Caso Vercase Of Vereinigung Demokratischer Soldaten Österreichs And Gubi contra Austria, de 19/12/1994 [ENG]

Notice Judgment (Merits and just Violation of Art. 10 ; Vi A302)

EUROPEAN COURT OF HUMAN RIGHTS

In the case of Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*,

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**, as a Chamber composed of the following judges:

Mr R. Bernhardt, President, Mr Thór Vilhjálmsson, Mr F. Matscher, Mr C. Russo, Mr A. Spielmann, Mr S.K. Martens, Mrs E. Palm, Mr I. Foighel, Mr L. Wildhaber,

and also of Mr H. Petzold, Acting Registrar,

Having deliberated in private on 23 June and 23 November 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

* The case is numbered 34/1993/429/508. 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.

** Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) 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 9 September 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15153/89) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by a private association under Austrian law, the Vereinigung demokratischer Soldaten Österreichs ("the VDSÖ"), and by an Austrian national, Mr Berthold Gubi, on 12 June 1989.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria 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 10, 13 and 14 (art. 10, art. 13, art. 14) of the Convention.

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. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr C. Russo, Mr A. Spielmann, Mr S.K. Martens, Mrs E. Palm, Mr I. Foighel and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who was unable to take part in the further consideration of the case (Rules 9 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Deputy Registrar, had consulted the Agent of the Austrian 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 applicants' memorial on 6 April 1994 and the Government's memorial on 18 April.

On 7 June the Commission produced various documents from the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 June 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr F. Cede, Head of the International Law Department, Federal Ministry of Foreign Affairs, Agent, Mr S. Rosenmayr, Constitutional Department, Federal Chancellery, Mrs E. Bertagnoli, International Law Department, Federal Ministry of Foreign Affairs, Mr G. Keller, colonel, Federal Ministry of Defence, Advisers;

(b) for the Commission

Mr S. Trechsel, Delegate;

(c) for the applicants

Mr G. Lansky, Rechtsanwalt, Counsel.

The Court heard addresses by Mr Cede, Mr Trechsel and Mr Lansky.

6. On 19 July 1994, at the Court's request, the Government lodged written observations on an additional bill of costs submitted by the applicants at the conclusion of the hearing.

AS TO THE FACTS

I. Circumstances of the case

A. First applicant

7. The first applicant, a Vienna-based association, published a monthly magazine aimed at the soldiers serving in the Austrian army and entitled der Igel ("The Hedgehog"). It contained information and articles - often of a critical nature - on military life.

8. On 27 July 1987 the association requested the Federal Minister for Defence (Bundesminister für Landesverteidigung) to have der Igel distributed in the barracks in the same way as the only other two military magazines published by private associations, Miliz-Impuls and Visier. The army had adopted the practice of sending these magazines out, alternately and at its own expense, with the official information bulletin distributed to all conscripts (Miliz-Information).

The minister did not reply to this request. When questioned by members of parliament, he stated in a letter of 10 May 1989 that he would not authorise the distribution of der Igel in barracks. In his view, section 46 para. 3 of the Armed Forces Act (Wehrgesetz, see paragraph 18 below) conferred on all armed forces personnel the right to receive without any restriction, through sources accessible to the public, information on political events. However, on military premises the only publications that could be supplied were those which identified at least to some extent with the constitutional duties of the army, did not damage its reputation and did not lend column space to political parties. Even critical magazines such as the journal Hallo of the trade union youth organisation would not be banned if they respected these conditions. Der Igel, on the other hand, did not comply with them. The minister derived authority for his decision in this matter from Article 79 of the Constitution (Bundesverfassungsgesetz) and sections 44 para. 1 and 46 of the Armed Forces Act, Article 116 of the Criminal Code (Strafgesetzbuch) and Regulation 3 para. 1 of the General Army Regulations (Allgemeine Dienstvorschriften für das Bundesheer, see paragraphs 17-20 below).

B. Second applicant

9. The second applicant, a member of the VDSÖ, began his national service on 1 July 1987 at the Schwarzenberg barracks in Salzbourg. On 29 July, on the occasion of his taking the oath, he made a protest directed against the President of the Republic. Over the following months, he lodged several complaints, published with twenty-one of his fellow conscripts an open letter criticising the number of fatigue duties to which he was assigned and circulated a petition in support of a conscientious objector.

