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

COURT (CHAMBER)

CASE OF KALAÇ v. TURKEY

(Application no. 20704/92)

JUDGMENT

STRASBOURG

1 July 1997

In the case of Kalaç v. Turkey[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 L.-E. PETTITI,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr I. FOIGHEL,
Sir John FREELAND,
Mr A.B. BAKA,
Mr D. GOTCHEV,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 24 February and 23 June 1997,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 19 April 1996 and by the Government of the Republic of Turkey ("the Government") on 3 July 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 an application (no. 20704/92) against Turkey lodged with the Commission under Article 25 (art. 25) by a Turkish national, Mr Faruk Kalaç, on 13 July 1992.

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

[1] The case is numbered 61/1996/680/870. 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.

disclosed a breach by the respondent State of its obligations under Article 9 of the Convention (art. 9).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings. On 24 January 1997 the President of the Court gave him leave to present his own case (Rule 30 para. 1).

3. The Chamber to be constituted included ex officio Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 27 April 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr R. Macdonald, Mr C. Russo, Mr A. Spielmann, Mr J.M. Morenilla, Sir John Freeland and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr Morenilla and Mr Macdonald, who were unable to attend, were replaced by Mr I. Foighel and Mr A.B. Baka, substitute judges (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant 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 applicant's and the Government's memorials on 4 November and 17 December 1996 respectively. The Delegate of the Commission did not submit any observations.

5. In the meantime, on 2 December 1996, the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President, who had given the applicant leave to use the Turkish language (Rule 27 para. 3), the hearing took place in public in the Human Rights Building, Strasbourg, on 17 February 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr A. GÜNDÜZ, *Agent*,
Mr M. ÖZMEN, *Counsel*,
Mr F. POLAT,
Miss A. EMÜLER,
Mrs N. ERDIM,
Mrs S. EMINAGAOGLU, *Advisers*;

(b) for the Commission

Mr J.-C. GEUS, *Delegate*;

(c) the applicant.

The Court heard addresses by Mr Geus, Mr Kalaç, Mr Gündüz and Mr Özmen.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. Mr Faruk Kalaç, a Turkish citizen born in 1939, pursued a career as judge advocate in the air force. In 1990 he was serving, with the rank of group captain, as the high command's director of legal affairs.

8. By an order of 1 August 1990 the Supreme Military Council (Yüksek Askeri Sûrasi), composed of the Prime Minister, the Minister of Defence, the Chief of Staff and the eleven highest-ranking generals in the armed forces, ordered the compulsory retirement of three officers, including Mr Kalaç, and twenty-eight non-commissioned officers for breaches of discipline and scandalous conduct. The decision, which was based on section 50 (c) of the Military Personnel Act, section 22 (c) of the Military Legal Service Act and Article 99 (e) of the Regulations on assessment of officers and non-commissioned officers, made the specific criticism, in the applicant's case, that his conduct and attitude "revealed that he had adopted unlawful fundamentalist opinions".

9. In a decision of 22 August 1990 the President of the Republic, the Prime Minister and the Minister of Defence approved the above order, which was served on the applicant on 3 September. The Minister of Defence ordered the forfeiture of the applicant's social security (health insurance) card, his military identity card and his licence to bear arms.

10. On 21 September 1990 Mr Kalaç asked the Supreme Administrative Court of the Armed Forces (Askeri Yüksek idare Mahkemesi) to set aside the order of 1 August 1990 and the measures ordered by the Ministry of Defence.

11. In a judgment of 30 May 1991 the Supreme Administrative Court of the Armed Forces ruled by four votes to three that it did not have jurisdiction to entertain the application to set aside the order of 1 August 1990, on the ground that under Article 125 of the Constitution the decisions of the Supreme Military Council were final and not subject to judicial review. In that connection it observed that under the Military Legal Service Act members of the military legal service had the status of military personnel. Their compulsory retirement for breaches of discipline was regulated in the same manner as that of other army officers.

In their dissenting opinion the three members of the minority referred to the principle of the independence of the judiciary enunciated in Article 139 of the Constitution. They expressed the view that security of tenure for both civilian and military judges, which was protected by that Article, formed a lex specialis in relation to the other provisions of the Constitution and that decisions of the Supreme Military Council which infringed that principle should therefore be subject to review by the Supreme Administrative Court of the Armed Forces.

The court set aside, however, the refusal to issue social security cards to the applicant and his family.

12. On 9 January 1992 the court dismissed an application for rectification lodged by Mr Kalaç.

II. RELEVANT DOMESTIC LAW

A. The Constitution

13. The relevant provisions of the Constitution are as follows:

Article 14 para. 1

"None of the rights and freedoms set forth in the Constitution may be exercised with the aim of undermining the territorial integrity of the State or the indivisible unity of its people, imperilling the existence of the Turkish State and the Republic, abolishing fundamental rights and freedoms, handing over control of the State to a single individual or group or bringing about the dominance of one social class over the others, establishing discrimination on the grounds of language, race, religion or adherence to a religious sect or setting up by any other means a State order based on such beliefs and opinions."

