Caso Tsirlis And Kouloumpas contra Grecia, de 29/05/1997 [ENG]

Violation of Art. 5-1

EUROPEAN COURT OF HUMAN RIGHTS

In the case of Tsirlis and Kouloumpas v. Greece (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President, Mr F. Gölcüklü, Mr N. Valticos, Mr R. Pekkanen, Mr A.N. Loizou, Mr A.B. Baka, Mr D. Gotchev, Mr P. Kuris, Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 24 January and 25 April 1997,

Delivers the following judgment, which was adopted on the last-mentioned date: _____ Notes by the Registrar

1. The case is numbered 54/1996/673/859-860. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently. _____

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 17 April 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in applications (nos. 19233/91 and 19234/91) against the Hellenic Republic lodged with the Commission under Article 25 (art. 25) by two Greek nationals, Mr Dimitrios Tsirlis and Mr Timotheos Kouloumpas, on 26 November 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Greece recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of

the case disclosed a breach by the respondent State of its obligations under Articles 3, 5, 6, 9, 13 and 14 of the Convention (art. 3, art. 5, art. 6, art. 9, art. 13, art. 14).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. On 27 April 1996, the President of the Court decided, under Rule 21 para. 7 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider this case and that of Georgiadis v. Greece (no. 56/1996/675/865). The Chamber to be constituted for that purpose included ex officio Mr N. Valticos, the elected judge of Greek nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On the same date, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr R. Pekkanen, Mr A.N. Loizou, Mr A.B. Baka, Mr D. Gotchev, Mr P. Kuris and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Greek Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 25 October 1996 and the applicants' claims for just satisfaction on 31 October 1996.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 January 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr P. Georgakopoulos, Senior Adviser, Legal Council of State, Delegate of the Agent, Mrs K. Grigoriou, Legal Assistant, Legal Council of State, Counsel;

(b) for the Commission

Mr P. Lorenzen, Delegate;

(c) for the applicants

Mr P. Bitsaxis, of the Athens Bar, Counsel.

The Court heard addresses by Mr Lorenzen, Mr Bitsaxis and Mrs Grigoriou and also replies to its questions.

AS TO THE FACTS

I. The circumstances of the case

6. The applicants were born in 1964 and live in Thiva, Beotia.

A. The case of Mr Tsirlis

7. On 4 November 1987 Mr Tsirlis was appointed religious minister by the Central Congregation of the Christian Jehovah's Witnesses of Greece. He was given authority,

inter alia, to perform wedding ceremonies between persons of that faith and to notify such weddings to the competent registry offices. By letter of 20 November 1987 the Prefecture of Eastern Attica notified the registry offices of Eastern Attica of his appointment.

8. On 13 February 1990 the applicant lodged an application with the Recruitment Office of Eastern Attica ("the Recruitment Office") to be exempted from military service in accordance with section 6 of Law no. 1763/1988 ("the 1988 Law"), which grants such a right to all ministers of "known religions". On 28 February 1990 the Recruitment Office rejected the application on the ground that Jehovah's Witnesses were not a "known religion". The applicant immediately lodged an appeal with the Director for Recruitment at the General Headquarters for National Defence ("the Director for Recruitment").

9. While that appeal was pending, the applicant was ordered by the Recruitment Office to report for duty at a military training centre in Rethymnon on 6 March 1990. The applicant presented himself at the Rethymnon centre, as ordered, but refused to join his unit, invoking his status as a minister of a "known religion". He also refused to wear a military uniform as ordered by a military officer. He was arrested, charged with insubordination (see paragraph 45 below) and detained pending trial.

10. On 22 March 1990 the Director for Recruitment rejected the applicant's appeal against the Recruitment Office's decision, on the ground that Jehovah's Witnesses were not a "known religion".

11. On 30 April 1990 the Canea Permanent Army Tribunal (Diarkes Stratodikio), composed of two military judges and three ordinary military officers, examined the criminal charges against the applicant. Mr Tsirlis claimed that he was innocent on the ground that he was a minister of a "known religion" exempted from military service. At the end of the hearing the President of the tribunal put the following question to its members:

"Is [the applicant], who is a Jehovah's Witness, guilty of having refused to obey, while serving in the military, an order given by his commanding officer to perform a certain duty, namely collecting articles of clothing necessary for his training as an unarmed soldier, on the ground that the religious convictions of Jehovah's Witnesses did not permit him to do so?"