On 1, 9 and 22 July he was personally informed of the content of the military law applicable to his situation.

10. On 29 December 1987, while distributing issue no. 3/87 of der Igel in the barracks, he was ordered by an officer to cease.

In its editorial, the issue in question mentioned, as being one of the aims of the VDSÖ, co-operation between conscripts and the cadres on the basis of their joint interests and of mutual respect. Some articles adopted a critical stance; they dealt with, among other things, military training, the proceedings resulting from a complaint lodged by Mr Gubi and the principles governing national service. The other articles discussed various contributions that had appeared in the press, the congress of the trade union youth movement, the aims and the activities of the VDSÖ and the complaint of a conscript whose pay had been reduced following alleged loss of equipment.

11. On 12 January 1988 another officer informed Mr Gubi of the content of the circulars of 1975 and 1987 and of the regulations of the Schwarzenberg barracks, as amended on 4 January 1988, which prohibited any distribution or despatching within the barracks of publications without the authorisation of the commanding officer (see paragraph 20 below).

12. On 22 January 1988 Mr Gubi complained about this ban and about the order of 29 December 1987 (see paragraph 10 above) to the Military Complaints Board (Beschwerdekommission in militärischen Angelegenheiten) at the Federal Ministry of Defence.

On 7 April the Complaints Division (Beschwerdeabteilung) at the ministry rejected the applicant's complaint, in accordance with the Complaints Board's recommendation. In its view, the contested order was validly based on a 1987 circular of the Second Army Corps (Korpskommando II), containing instructions regarding the distribution of printed matter, which were themselves based on Article 5 of the 1867 Basic Law

(Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger), Regulation 19 of the General Army Regulations and section 13 of the Armed Forces Act (see paragraphs 15 and 18-20 below). The first of those provisions affords the same protection to the property of public-law legal persons as that guaranteed to the property of private individuals; accordingly, the Schwarzenberg barracks were to be regarded as the property of the Federal State, whose rights were exercised by the commanding officer.

The freedom of expression secured under Article 13 of the 1867 Basic Law was subject to "statutory limits" (gesetzliche Schranken) such as those which stemmed from the duty of discretion and obedience laid down in sections 17 and 44 of the Armed Forces Act and derived from the very nature of this special relationship of subordination (besonderes Gewaltverhältnis). The contested measures had therefore in no way interfered with the freedom in question.

13. Mr Gubi then applied to the Constitutional Court (Verfassungsgerichtshof). On 26 September it declined to entertain his appeal on the ground that it did not raise genuine constitutional issues and had insufficient prospects of success.

14. The same day, however, the Constitutional Court quashed the decision of 15 February 1988 whereby the commanding officer of battalion no. 3 had confirmed the three days' custody imposed on the applicant as a disciplinary penalty for having distributed der Igel in the barracks. It found that the provisions which Mr Gubi was accused of infringing, the 1975 and 1987 circulars (see paragraph 20 below), were not binding on him but on the military authorities. This was not the case in regard to the relevant provisions of the Schwarzenberg barracks regulations, but these rules had been introduced on 4 January 1988 and were therefore not yet in force at the material time.

II. Relevant domestic law

A. Rights under the Basic Law

15. Article 5 of the Basic Law of 21 December 1867 on the general rights of citizens protects property.

16. Article 13 provides as follows:

"Subject to statutory limits, everyone has the right to express freely his opinion orally, in writing, in the printed word or through graphic expression. The Press may not be censored or restricted by a system of licences ... "

B. Military law

17. Article 79 of the Federal Constitution describes the general duties of the Austrian armed forces.

18. At the material time the rights and obligations of military personnel were governed by sections 44 to 46 of the 1978 Armed Forces Act. According to this statute, soldiers are under a duty to support the army in the performance of its tasks and to refrain from doing anything which could damage its reputation (section 44 para. 1). They have the right to submit requests and complaints and to file appeals (section 44 para. 4). They enjoy the same political rights as civilians (section 46 para. 2). However, the army must not be involved in any political activity and may not be used for political ends (section 46 para. 1). Consequently, such activities while on duty and on military premises are prohibited, with the exception of those which consist in obtaining information as an individual on political events through sources accessible to the public (section 46 para. 3).

