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

FIRST SECTION

CASE OF LANG v. AUSTRIA

(Application no. 28648/03)

JUDGMENT

STRASBOURG

19 March 2009

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lang v. Austria,

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 28648/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Gerhard Lang ("the applicant"), on 26 August 2003.

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

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

4. On 17 November 2005 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Altmünster.

6. Upon his baptism on 30 July 1983 the applicant became a member of the recognised religious community of the Jehovah's Witnesses in Austria, within which he assumed the function of a preacher (*Prediger*) and, since 6 November 1997, an elder (*Ältester*) in the Jehovah's Witnesses' community in Gmunden. This function includes providing pastoral care to the community, leading church services and preaching.

7. In September 2000 the Upper Austrian Military Authority (*Militärkommando*) ordered the applicant to undergo examinations as to his ability to perform military service. The applicant appealed against the order, claiming that he should be dispensed from military service since he performed a function within the Jehovah's Witnesses which was equivalent to that of members of a recognised religious society who were exempt from military service under section 24(3) of the Military Service Act (*Wehrgesetz*). To restrict such a privilege to members of recognised religious societies was not objectively justified and was therefore in breach of the Federal Constitution.

8. On 9 October 2000 the Upper Austria Military Authority dismissed the applicant's appeal. On 14 December 2000 the Federal Minister for Defence (*Bundesminister für Landesverteidigung*) confirmed that decision. Both authorities refused the applicant's appeals on the ground that he did not belong to a recognised religious society.

9. Subsequently, on 25 January 2001, the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*), requesting it to repeal the wording “recognised religious societies” in section 24(3) of the Military Service Act.

10. On 25 September 2001 the Constitutional Court refused to deal with the applicant's complaint for lack of prospects of success. It found that the applicant's obligations under the Military Service Act did not interfere with the internal rules and practices of the religious community at issue. It furthermore referred to earlier decisions dealing with the legal status of religious communities and their difference from recognised religious societies under the Recognition Act.

11. On 23 May 2003 the Administrative Court (*Verwaltungsgerichtshof*) dismissed the applicant's complaint. It found that exemption from the obligation to perform military service merely applied to members of recognised religious societies and could not be extended to members of registered religious communities. This decision was served on the applicant's counsel on 4 July 2003.

12. On 26 August 2003 the applicant asked the Federal Ministry for Defence to take no action until the European Court of Human Rights had decided on his application. The applicant was informed that an instruction had been issued to the Upper Austrian Military Authority not to call him up until further notice.

II. RELEVANT DOMESTIC LAW

A. The obligation to perform military or alternative service

13. Article 9 a § 3 of the Federal Constitution reads as follows:

> "Every male Austrian citizen is liable for military service. Conscientious objectors who refuse to perform compulsory military service and who are dispensed from this requirement must perform alternative service. The details shall be regulated by ordinary law."

14. Section 24(3) of the Military Service Act, as in force at the relevant time, read as follows:

> "An exemption from the obligation to perform military service shall apply to the following members of recognised religious societies:
>
> 1. ordained priests,
>
> 2. persons involved in spiritual welfare or in clerical teaching after graduating in theological studies,
>
> 3. members of a religious order who have made a solemn vow, and
>
> 4. students of theology who are preparing to assume a clerical function."

B. Religious societies and religious communities

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

THE LAW

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

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

Article 14 of the Convention provides:

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

Article 9 provides as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

17. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

A. Submissions by the parties

18. The Government pointed out that Article 9 a § 3 of the Federal Constitution provided that every male Austrian citizen was liable to perform military service. Exemptions from this obligation were set out in section 24(3) and were linked to membership of a recognised religious

society. However, there were also further criteria which the applicant did not satisfy either. The applicant had stated that his function was comparable to those of persons who were involved in spiritual welfare or in clerical teaching after graduating in theological studies or who were preparing to assume such functions. In this connection, the Government stressed that the applicant had not stated at any time during the domestic proceedings that he had studied theology at a university or any equivalent institution. Therefore, notwithstanding his religious denomination, the applicant had failed to prove that he complied with any of the four criteria set out in the above-mentioned provision. Thus, there was no need to consider whether or not the applicant had been discriminated against on the ground of his faith. In addition, members of recognised religious societies who did not comply with the criteria laid down in section 24(3) of the Military Service Act were not exempt from military service.

19. The Government submitted further that, as the Contracting States were under no obligation to accept a refusal to perform military service for religious reasons, non-exemption of a person from military or alternative civilian service did not raise any concerns under Article 9 of the Convention.

20. The applicant contested this view and maintained that if the relevant domestic legislation provided for exemptions from military or alternative civilian service, it should do so without any discrimination.

21. While it was true that the Jehovah's Witnesses had neither universities nor faculties within State or church universities, they nonetheless offered intensive clerical training which consisted of theoretical studies and practical experience. Elders and deacons were in charge of spiritual welfare, guided the community's worship, provided social assistance, celebrated mass, baptisms, marriages and funerals, and supervised missionary work. The Religious Order of the Jehovah's Witnesses had already existed for many decades and had about 160 members in Austria. Most of its members lived and worked in a community of preachers who took part together in morning worship, prayer and studies; other members were “special pioneers” (*Sonderpioniere*) and “travelling overseers” (“*episcopoi*” or bishops) who visited communities to perform missionary work and ensure spiritual welfare. The Austrian authorities and courts only linked the granting of an exemption from civilian service to membership of a recognised religious society and did not examine whether or not the person concerned performed comparable functions for the purposes of section 24(3) of the Military Service Act.