The tribunal unanimously answered the question in the affirmative, found the applicant guilty of insubordination and sentenced him to four years' imprisonment, from which it deducted the period he had spent in detention pending trial.

12. On 4 May 1990 the applicant appealed against that decision to the Military Appeal Court (Anatheoritiko Dikastirio).

13. On 21 May 1990 the applicant brought proceedings in the Supreme Administrative Court (Symvoulio tis Epikratias) to have the Director for Recruitment's decision of 22 March 1990 quashed. He asked, among other things, to be treated like other religious ministers.

14. On 19 June 1990 the applicant's appeal came up for hearing before the Military Appeal Court, a court composed of five military judges. The defence sought the applicant's acquittal or, alternatively, an adjournment of the hearing pending the Supreme Administrative Court's decision on his administrative appeal. The defence also applied for the applicant's provisional release. The military court decided to adjourn the hearing to a date to be fixed by the prosecutor (Epitropos), in order to enable the latter to produce a

copy of the applicant's original application for an exemption and of the Director for Recruitment's final decision on it. It further ruled that the applicant should not be provisionally released.

15. On 12 September 1990 the applicant requested the Supreme Administrative Court to order a stay of execution of the Director for Recruitment's decision refusing to exempt him from military service.

16. On 29 November 1990 the applicant's appeal came up again for hearing before the Military Appeal Court. In the meantime the Fourth Division of the Supreme Administrative Court had delivered judgment no. 3601/90, in which the right of Jehovah's Witnesses ministers of religion to be exempted from military service had been expressly upheld (see paragraph 44 below). The prosecutor requested an adjournment of the hearing with a view to obtaining the opinion of the Director for Recruitment on the following matter:

"Is the accused under an obligation to perform military service in the light of judgment no. 3601/90 of the Fourth Division of the Supreme Administrative Court, which quashed a decision of the Director for Recruitment at the General Headquarters for National Defence, who had rejected an application for exemption from military service lodged by another accused person who was a religious minister of the Central Congregation of the Christian Jehovah's Witnesses ...?"

17. The prosecutor further submitted that the applicant should remain in custody. The defence agreed to the hearing being adjourned and considered that the question of the applicant's provisional release "should be left to the court's discretion". The court granted the prosecution's application and ordered that the applicant should not be provisionally released.

18. On 16 April 1991 the applicant's appeal came up for hearing for the third time before the Military Appeal Court. A hearing had been fixed on the same day in the action the applicant had brought in the Supreme Administrative Court to have the Director for Recruitment's decision of 22 March 1990 quashed.

19. The prosecutor at the Military Appeal Court proposed adjourning the hearing of the applicant's criminal appeal pending the Supreme Administrative Court's decision. He also submitted that the applicant should remain in custody. The defence considered that the first matter should be left to the court's discretion but made an application for the applicant's provisional release.

20. The court decided to adjourn the hearing in order to obtain the opinion of the Director for Recruitment on the following question: "Was the accused exempted from the obligation to report for duty in the light of his purported status of religious minister?" It further ordered that the applicant should remain in custody.

21. On 24 April 1991 the Supreme Administrative Court quashed the Director for Recruitment's decision of 22 March 1990 on the ground that Jehovah's Witnesses were a "known religion" and the administrative authorities had not challenged the evidence produced by the applicant that he was a minister of that religion.

22. On 8 May 1991 a three-member committee of the Supreme Administrative Court decided that in the circumstances there was no need to rule on the applicant's petition for a stay of execution of the Director for Recruitment's decision.

23. On 30 May 1991 the Military Appeal Court considered the applicant's appeal against the Canea Permanent Army Tribunal's judgment of 30 April 1990. The issue before the court, as formulated by its President, was the following:

"Is [the applicant], a member of the religious sect of Jehovah's Witnesses, guilty of having refused to obey, while serving in the military, an order given by his commanding officer to perform a certain duty, namely collecting articles of clothing necessary for his training as an unarmed soldier, on the ground that the religious convictions of Jehovah's Witnesses did not permit him to do so?"

24. Having heard the evidence and the parties' submissions on the question of the applicant's guilt, the court withdrew for deliberations. After the deliberations the President announced the verdict. The applicant was acquitted, by three votes to two, on the ground that "there was no act" of insubordination. The dissenting judges considered that "the accused [was] not a religious minister". The following order was attached to the court's verdict and read out together with it: "The State is under no obligation to compensate the applicant for his detention between 6 March 1990 and 30 May 1991, because his detention was due to his own gross negligence."

25. The applicant was immediately released and was provisionally discharged from the armed forces on the basis that he was a minister of religion.

B. The case of Mr Kouloumpas

26. On 4 November 1987 Mr Kouloumpas was appointed religious minister by the Central Congregation of the Christian Jehovah's Witnesses of Greece. He was given authority, inter alia, to perform wedding ceremonies between persons of that faith and to notify such weddings to the competent registry offices. By letter of 20 November 1987 the Prefecture of Eastern Attica notified the registry offices of Eastern Attica of his appointment.

27. On 29 November 1989 the applicant lodged an application with the Patras Recruitment Office ("the Recruitment Office") to be exempted from military service in accordance with section 6 of the 1988 Law. On 1 March 1990 the Recruitment Office rejected the application on the ground that Jehovah's Witnesses were not a "known religion". The applicant immediately lodged an appeal with the Director for Recruitment.

28. While that appeal was pending, the applicant was ordered by the Recruitment Office to report for duty at a military training centre in Sparta on 6 March 1990. The applicant presented himself at the Sparta centre, as ordered, but refused to join his unit, invoking his status as a minister of a "known religion". He also refused to wear a military uniform as ordered by a military officer. He was arrested, charged with insubordination (see paragraph 45 below) and detained pending trial.

29. On 6 April 1990 the Director for Recruitment rejected the applicant's appeal against the Recruitment Office's decision, on the ground that Jehovah's Witnesses were not a "known religion".

30. On 21 May 1990 the applicant brought proceedings in the Supreme Administrative Court to have the Director for Recruitment's decision of 6 April 1990 quashed. He asked, among other things, to be treated like other religious ministers.

31. On 30 May 1990 the Athens Permanent Army Tribunal, composed of one military judge and four ordinary military officers, examined the criminal charges against the applicant. Mr Kouloumpas claimed that he was innocent on the ground that he was a minister of a "known religion" exempted from military service. At the end of the hearing the President of the tribunal put the following question to its members:

"Is [the applicant], who is a Jehovah's Witness, guilty of having refused to obey, while serving in the military, an order given by his commanding officer to perform a certain duty, namely collecting articles of clothing necessary for his training as an unarmed soldier, on the ground that the religious convictions of Jehovah's Witnesses did not permit him to do so?"

The tribunal unanimously answered the question in the affirmative, found the applicant guilty of insubordination and sentenced him to four years' imprisonment, from which it deducted the period he had spent in detention pending trial.

32. On 1 June 1990 the applicant appealed against that decision to the Military Appeal Court.

33. On 12 July 1990 the applicant's appeal came up for hearing before the Military Appeal Court. The defence sought the applicant's acquittal or, alternatively, an adjournment of the hearing pending the Supreme Administrative Court's decision on his administrative appeal. The court decided to adjourn the hearing to a date to be fixed by the prosecutor, in order to enable the latter to produce copies of certain documents from the Ministry of Education and the Holy Synod of the Orthodox Church of Greece which had been relied on by the military authorities to refuse the applicant's application for exemption. The court further accepted the submission of both the prosecution and the defence that the applicant should not be provisionally released.

34. On 12 September 1990 the applicant requested the Supreme Administrative Court to order a stay of execution of the Director for Recruitment's decision refusing to exempt him from military service.

35. On 27 November 1990 the applicant's appeal came up again for hearing before the Military Appeal Court. In the meantime the Fourth Division of the Supreme Administrative Court had delivered judgment no. 3601/90, in which the right of Jehovah's Witnesses ministers of religion to be exempted from military service had been expressly upheld (see paragraph 44 below). The prosecutor requested an adjournment of the hearing with a view to obtaining the opinion of the Director for Recruitment on the following matter:

"Is the accused under an obligation to perform military service in the light of judgment no. 3601/90 of the Fourth Division of the Supreme Administrative Court, which quashed a decision of the Director for Recruitment at the General Headquarters for National Defence, who had rejected an application for exemption from military service lodged by another accused person who was a religious minister of the Central Congregation of the Christian Jehovah's Witnesses ...?"

36. The prosecutor further submitted that the applicant should remain in custody. The defence requested the applicant's provisional release. The court granted the prosecution's application and ordered that the applicant should not be provisionally released.

37. On 7 March 1991 the applicant's appeal came up for hearing for the third time before the Military Appeal Court. The prosecutor sought an adjournment of the hearing on the ground that the Director for Recruitment should give his opinion on the following matter: "Is the accused already exempted from the obligation to perform military service in view of the proceedings he has brought in the Supreme Administrative Court?" He also submitted that the applicant should remain in custody. Despite the applicant's opposition, the court granted both applications.

38. On 24 April 1991 the Supreme Administrative Court quashed the Director for Recruitment's decision refusing the applicant's application for exemption on the ground that Jehovah's Witnesses were a "known religion" and the administrative authorities had not challenged the evidence produced by the applicant that he was a minister of that religion.

39. On 8 May 1991 a three-member committee of the Supreme Administrative Court decided that in the circumstances there was no need to rule on the applicant's petition for a stay of execution of the Director for Recruitment's decision.

40. On 29 May 1991 the Military Appeal Court considered the applicant's appeal against the Athens Permanent Army Tribunal's judgment of 30 May 1990. The issue before the court, as formulated by its President, was the following:

"Is [the applicant], a member of the religious sect of Jehovah's Witnesses, guilty of having refused to obey, while serving in the military, an order given by his commanding officer to perform a certain duty, that is to collects articles of clothing necessary for his training as an unarmed soldier, on the ground that the religious convictions of Jehovah's Witnesses did not permit him to do so?"

41. Having heard the evidence and the parties' submissions on the question of the applicant's guilt, the court withdrew for deliberations. After the deliberations the President announced the verdict. The applicant was acquitted, by three votes to two, on the ground that "there was no act" of insubordination. The dissenting judges considered that "the accused [was] not a religious minister". The following order was attached to the tribunal's verdict and read out together with it: "The State is under no obligation to compensate the applicant for his detention between 6 March 1990 and 29 May 1991, because his detention was due to his own gross negligence."

42. The applicant was immediately released and was provisionally discharged from the armed forces on the basis that he was a minister of religion.

II. Relevant domestic law and practice

A. Law no. 1763/1988

43. Section 6 of Law no. 1763/1988 ("the 1988 Law") exempts all ministers of "known religions" from military service. In application of this provision, priests of the Greek Orthodox Church obtain exemption without any difficulty.

44. The Supreme Administrative Court has repeatedly held that Jehovah's Witnesses are a "known religion" (judgments nos. 2105 and 2106/1975, 4635/1977, 2484/1980, 4620/1985 and 790 and 3533/1986). In its judgment no. 3601/1990 the Supreme Administrative Court expressly upheld the right of Jehovah's Witnesses ministers of religion to be exempted from military service.

B. The Military Criminal Code

45. Article 70 of the Military Criminal Code provides as follows:

"A member of the armed forces who refuses ... to obey an order by his superior to perform one of his duties is punished..."

46. On 16 March 1992 the Athens Permanent Army Tribunal held that a Jehovah's Witnesses minister of religion who had refused to collect military clothing when first called upon to join the army was not guilty of insubordination. The tribunal considered that there had been no act of insubordination, because the accused had no obligation to perform military service as he was a minister of a "known religion".

47. Article 434 provides that where a procedural matter is not regulated in the Military Criminal Code, the Code of Criminal Procedure applies.

C. The Code of Criminal Procedure

48. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 533 para. 2

"Persons who have been detained on remand and subsequently acquitted ... shall be entitled to request compensation ... if it has been established in the proceedings that they did not commit the criminal offence for which they were detained ..."

Article 535 para. 1

"The State shall have no obligation to compensate a person who ... has been detained on remand if, whether intentionally or by gross negligence, he was responsible for his own detention."

Article 536

"1. Upon an oral application by a person who has been acquitted, the court which heard the case shall rule on the State's obligation to pay compensation in a separate decision delivered at the same time as the verdict. However, the court may also make such a ruling proprio motu ...