19. The General Army Regulations, issued by the Federal Ministry of Defence, set out the obligations attaching to national service. They provide, inter alia, that servicemen must always be ready to fulfil their duties in the best possible way and must refrain from doing anything which could damage the reputation of the army and undermine the confidence of the population in the defence of the country (Regulation 3 para. 1).

Servicemen have a special relationship of subordination in regard to the Austrian Republic. That relationship requires of them, in addition to the defence of the democratic institutions, discipline, comradeship, obedience, vigilance, courage and discretion (Regulation 3 para. 2). Under Regulation 19 para. 2 barracks' commanders are bound to take all the measures necessary to maintain order and military security in the premises in question; to this end they are under a duty to issue rules (Kasernordnung) governing inter alia access to the barracks (Regulation 19 para. 3).

20. By a circular of the Federal Ministry of Defence of 14 March 1975 the army general staff (Armeekommando) instructed commanding officers to take preventive measures in respect of publications denigrating the army (negatives wehrpolitisches Gedankengut). They were, among other things, to ban their distribution and posting up in military areas.

A circular from the general staff of the Second Army Corps) of 17 December 1987 instructed the same officers to insert in the barracks rules a prohibition on the distribution or posting up without the commanding officer's authorisation of any non-official publication. The Schwarzenberg barracks rules were amended accordingly on 4 January 1988.

C. Proceedings in the Constitutional Court

21. The Constitutional Court examines, on an application (Beschwerde), whether an administrative measure (Bescheid) has infringed a right guaranteed to the applicant by the Constitution, or whether it has applied a decree (Verordnung) that is contrary to the law, an Act contrary to the Constitution or an international treaty incompatible with Austrian law (Article 144 para. 1 of the Federal Constitution).

PROCEEDINGS BEFORE THE COMMISSION

22. The VDSÖ and Mr Gubi applied to the Commission on 12 June 1989. Relying on Article 10 (art. 10) of the Convention, they complained of the prohibition imposed in respect of the magazine der Igel in Austrian barracks and, the second applicant, of the order of 29 December 1987 requiring him to cease distributing issue no. 3/87 in the Schwarzenberg barracks. They also maintained that they had not had an effective remedy within the meaning of Article 13 (art. 13) and that they had been victims of discrimination on political grounds in breach of Article 14 read in conjunction with Article 10 (art. 14+10).

23. The Commission declared the application (no. 15153/89) admissible on 6 July 1992. In its report of 30 June 1993 (Article 31) (art. 31) it expressed the following opinion:

(a) as regards the first applicant:

(i) that there had been a violation of Articles 10 and 13 (art. 10, art. 13) (twelve votes to nine);

(ii) that no separate question arose under Article 14 read in conjunction with Article 10 (art. 14+10) (unanimously);

(b) as regards the second applicant:

(i) that there had been a violation of Article 10 (art. 10) (twelve votes to nine) but not of Article 13 (art. 13) (unanimously);

(ii) that no separate question arose under Article 14 read in conjunction with Article 10 (art. 14+10) (unanimously).

The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment*.

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 302 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

A. First applicant

24. The first applicant complained of the Minister for Defence's refusal to add der Igel to the list of periodicals distributed by the Austrian army. It considered that this constituted a breach of Article 10 (art. 10) of the Convention, according to which:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

25. It was the Government's contention that the VDSÖ was in no way to be confused with those of its members who were serving in the armed forces at the material time. The minister had therefore been justified in regarding it as a third party and in exercising one of the rights that the Civil Code conferred on the Federal State as the proprietor of the barracks, namely that of deciding freely the nature of the services to be provided on those premises and of choosing which providers of such services should be solicited in that connection, without having to furnish an explanation to the latter.

The applicant association had asked that its magazine should be distributed by the army in the same way as two other non-official periodicals. In fact the service that it was requesting was based exclusively on private-law arrangements, arrangements which could in any event not be demanded as of right by the publishers concerned. The army authorities could not be expected to help distribute all the magazines that were submitted to them. In short, the minister had exercised a discretionary power and had not infringed a right, no such right being vested in the applicant association.

26. In the light of the different arguments adduced, the Court must first consider whether there was an interference with the exercise by the VDSÖ of its right to impart information and ideas.

1. Whether there was an interference

27. As the Court has consistently held, the responsibility of a Contracting State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 (art. 1) to secure those rights and freedoms in its domestic law to everyone within its jurisdiction (see, as the most recent authority, the Costello-Roberts v. the United Kingdom judgment of 25 March 1993, Series A no. 247-C, p. 57, para. 26).

In the present case the authorities effected themselves and at their own expense the distribution on a regular basis of military periodicals published by various associations, by sending them out with their official publications. Whatever the legal status of this arrangement, such a practice was bound to have an influence on the level of information

imparted to the members of the armed forces and, accordingly, engaged the responsibility of the respondent State under Article 10 (art. 10). Freedom of expression applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States (see, as the most recent authority, the Hadjianastassiou v. Greece judgment of 16 December 1992, Series A no. 252, p. 17, para. 39).

The Court notes further that, according to the case file, of all the periodicals for servicemen, only der Igel was not allowed access to this type of distribution (see paragraph 8 above). The VDSÖ could therefore reasonably claim that this situation should be remedied. It follows that the Minister for Defence's rejection of its request was an interference with the exercise of its right to impart information and ideas.

2. Whether the interference was justified

28. The interference in issue infringed Article 10 (art. 10) if it was not "prescribed by law", if it did not pursue one or more of the legitimate aims referred to in paragraph 2 of that Article (art. 10-2) or if it was not "necessary in a democratic society" in order to attain such aims.

(a) Was the interference "prescribed by law"?

29. According to the applicant association, none of the provisions of military law on which the Minister for Defence might have relied could be regarded as "law" within the meaning of the Convention. This was true in the first place of sections 44 to 46 of the Armed Forces Act and Regulation 3 of the General Army Regulations, the very vague wording of which opened the way to arbitrariness. This was also the case in regard to the 1975 and the 1987 circulars, which had not, moreover, been accessible to the VDSÖ.

30. The Government pointed out that, far from having adopted an administrative measure, the minister had merely refused to give a favourable reply to the applicant association's request. In so far as was necessary, sufficient basis for his decision was to be found in the Civil Code and that basis satisfied Article 10 (art. 10) in this respect. The provisions of military law cited, in particular the 1975 circular, had at most served as a guide for the minister's decision.

31. The Court observes that although those provisions could not strictly constitute the legal basis of the minister's action, as the minister did not take a formal decision, he nevertheless followed them in this instance. This is clear in particular from his reply to a parliamentary question (see paragraph 8 above). It is accordingly necessary to ascertain whether they qualified as "law".

The Court acknowledges that the provisions in question were formulated in general terms. It should however be recalled that the level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed (see, as the most recent authority, the Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, para. 25).

As far as military discipline is concerned, it would scarcely be possible to draw up rules describing different types of conduct in detail. It may therefore be necessary for the authorities to formulate such rules more broadly. The relevant provisions must, however, afford sufficient protection against arbitrariness and make it possible to foresee the consequences of their application.

In the Court's view, the provisions in question, in particular the circular of 14 March 1975, provided sufficient legal basis for the refusal of the VDSÖ's request. The first applicant had among its members servicemen who had access to these rules and it could

therefore have been expected to be aware of the possibility that the minister might regard himself as bound to refer to them in relation to it. In conclusion, the interference in issue was "prescribed by law".

(b) Did the interference pursue a legitimate aim?

32. The impugned decision was evidently taken with a view to preserving order in the armed forces, a legitimate aim for the purposes of Article 10 para. 2 (art. 10-2) (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 41, para. 98).

(c) Was the interference "necessary in a democratic society"?

33. The VDSÖ denied that the refusal of its request had been necessary. It had been motivated solely by the desire to prevent a current of opinion regarded by the authorities as hostile to the army from being spread among the troops by the distribution of der Igel. Yet, the applicant association maintained, the Government were gradually implementing most of the reforms proposed by the magazine, such as the reduction of curfew restrictions, the introduction of a five-day week, pay increases and free public transport. The journal could not therefore be seen as a genuine threat.

34. The Commission in substance accepted the first applicant's view. It noted that der Igel contained no incitement to violence, to disobedience or to break the rules; at the very most it provided information on complaints and appeals procedures.

35. According to the Government, the magazine sought to undermine the effectiveness of the army and of the country's system of defence. Its distribution had been particularly undesirable because at the material time, when the cold war had still been in progress, there had been a certain amount of friction in the Schwarzenberg barracks. This situation, which was comparable to that found to exist in the case of Engel and Others (cited above, p. 42, para. 101), had arisen because of unrest among the servicemen as a result of various deliberately provocative actions (see paragraph 9 above), carried out by Mr Gubi, an active member of the VDSÖ.