Article 24

"Everyone shall have the right to freedom of conscience, faith and religious belief.

Prayers, worship and religious services shall be conducted freely, provided that they do not violate the provisions of

Article 14.

No one shall be compelled to participate in prayers, worship or religious services or to reveal his religious beliefs and convictions; nor shall he be censured or prosecuted because of his religious beliefs or convictions.

...

No one may exploit or abuse religion, religious feelings or things held sacred by religion in any manner whatsoever with a view to causing the social, economic, political or legal order of the State to be based on religious precepts, even if only in part, or for the purpose of securing political or personal influence thereby."

Article 125

"All acts or decisions of the administration are subject to judicial review ... Decisions of the President of the Republic concerning matters within his sole jurisdiction and decisions of the Supreme Military Council shall not be subject to judicial review.

..."

Article 139

"Judges and public prosecutors shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of a court or post.

The exceptions laid down by law concerning judges or public prosecutors who have been convicted of an offence requiring their dismissal from the service, those whose unfitness to carry out their duties for medical reasons has been finally established or those whose continued service has been adjudged undesirable shall remain in force."

Article 144

"Supervision of judges and public prosecutors as regards the performance of their duties in accordance with laws, regulations, subordinate legislation and circulars (administrative circulars, in the case of judges), investigations into whether they have committed offences in connection with, or in the course of, their duties, or whether their conduct and attitude are compatible with the obligations arising from their status and duties and, if necessary, inquiries concerning them shall be made by judicial inspectors with the permission of the Ministry of Justice. The Minister of Justice may also ask a judge or public prosecutor senior to the judge or public prosecutor in question to conduct the investigation or inquiry."

Article 145, fourth paragraph

"The organisation and functions of military judicial organs, the personal status of military judges and the relations between judges acting as military prosecutors and the commanders under whom they serve shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of the judiciary and with the requirements of military service. Relations between military judges and the commanders under whom they serve as regards their non-judicial duties shall also be regulated by law in accordance with the requirements of military service."

B. Law no. 357 ("the Military Legal Service Act")

14. Section 22 (c) of the Military Legal Service Act provides:

"Irrespective of length of service, servicemen whose continued presence in the armed forces is adjudged to be inappropriate on account of breaches of discipline or immoral behaviour on one of the grounds set out below, as established in one or more documents drawn up during their service in the last military rank they held, shall be subject to the provisions of the Turkish Pensions Act.

...

Where their conduct and attitude reveal that they have adopted unlawful opinions."

C. Law no. 926 ("the Military Personnel Act")

15. Section 50 (c) of the Military Personnel Act provides:

"Irrespective of length of service, servicemen whose continued presence in the armed forces is adjudged inappropriate on account of breaches of discipline and immoral behaviour shall be subject to the provisions of the Turkish Pensions Act.

The Regulations for Military Personnel shall lay down which authorities have jurisdiction to commence proceedings, to examine, monitor and draw conclusions from personnel assessment files and to carry out any other act or formality in such proceedings. A decision of the Supreme Military Council is required to discharge an officer whose case has been submitted by the Chief of Staff to the Supreme Military Council."

D. The Regulations on assessment of officers and non-commissioned officers

16. Article 99 of the Regulations on assessment of officers and non-commissioned officers provides:

"Irrespective of length of service, the compulsory retirement procedure shall be applied to all servicemen whose continued presence in the armed forces is adjudged to be inappropriate on account of breaches of discipline or immoral behaviour on one of the grounds set out below, as established in one or more documents drawn up during their service in the last military rank they held:

...

(e) where by his conduct and attitude the serviceman concerned has provided evidence that he holds unlawful, subversive, separatist, fundamentalist and ideological political opinions or takes an active part in the propagation of such opinions."

PROCEEDINGS BEFORE THE COMMISSION 17.

Mr Kalaç applied to the Commission on 13 July 1992. Relying on Article 9 of the Convention (art. 9), he complained that he had been removed from his post as judge advocate on account of his religious convictions.

18. The Commission declared the application (no. 20704/92) admissible on 10 January 1995. In its report of 27 February 1996 (Article 31) (art. 31) it expressed the unanimous opinion that there had been a violation of Article 9 of the Convention (art. 9). The full text of the Commission's opinion is reproduced as an annex to this judgment[3].

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

AS TO THE LAW

I. SCOPE OF THE CASE

19. In his memorial to the Court the applicant, in addition to his complaint under Article 9 of the Convention (art. 9), also relied on Article 6 para. 1 (art. 6-1) on the ground that he had not had a hearing by a tribunal in connection with the facts held against him.

20. The Court notes that this last complaint lies outside the compass of the case as delimited by the Commission's decision on admissibility, since it was not dealt with either in that decision or in the Commission's report (see, among other authorities, the Scollo v. Italy judgment of 28 September 1995, Series A no. 315-C, p. 51, para. 24; and the Hussain v. the United Kingdom judgment of 21 February 1996, Reports of Judgments and Decisions 1996-I, p. 266, para. 44).

The scope of the case is therefore limited to the questions raised under Article 9 (art. 9).