2. The ruling on the State's obligation to pay compensation cannot be challenged separately; it shall, however, be quashed if the decision on the principal issue of the criminal trial is reversed."

Article 537

"1. A person who has suffered loss may seek compensation at a later stage from the same court.

2. In those circumstances the application must be submitted to the prosecutor [Epitropos] at that court no later than forty-eight hours after the delivery of the judgment in open court."

Article 539 para. 1

"Where it has been decided that the State must pay compensation, the person entitled thereto may bring his claim in the civil courts, which shall not call in question the existence of the State's obligation."

Article 540 para. 1

"Persons who have been unfairly ... detained on remand must be compensated for any pecuniary loss they have suffered as a result of their ... detention. They must also be compensated for non-pecuniary loss ..."

PROCEEDINGS BEFORE THE COMMISSION

49. Mr Tsirlis and Mr Kouloumpas applied to the Commission on 26 November 1991. Relying on Articles 3, 5 paras. 1 and 5, 6 para. 1, 9, 13 and 14 of the Convention (art. 3, art. 5-1, art. 5-5, art. 6-1, art. 9, art. 13, art. 14), they complained that their detention was unlawful and amounted to discrimination on account of their religious beliefs, that they had been subjected to inhuman and degrading treatment, and that they did not have a fair hearing in the matter of compensation for their unlawful detention. They further complained under Article 7 (art. 7) that their conviction had been arbitrary.

50. On 4 September 1995 the Commission declared the applications (nos. 19233/91 and 19234/91) admissible with the exception of the complaints concerning the lawfulness of the applicants' pre-trial detention and the complaint under Article 7 (art. 7). In its report of 7 March 1996 (Article 31) (art. 31), the Commission expressed the opinion that:

(a) there had been a violation of Article 5 para. 1 (art. 5-1) (unanimously);

(b) there had been a violation of Article 5 para. 5 (art. 5-5) (unanimously);

(c) there had been a violation of Article 6 para. 1 (art. 6-1) (unanimously);

(d) it was not necessary to examine whether there had been a violation of Article 13 (art. 13) (unanimously);

(e) there had been a violation of Article 14 read in conjunction with Article 9 (art. 14+9) (twenty-six votes to two);

(f) it was not necessary to examine whether there had been a violation of Article 9 (art. 9) (twenty-four votes to four);

(g) there had been no violation of Article 3 (art. 3) (unanimously).

The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment (1). _____
Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-III), but a copy of the Commission's report is obtainable from the registry. _____

FINAL SUBMISSIONS TO THE COURT

51. At the hearing, the applicants requested the Court to find that, in their cases, Articles 3, 5 paras. 1 and 5, 6 para. 1, 9, 13 and 14 (art. 3, art. 5-1, art. 5-5, art. 6-1, art. 9, art. 13, art. 14) had been violated.

The Government, for their part, asked the Court to reject every allegation of a violation of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION (art. 5)

A. Paragraph 1 (art. 5-1)

52. Mr Tsirlis and Mr Kouloumpas complained that their detention following conviction and up to their final acquittal by the Military Appeal Court was in breach of Article 5 para. 1 of the Convention (art. 5-1), which, in so far as relevant, reads:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

..."

Mr Tsirlis complained that his detention between 30 April 1990 and 30 May 1991 was not "lawful" within the meaning of this provision (art. 5-1). Mr Kouloumpas made the same complaint in respect of the period spent in detention between 30 May 1990 and 29 May 1991. In their allegation, the applicable provisions of the 1988 Law were clear: all ministers of known religions had the right to be exempted from military service (see paragraph 43 above). Mr Tsirlis and Mr Kouloumpas had requested exemption on 13 February 1990 and 29 November 1989 respectively. In the light of the existing case-law of the Supreme Administrative Court, which recognised Jehovah's Witnesses as a "known religion" (see paragraph 44 above), and since their status as ministers of that religion was never questioned throughout the proceedings, it was undisputable that the applicants were not liable to military service. In these circumstances, their convictions on charges of insubordination by the permanent army tribunals of Canea and Athens were considered by the applicants to be "openly arbitrary".

The applicants further sought to describe the measures taken against them as a part of a more general move by the Greek authorities not to recognise the existence of a religious minority.

53. The Commission noted that the question of the applicants' liability to military service was central to the issue of their criminal responsibility for insubordination. It concluded that, in ignoring the applicants' appointment as ministers of the Jehovah's Witnesses and the relevant case-law of the Supreme Administrative Court, the first-instance military tribunals clearly misconstrued section 6 of the 1988 Law, which exempts all ministers of "known religions" from military service. The applicants' detention following conviction could not therefore be regarded as "lawful" within the meaning of Article 5 para. 1 of the Convention (art. 5-1).

54. In the Government's submission, no breach of Article 5 para. 1 (art. 5-1) had taken place. The applicants were detained following conviction by the competent military courts on charges of insubordination. Insubordination is committed when a member of the armed forces refuses to comply with orders given by a serviceman of a higher rank. At the material time the applicants were members of the armed forces. By refusing to obey their superior's order to wear a military uniform, Mr Tsirlis and Mr Kouloumpas therefore committed a criminal offence. This was the only issue before the military jurisdictions. Neither the military units to which the applicants reported, nor the military courts had the power to set aside the administrative decision declining to exempt the applicants from military service. At any event, the applicants had refused to obey on the ground that they

were Jehovah's Witnesses, not religious ministers, as borne out by the legal issue formulated by the presidents of the military tribunals (see paragraphs 11, 23, 31 and 40 above).

It was further contended that the military authorities were hesitant to follow the Supreme Administrative Court's decision acknowledging that ministers of the Jehovah's Witnesses were to be considered as "ministers of a known religion" and thus exempted from military obligations (judgment no. 3601/90 - see paragraph 44 above), on the ground that one single decision did not constitute established case-law. Such hesitancy was further reflected in the dissenting opinions attached to the decisions rendered by the Supreme Administrative Court in the applicants' cases.

55. Those appearing before the Court agreed that Mr Tsirlis's and Mr Kouloumpas's detention fell properly to be classified as detention "after conviction by a competent court" and its lawfulness to be examined under sub-paragraph (a) of Article 5 para. 1 (art. 5-1-a); the Court sees no reason to adopt a different view.

56. It must therefore be established whether Mr Tsirlis's detention between 30 April 1990 and 30 May 1991 as well as Mr Kouloumpas's detention between 30 May 1990 and 29 May 1991 were "in accordance with a procedure prescribed by law" and "lawful" within the meaning of Article 5 para. 1 of the Convention (art. 5-1). The Court reiterates that the Convention here essentially refers back to domestic law and states the obligation to conform to the substantive and procedural rules thereof; but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness (see, among many other authorities, the Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 23, para. 54, and the Lukanov v. Bulgaria judgment of 20 March 1997, Reports of Judgments and Decisions 1997-II, pp. 543-44, para. 41).

57. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 para. 1 (art. 5-1) failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see the Bouamar v. Belgium judgment of 29 February 1988, Series A no. 129, p. 21, para. 49).

58. Detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law (see the Benham v. the United Kingdom judgment of 10 June 1996, Reports 1996-III, p. 753, para. 42).

59. The Court notes that section 6 of the 1988 Law refers to ministers of all "known religions". As early as 1975, the Supreme Administrative Court acknowledged that the Jehovah's Witnesses were to be considered as such, and this case-law could unquestionably be regarded as established by 1990 (see paragraph 44 above). It was not disputed throughout the domestic proceedings that the applicants were ministers of that religion. However, in deciding on the issue of the applicants' criminal liability, and thus on

the lawfulness of their detention, the military authorities blatantly ignored this case-law. As a result, Mr Tsirlis and Mr Kouloumpas spent thirteen and twelve months in detention respectively.

60. Furthermore, the relevant authorities' persistence not to recognise Jehovah's Witnesses as a "known religion" and the disregard of the applicants' right to liberty that followed, were of a discriminatory nature when contrasted with the way in which ministers of the Greek Orthodox Church obtain exemption (see paragraph 43 above).