Confronted with this situation, the Minister for Defence had even shown restraint as he had merely refused to allow the army to assist in the distribution of der Igel. This measure had been necessary in order to maintain discipline, but it had not prevented the applicant association from making the publication available to the soldiers through any other means. They could for instance receive it through the post and no restrictions were placed on their freedom to read it in the barracks. In short, the authorities had not overstepped their margin of appreciation, which was necessarily wider in this area because they alone were in a position to assess with full knowledge of all the circumstances, in a given situation, the specific duties and responsibilities of members of the armed forces.

36. The Court reiterates that freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, inter alia, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 30, para. 59, and the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 22, para. 42).

The same is true when the persons concerned are servicemen, because Article 10 (art. 10) applies to them just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings (see the Engel and Others judgment, cited above, p. 41, para. 100, and the Hadjianastassiou judgment, cited above, p. 17, para. 39).

37. The Court observes that at the material time the army distributed free of charge in all the country's barracks its own publications and those of private associations of soldiers. It appears that only der Igel was denied this facility, which undoubtedly reduced considerably its chances of increasing its readership among service personnel. The fact that the VDSÖ retained the possibility of sending its journal to subscribers could not offset such a handicap. It could therefore only have been justified by imperative necessities since exceptions to the freedom of expression must be interpreted narrowly (see the Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 41, para. 65).

38. The Government sought support for their argument from the content of der Igel. The periodical, which was critical and satirical, had represented a threat to discipline and to the effectiveness of the army.

It is the Court's opinion that such an assertion must be illustrated and substantiated by specific examples. None of the issues of der Igel submitted in evidence recommend disobedience or violence, or even question the usefulness of the army. Admittedly, most of the issues set out complaints, put forward proposals for reforms or encourage the readers to institute legal complaints or appeals proceedings. However, despite their often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves.

39. The Government also cited friction in the Schwarzenberg barracks, for which, they claimed, the publications of the applicant association and Mr Gubi's activities were essentially responsible (see paragraph 9 above). This situation had led to a large number of complaints from the conscripts.

In the Court's view, this situation, peculiar to a single barracks, was not sufficiently serious to justify a decision whose effects extended to all the military premises on the national territory. On this point the facts may be distinguished from the Engel and Others case. In that case the banned journal had been distributed solely in the place were the unrest cited by the authorities had occurred (see the above-mentioned judgment, p. 18, para. 43).

40. In conclusion, the refusal by the Minister for Defence to include der Igel among the magazines distributed by the army was disproportionate to the legitimate aim pursued. It follows that the first applicant was the victim of a violation of Article 10 (art. 10).

B. Second applicant

41. Mr Gubi likewise claimed to have been the victim of a breach of Article 10 (art. 10) inasmuch as he had been prohibited from distributing issue no. 3/87 of der Igel (see paragraph 10 above).

1. Whether there was an interference

42. It is not in dispute that there was an interference with the exercise by Mr Gubi of his right to impart information and ideas.

2. Whether the interference was justified

43. It must therefore be determined whether the interference was "prescribed by law", whether it pursued one or more of the legitimate aims referred to in paragraph 2 of Article 10 (art. 10-2) and whether it was "necessary in a democratic society" in order to attain such aims.

(a) Was the interference "prescribed by law"?

44. The applicant complained that there had been no legal basis for the order of 29 December 1987 requiring him to cease distributing der Igel. Neither the 1975 and 1987 circulars nor the regulations of the Schwarzenberg barracks could be regarded as "law" within the meaning of the Convention; they had not been published in the Official Gazette and their wording lacked sufficient precision. Only the barracks regulations contained a relevant provision, but it had been inserted with effect from 4 January 1988, in other words after the events giving rise to this case.

45. The Government contended that the impugned measure had been based on sections 44 para. 1 and 46 of the Armed Forces Act, the requirements of which were set out in greater detail in Regulations 3 and 19 of the General Army Regulations and in the different barracks regulations. Indeed Mr Gubi had been personally informed of their content and how they applied in practice on 1, 9 and 22 July 1987 (see paragraph 9 above).