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION (art. 9)

A. The Government's preliminary objection

21. The Government submitted to the Commission a preliminary objection divided into three limbs, but in their memorial to the Court they resubmitted only the limb concerning failure to exhaust domestic remedies, leaving aside the other two, which concerned the Commission's lack of competence ratione materiae and the application's late submission. At the hearing on 17 February 1997 the Government presented argument on the first limb and in addition pleaded the Court's lack of jurisdiction ratione materiae.

The Court considers that the latter objection calls for no decision as it was submitted to the Court out of time for the purposes of Rule 48 para. 1 of Rules of Court A.

22. As for the argument which was repeated in the memorial of December 1996 and at the hearing, it amounts to an assertion that the applicant did not explicitly allege to the Turkish authorities that his right to freedom of conscience and religion had been infringed. The Government maintained that, in accordance with the principle laid down by the Court in its judgment of 15 November 1996 in the case of Ahmet Sadik v. Greece (Reports 1996-V, p. 1654, para. 33), the applicant should have relied on Article 9 of the Convention (art. 9), which formed an integral part of Turkish law.

23. Like the Delegate of the Commission, the Court considers that the objection of failure to exhaust domestic remedies must be dismissed because, under Article 125 of the Constitution, and as the Supreme Administrative Court of the Armed Forces held in its judgment of 30 May 1991, the Supreme Military Council's decision against Mr Kalaç was not subject to judicial review.

B. Merits of the complaint

24. The applicant submitted that his compulsory retirement from his judge advocate's post infringed his freedom of religion on the ground that it was based on his religious beliefs and practices. He relied on Article 9 of the Convention (art. 9), which provides:

> "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."

The applicant argued that domestic law gave no indication of what the expression "unlawful fundamentalist opinions", given as grounds for his compulsory retirement (see paragraph 8 above), should be understood to mean. As a practising Muslim, he prayed five times a day and kept the fast of Ramadan. The documents produced by the Government for the first time when the proceedings were already before the Court did not constitute evidence of his alleged membership of the Muslim fundamentalist Süleyman sect (Süleymancilik tarikati), whose existence he had been unaware of. Moreover, the Supreme Military Council's decision infringed the principle of judges' security of tenure, which was set forth in Article 139 of the Constitution.

25. The Government argued that the question whether Mr Kalaç should be allowed to remain a member of the armed forces lay at the heart of the problem submitted to the Court. His compulsory retirement was not an interference with his freedom of conscience, religion or belief but was intended to remove from the military legal service a person who had manifested his lack of loyalty to the foundation of the Turkish nation, namely secularism, which it was the task of the armed forces to guarantee. The applicant belonged to the Süleyman sect, as a matter of fact, if not formally, and participated in the activities of the Süleyman community, which was known to have unlawful fundamentalist tendencies. Various documents annexed to the memorial to the Court showed that the applicant had given it legal assistance, had taken part in training sessions and had

intervened on a number of occasions in the appointment of servicemen who were members of the sect. On the basis of those documents, a committee of five officers drawn from the highest echelons of the military had concluded that by taking and carrying out instructions from the leaders of the sect Group Captain Kalaç had breached military discipline and should accordingly be compulsorily retired pursuant to section 50 (c) of the Military Personnel Act. The Supreme Military Council had based its decision on this opinion, which had been approved by the high command and the air force chief of staff.

Lastly, facilities to practise one's religion within the armed forces were provided in Turkey for both Muslims and the adherents of other faiths. However, the protection of Article 9 (art. 9) could not extend, in the case of a serviceman, to membership of a fundamentalist movement, in so far as its members' activities were likely to upset the army's hierarchical equilibrium.

26. The Commission, basing its opinion on the documents submitted to it by the Government, took the view that the applicant's compulsory retirement constituted interference with the right guaranteed by Article 9 para. 1 (art. 9-1) and concluded that there had been a breach of that provision (art. 9-1) on the ground that the interference in question was not prescribed by law within the meaning of the second paragraph (art. 9-2), finding that the relevant provisions did not afford adequate protection against arbitrary decisions. The Delegate observed that, in support of their memorial to the Court, the Government had produced documents which, during the proceedings before the Commission, had been said to be "secret in the interests of national security". In any event, these documents did not support the argument that Mr Kalaç had any links with a sect.

27. The Court reiterates that while religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares, but also alone and in private (see the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 17, para. 31). Article 9 (art. 9) lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 (art. 9) does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.

28. In choosing to pursue a military career Mr Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 24, para. 57). States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular

an attitude inimical to an established order reflecting the requirements of military service.

29. It is not contested that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion. For example, he was in particular permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque.

30. The Supreme Military Council's order was, moreover, not based on Group Captain Kalaç's religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude (see paragraphs 8 and 25 above). According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.

31. The Court accordingly concludes that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 (art. 9) since it was not prompted by the way the applicant manifested his religion.

There has therefore been no breach of Article 9 (art. 9).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the Government's preliminary objection;

2. Holds that there has been no breach of Article 9 of the Convention (art. 9).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 1 July 1997.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar