 taken in conjunction with Article 9 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

41. The applicant also relied on Article 9 of the Convention in complaining that he was not exempt from military service, unlike persons assuming a comparable function in religious communities recognised as religious societies.

42. In the circumstances of the present case the Court considers that in view of the considerations under Article 14 read in conjunction with Article 9 of the Convention there is no separate issue under Article 9 of the Convention alone.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 4

43. The applicant complained that the fact that he was not exempt from military service while assuming a function with the Jehovah's Witnesses which was comparable to those of members of recognised religious societies who were exempt from military service constituted discrimination on the

ground of his religion, prohibited by Article 14 of the Convention taken together with Article 4.

Article 4 §§ 2 and 3 of the Convention reads as follows:

“2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term ‘forced or compulsory labour’ shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.”

44. The Court considers that, in view of its finding under Article 14 read in conjunction with Article 9 of the Convention, there is no need to examine this question also from the point of view of Article 14 read in conjunction with Article 4, all the more so as the core issue, whether the difference in treatment may be based on the criterion of “being a member of a religious society”, has already been sufficiently dealt with above.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

46. The applicant claimed 4,000 Euros (EUR) for non-pecuniary damage for the suffering caused by the obligation to leave his vocation and his function as a member of a religious order and the restriction of his duties as a “ministerial servant” for one year. Furthermore, criminal proceedings had been initiated against him while his request for suspension of the order to perform civilian service was still pending before the Constitutional Court.

47. The Government maintained that the finding of a violation would constitute sufficient just satisfaction. In any event, the amount claimed was excessive.

48. The Court considers that the applicant has sustained non-pecuniary damage which cannot be compensated by the finding of a violation. It considers that the sum claimed by the applicant appears reasonable and awards the full amount, namely EUR 4,000, plus any tax that may be chargeable on this amount.

B. Costs and expenses

49. The applicant claimed EUR 5,962.30, plus value-added tax (VAT), for the costs of the domestic proceedings and EUR 4,475.99, plus VAT, for the costs of the proceedings before the Court.

50. The Government pointed out that the application had been declared only partly admissible.

51. The Court reiterates that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum. The Court considers that these conditions are met regards the costs of the domestic proceedings. It therefore awards the full amount claimed under this head, namely EUR 5,962.30, plus any tax that may be chargeable to the applicant on this amount.

52. As regards the proceedings before the Court, the applicant, who was represented by counsel, did not have the benefit of legal aid. However, the Court agrees with the Government that the claim is excessive. It notes in particular that the application was only partly successful. Making an assessment on an overall basis, the Court awards EUR 2,500 under this head, plus any taxes that may be chargeable to the applicant on this amount.

53. The Court thus awards a total amount of EUR 8,462.30 in respect of costs and expenses.

C. Default interest

54. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 9 of the Convention;
2. *Holds* that there is no separate issue under Article 9 of the Convention alone;
3. *Holds* that it is not necessary to examine the complaint under Article 14 taken in conjunction with Article 4 §§ 2 and 3 (b) of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant;
 - (ii) EUR 8,462.30 (eight thousand four hundred and sixty-two euros and thirty cents) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on this amount;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President