46. On the question of the wording of these provisions, the Court refers to its reasoning in paragraph 31 above. Having regard in particular to the information given on the rules in force (see paragraph 9 above), the Court takes the view that, if need be having sought appropriate advice, the applicant was in a position to foresee, to a degree that was reasonable in the circumstances, the possibility of such a ban being imposed on him (see, mutatis mutandis, the Sunday Times (no. 1) judgment, cited above, p. 31, para. 49, and the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246-A, p. 27, para. 60).

(b) Did the interference pursue a legitimate aim?

47. The Court considers that the contested measure served, like the refusal complained of by the first applicant, to maintain order in the armed forces (see paragraph 32 above).

(c) Was the interference "necessary in a democratic society"?

48. The Government explained the order in issue by referring to Mr Gubi's conduct. Not only had he, when taking the oath, made a protest directed at the President of the Republic, he had also lodged several complaints and circulated a petition and an open letter (see paragraph 9 above). The applicant had thus borne a large share of the responsibility for the friction existing at the time in his barracks. He was in addition a member of the Austrian communist party, whose manifesto called for the abolition of the army. By ordering him to cease distributing der Igel, the officer in question had sought to prevent him from destabilising his fellow soldiers even further.

49. The Court refers in the first instance to its reasoning at paragraphs 36 and 37 above. It shares the Government's opinion that the particular incident must be viewed in its general context. This approach does not, however, remove the necessity of first examining the content of the publication in issue. Like the Commission, the Court notes that issue no. 3/87 of der Igel was essentially devoted to articles on the conditions of national service (see paragraph 10 above). These articles were written in a critical or even satirical style and were quick to make demands or put forward proposals for reform, yet they did not call into question the duty of obedience or the purpose of service in the armed forces. Accordingly the magazine could scarcely be seen as a serious threat to military discipline. It follows that the measure in question was disproportionate to the aim pursued and infringed Article 10 (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

A. First applicant

50. The VDSÖ complained in addition that no effective remedy had been available to it in Austria in respect of its grievance under Article 10 (art. 10). It relied on Article 13 (art. 13) of the Convention, which provides:

"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."

51. The Commission in substance subscribed to this view.

52. The Government denied in the first place that the applicant association's complaints were "arguable" for the purposes of the Convention. In the alternative, they contended that the association could have submitted its request to have der Igel distributed to the civil courts by means of an action for performance (Leistungsklage), an action for an order requiring the defendant to permit something to be done (Duldungsklage), or even an action for a declaration (Feststellungsklage).

53. In the light of the conclusion at paragraph 40 above, the requirement that the complaint be "arguable" is satisfied in respect of the submission in question (see, inter alia, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, para. 52).

As regards the possible remedies cited by the Government, they have not put forward any example showing their application in a case similar to the present one. They have therefore failed to show that such remedies would have been effective.

It follows that the first applicant has been the victim of a violation of Article 13 (art. 13).

B. Second applicant

54. Mr Gubi likewise complained of a breach of Article 13 (art. 13). In the circumstances of the present case, neither the Complaints Division nor the Constitutional Court could be regarded as a "national authority" within the meaning of that provision. The Complaints Division was under the authority of the Ministry of Defence and did not therefore afford the necessary guarantees of independence; the Constitutional Court had not examined the merits of the applicant's complaint.

55. Like the Commission and the Government, the Court notes that, under Article 144 of the Constitution, the Constitutional Court is competent to hear complaints of servicemen alleging a violation of their right to freedom of expression (see paragraph 21 above).

It is true that in this instance the Constitutional Court declined to entertain Mr Gubi's complaint (see paragraph 13 above). However, the effectiveness of a remedy for the purposes of Article 13 (art. 13) does not depend on the certainty of a favourable outcome (see, among other authorities, the Costello-Roberts judgment, cited above, p. 62, para. 40). The second applicant consequently had available to him a remedy satisfying the requirements of that provision.

It is not therefore necessary for the Court to consider whether the Complaints Division constitutes a "national authority" within the meaning of Aof Article 13 (art. 13).

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

56. The applicants complained finally that they had each been the victim of a breach of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10). The violation of their right to freedom of expression amounted to discrimination on political grounds.

Having regard to its conclusions concerning Article 10 (art. 10), the Court does not consider it necessary to rule on this complaint.

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

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

"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

1. Pecuniary damage

58. The VDSÖ claimed 14,800,000 Austrian schillings (ATS) for pecuniary damage. This sum represented the amount that the Ministry of Defence would have had to pay the association if it had decided to buy and distribute der Igel from 27 July 1987, the date of the association's request (see paragraph 8 above).