61. It is no answer to these failings that, as the Government have submitted, the question of the applicants' position as ministers of religion lay outside the scope of the case before the military courts, whose jurisdiction only extended itself to the alleged offence of insubordination (see paragraph 54 above). In the first place, it is clear from the repeated adjournments of the applicants' cases by the Military Appeal Court in order to clarify whether Jehovah's Witnesses ministers were under an obligation to perform military service (see paragraphs 16, 20, 35 and 37 above) that this latter issue was of central importance to the appeals. In the second place, the appellate courts acquitted the applicants immediately after the Supreme Administrative Court had quashed the Director for Recruitment's decision not to grant exemption from military duties on the grounds that the applicants were ministers of a "known religion".

62. Against this background, the Court finds that the applicants' detention following their conviction on charges of insubordination had no basis under domestic law and was arbitrary. It cannot accordingly be considered to have been "lawful" for the purposes of Article 5 para. 1 (art. 5-1).

63. In conclusion, there has been a violation of Article 5 para. 1 of the Convention (art. 5-1).

B. Paragraph 5 (art. 5-5)

64. The applicants further complained that despite their unlawful detention, they were not awarded any compensation. They invoked Article 5 para. 5 (art. 5-5), which reads:

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article (art. 5) shall have an enforceable right to compensation."

The Commission agreed with the applicants.

65. The Government submitted that since the applicants' detention was lawful (see paragraph 54 above), no question of a breach of Article 5 para. 5 (art. 5-5) could arise.

66. The Court recalls its finding that the applicants' detention following conviction on charges of insubordination was unlawful for the purposes of paragraph 1 of Article 5 of the Convention (art. 5-1) (see paragraph 62 above). However, on 30 May 1991 and 29 May 1991 respectively the Military Appeal Court found that Mr Tsirlis and Mr Kouloumpas were not entitled under Greek law to any compensation on the ground that their detention had been due to their own "gross negligence" (see paragraphs 24 and 41 above). In the absence of any enforceable claim for compensation before the domestic authorities, it follows that paragraph 5 (art. 5-5) has also been breached (see, for example, the Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, p. 21, para. 46).

II. ALLEGED VIOLATIONS OF ARTICLE 9 OF THE CONVENTION, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14 (art. 9, art. 14+9)

67. The applicants further complained that they had to spend lengthy periods in detention before obtaining exemption from military service exclusively on account of their being members of the religious minority of the Jehovah's Witnesses. In their submission, these complaints raised issues under Article 9 of the Convention, both taken alone (art. 9) and in conjunction with Article 14 (art. 14+9). These provisions (art. 9, art. 14) read as follows:

Article 9 (art. 9)

"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 in 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."

Article 14 (art. 14)

"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."

68. In respect of their complaint under Article 9 (art. 9), the applicants contended that during the time spent in detention they had been deprived of their right to exercise their duties as religious ministers.

Under Article 9 read in conjunction with Article 14 of the Convention (art. 14+9), the applicants, with whom the Commission agreed, further alleged that under section 6 of the 1988 Law all ministers of known religions have the right to be exempted from military service. However, while the ministers of the dominant Greek Orthodox Church obtain exemption without difficulty, they were detained for thirteen and twelve months respectively pending the outcome of the administrative proceedings.

69. By way of preliminary objections, the Government maintained that the applicants' complaints under this head were introduced well after the six-month period set out in Article 26 of the Convention (art. 26) and that the relevant Convention provisions were never invoked in the domestic proceedings.

As to the merits, they submitted that no provision in the Convention requires a Contracting Party to grant exemption from military service on grounds of religious conscience. In any event, the Convention's system of control being by virtue of Article 26 (art. 26) of a subsidiary nature, no violation of its provisions can be found where redress has been obtained from the national authorities. The requirements of the Convention were therefore fulfilled with the final decisions of the Supreme Administrative Court.

70. The Court observes that at the centre of the present complaints lies the issue of the applicants' detention pending the administrative decision on their applications for

exemption. Having found that the applicants' detention was arbitrary and hence unlawful for the purposes of Article 5 para. 1 of the Convention (art. 5-1) (see paragraphs 60 and 62 above), the Court does not consider it necessary to examine the same facts also from the angle of Article 9, either taken alone (art. 9) or in conjunction with Article 14 of the Convention (art. 14+9).

In these circumstances the Court is not required to rule on the Government's preliminary objections.

III. ALLEGED VIOLATIONS OF ARTICLES 6 PARA. 1 AND 13 OF THE CONVENTION (art. 6-1, art. 13)

71. The applicants complained that the question of compensation for their detention was determined in an unfair manner with insufficient reasons and without affording them an opportunity to address the court. They invoked Article 6 para. 1 of the Convention (art. 6-1) which, in so far as relevant, reads:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

The Commission agreed with the applicants whereas the Government contested the applicability of Article 6 para. 1 (art. 6-1) to the proceedings in question.

72. The applicants further complained that, since the decisions of the Military Appeal Court were final, no effective remedy under national law for the violation of their rights under the Convention was available to them. In their submission, this was in breach of Article 13 of the Convention (art. 13), which reads:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

73. The Court notes that in matters of compensation for unlawful detention, paragraph 5 of Article 5 (art. 5-5) constitutes a lex specialis. Having already found a breach of that provision (art. 5-5) (see paragraph 66 above), the Court does not consider it necessary to examine whether the breach of the State's obligation to grant compensation in respect of the applicants' unlawful detention was also contrary to Articles 6 para. 1 or 13 of the Convention (art. 6-1, art. 13).

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION (art. 3)

74. Before the Commission, Mr Tsirlis and Mr Kouloumpas complained that, as a result of their detention they were subjected to treatment prohibited under Article 3 of the Convention (art. 3). This provision (art. 3) reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

75. The Government agreed with the Commission that, given the level of severity required by Article 3 (art. 3), it could not be said that the applicants' detention had amounted to "inhuman or degrading treatment or punishment".

76. The Court notes that the applicants have not sought to substantiate this complaint before it. Accordingly, no breach of Article 3 (art. 3) has been established.

V. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

77. Under Article 50 of the Convention (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

78. Mr Tsirlis and Mr Kouloumpas sought compensation for damage in the amount of 14,700,000 drachmas (GRD) each.

79. For the Government the claims were unjustified and unsupported by any evidence of damage. An award of GRD 600,000 should be sufficient to cover both damage and costs in respect of the instant case and of the case of Georgiadis v. Greece, which were pleaded jointly (see paragraph 3 above).

80. The Court observes that Mr Tsirlis and Mr Kouloumpas spent thirteen and twelve months respectively in what was unlawful detention (see paragraph 62 above). The very fact of their deprivation of liberty must have produced damage of both pecuniary and non-pecuniary nature. However, no compensation was granted by the domestic courts.

Making an assessment on an equitable basis, as required by Article 50 (art. 50), the Court grants Mr Tsirlis GRD 8,000,000 and Mr Kouloumpas GRD 7,300,000 in respect of any damage they have sustained.

B. Costs and expenses

81. The applicants claimed a total of GRD 11,200,000 in respect of legal costs and expenses incurred both in the domestic proceedings and before the Convention institutions.

82. The Government found the sum excessive, whereas the Delegate of the Commission left the matter to the Court's discretion.

83. It is to be observed that the main thrust of the applicants' allegations has led to the finding of a violation. The sum claimed is, however, excessive. Therefore, the Court, making an equitable assessment as required by Article 50 (art. 50), awards the applicants a global sum of GRD 2,000,000 in respect of costs and expenses.

C. Default interest

84. According to the information available to the Court, the statutory rate of interest applicable in Greece at the date of adoption of the present judgment is 6% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 5 para. 1 of the Convention (art. 5-1);

2. Holds that there has been a violation of Article 5 para. 5 of the Convention (art. 5-5);

3. Holds that it is not necessary to examine whether there has been a violation of Article 9, either taken alone (art. 9) or in conjunction with Article 14 of the Convention (art. 14+9);

4. Holds that it is not necessary to examine whether there has been a violation of either Article 6 para. 1 or 13 of the Convention (art. 6-1, art. 13);

5. Holds that there has been no violation of Article 3 of the Convention (art. 3);

6. Holds

(a) that the respondent State is to pay, within three months, 8,000,000 (eight million) drachmas to Mr Tsirlis, and 7,300,000 (seven million three hundred thousand) drachmas to Mr Kouloumpas, in respect of both pecuniary and non-pecuniary damage; and a global sum of 2,000,000 (two million) drachmas in respect of costs and expenses;

(b) that simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement;

7. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 May 1997.

Signed: Rolv RYSSDAL President
Signed: Herbert PETZOLD Registrar