59. The Court agrees with the Delegate of the Commission that the violation of Article 10 (art. 10) derives not from the failure to pay the VDSÖ but solely from the refusal of the military authorities to distribute der Igel. The claim is accordingly unfounded.

2. Non-pecuniary damage

60. The VDSÖ and Mr Gubi claimed in addition compensation for non-pecuniary damage in an amount which they left to the discretion of the Court.

61. The Delegate of the Commission supported this claim.

62. Like the Government, who pointed out that der Igel ceased publication in 1988, the Court considers that the present judgment affords the applicants sufficient just satisfaction for any non-pecuniary damage that they may have suffered.

B. Costs and expenses

63. The applicants claimed a total of ATS 360,952.34 for costs and expenses: ATS 113,267.56 for the proceedings before the national authorities and ATS 247,684.78 for those before the Convention institutions.

64. The Government agreed to pay ATS 110,000.

65. Having regard to the criteria laid down in its case-law and making an assessment on an equitable basis, the Court awards the applicants ATS 180,000 in respect of all their costs and expenses.

FOR THESE REASONS, THE COURT

1. Holds by six votes to three that there has been a breach of Article 10 (art. 10) of the Convention in respect of the first applicant;

2. Holds by eight votes to one that there has been a breach of Article 10 (art. 10) of the Convention in respect of the second applicant;

3. Holds by six votes to three that there has been a breach of Article 13 (art. 13) of the Convention in respect of the first applicant;

4. Holds unanimously that there has been no breach of Article 13 (art. 13) of the Convention in respect of the second applicant;

5. Holds unanimously that it is not necessary to consider whether there has been a breach of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10);

6. Holds unanimously that the present judgment constitutes in itself sufficient just satisfaction for the alleged non-pecuniary damage;

7. Holds unanimously that the respondent State is to pay the applicants, within three months, 180,000 (one hundred and eighty thousand) Austrian schillings for costs and expenses;

8. Dismisses unanimously 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 19 December 1994.

Signed: Rudolf BERNHARDT President

Signed: Herbert PETZOLD Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Thór Vilhjálmsson; (b) partly dissenting opinion of Mr Matscher, joined by Mr Bernhardt.

Initialled: R. B.

Initialled: H. P.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

In this case I have not found a violation of Article 10 (art. 10) of the Convention, or of Article 13 (art. 13).

With regard to the first applicant, I agree with the opinion of Mr Matscher joined by Mr Bernhardt.

In respect of the second applicant, Mr Gubi, I would make the following remarks:

In paragraph 36 of the judgment the Court makes what appears to me to be the obvious point that "the proper functioning of the army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline ...". Certain restrictions were undoubtedly imposed on Mr Gubi when he was ordered by an officer to stop distributing the magazine der Igel in his barracks. However, these restrictions were limited to his conduct within the barracks. They did not affect the distribution of this publication in any other way. Applying the principle of proportionality, I have, unlike the Court, found that the Austrian officer acted within the permissible boundaries of Article 10 (art. 10) in issuing the said order to Mr Gubi.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER, JOINED BY JUDGE BERNHARDT

(Translation)

I agree with the finding of a violation as regards the second applicant but not as regards the first applicant.

The latter complained that there had been a violation of Article 10 (art. 10) of the Convention on account of the refusal of the Minister for Defence to include the magazine der Igel in the list of periodicals distributed by the army. Article 10 (art. 10) protects the freedom of expression and information but does not guarantee publications a right to be distributed by the public authorities. The "official" distribution of the journal in question would have amounted in a way to identifying at least implicitly with the content of the magazine, which, in my view, the relevant military authorities could not be expected to do.

It was, moreover, entirely open to the conscripts who were interested in reading the magazine to subscribe to it, to have it mailed to them privately or to buy it when they went outside the barracks, which they did virtually every day, and bring it back to the barracks. In addition, the first applicant could send the magazine free of charge to the conscripts either at the barracks or at their private address. The requirements of Article 10 (art. 10) were in this manner fully complied with in relation to the applicant association.

In these circumstances, as regards the first applicant there was no interference with the right protected under Article 10 (art. 10); it follows that there could likewise be no breach of Article 13 (art. 13) in relation to it.