B. The Court's assessment

22. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and the

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

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

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

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

26. According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, among other authorities, *Willis v. United Kingdom*, no. 36042/97, § 39, ECHR 2002-IV).

27. In the instant case, the Court first observes that the exemption from military service under section 24(3) of the Military Service Act is exclusively linked to members of recognised religious societies performing specific services of worship or religious instruction. The applicant, a member of the Jehovah's Witnesses, claimed that he performed similar services. However, the Jehovah's Witnesses was at the time a registered religious community and not a religious society, and there was thus no room for an exemption under the above-mentioned legislation.

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

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

30. In doing so the Court refers to the case of *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (no. 40825/98, 31 July 2008), in which the first applicant, the Jehovah's Witnesses in Austria, had been granted legal personality as a registered religious community, a private-law entity, but wished to become a religious society under the 1874 Recognition Act – that is, a public-law entity. The Court observed that under Austrian law, religious societies enjoyed privileged treatment in many areas, including, *inter alia*, exemption from military service and civilian service. Given the number of these privileges and their nature, the advantage obtained by religious societies was substantial. In view of these privileges accorded to religious societies, the obligation under Article 9 of the Convention incumbent on the State's authorities to remain neutral in the exercise of their powers in this domain required therefore that if a State set up a framework for conferring legal personality on religious groups to which a specific status was linked, all religious groups which so wished must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner (ibid., § 92). The Court found, however, that in the case of the Jehovah's Witnesses one of the criteria for acceding to the privileged status of a religious society had been applied in an arbitrary manner and concluded that the difference in

treatment was not based on any "objective and reasonable justification". Accordingly, it found a violation of Article 14 of the Convention taken in conjunction with Article 9 (ibid., § 99).

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

32. In conclusion, section 24(3) of the Military Service Act, which provides for exemptions from the obligation to perform military service exclusively in the case of members of a recognised religious society, is discriminatory and the applicant has been discriminated against on the ground of his religion as a result of the application of this provision. There has therefore been a violation of Article 14 taken in conjunction with Article 9 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

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

A. Admissibility

34. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

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

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

36. The applicant complained that the fact that he was not exempt from military service while assuming a function with the Jehovah's Witnesses which was comparable to those of members of recognised religious societies who were exempt from military service constituted discrimination on the ground of his religion, prohibited by Article 14 of the Convention taken together with Article 4.

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

> "2. No one shall be required to perform forced or compulsory labour.
>
> 3. For the purpose of this article the term 'forced or compulsory labour' shall not include:
>
> (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;
>
> (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
>
> (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
>
> (d) any work or service which forms part of normal civic obligations."

A. Admissibility

37. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

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

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

39. The applicant also complained under Article 13 of the Convention that the Constitutional Court had not given a decision on the merits of his complaint.

Article 13 of the Convention reads as follows:

> "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."

Admissibility

40. The Court notes that Article 13 guarantees the availability of a remedy at national level to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Thus, its effect is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 135, ECHR 1999-VI). Article 13 does not, however, presuppose that the remedy or remedies resorted to must always be successful.

41. Turning to the present case, the Court notes that the applicant, who was represented by counsel, had ample opportunity to challenge the obligation to perform military service at three appellate levels, including two levels of courts. The fact that in the present case the Constitutional Court refused to deal with the applicant's complaint, finding that it lacked sufficient prospects of success, does not lead to the conclusion that a complaint to the Constitutional Court would in itself not constitute an effective remedy, within the meaning of Article 13.

42. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. Article 41 of the Convention provides:

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

A. Damage

44. The applicant did not submit a claim for damages. Accordingly, the Court considers that there is no call to award him any sum on that account.

B. Costs and expenses

45. The applicant claimed 10,164.36 Euros (EUR), plus value-added tax (VAT), for the costs of the domestic proceedings and EUR 3,964.80, plus VAT, for the costs of the proceedings before the Court.

46. The Government argued that the costs claimed by the applicant were excessive, in particular as in the proceedings before the military authorities representation by a lawyer was not mandatory.

47. The Court reiterates that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum. The Court considers that these conditions are met regards the costs of the domestic proceedings. It therefore awards the full amount claimed under this head, namely EUR 10,164.36, plus any tax that may be chargeable to the applicant on this amount.

48. As regards the proceedings before the Court, the applicant, who was represented by counsel, did not have the benefit of legal aid. However, the Court agrees with the Government that the claim is excessive. It notes in particular that the application was only partly successful and was brought by the same lawyer who represented the applicants in the similar cases of *Löffelmann v. Austria* (cited above) and *Gütl v. Austria* (no. 49686/99). Making an assessment on an overall basis, the Court awards EUR 2,500 under this head, plus any taxes that may be chargeable to the applicant on this amount.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* unanimously admissible the applicant's complaints under Article 4 §§ 2 and 3 (b) and Article 9, both taken alone and in conjunction with Article 14 of the Convention, that he was discriminated

against on account of his religion in respect of the obligation to perform military service, and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention taken in conjunction with Article 9 of the Convention;

3. *Holds* unanimously that there is no separate issue under Article 9 of the Convention alone;

4. *Holds* unanimously that it is not necessary to examine the complaint under Article 14 taken in conjunction with Article 4 §§ 2 and 3 (b) of the Convention;

5. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,664.36 (twelve thousand six hundred and sixty-four Euros and thirty-six cents), plus any tax that may be chargeable, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinion is annexed to this judgment:
- Dissenting opinion of Judge Vajić.

DISSENTING OPINION OF JUDGE VAJIĆ

1. I do not agree with the majority that there has been a violation of the applicant's right under the Convention in the present case. In my opinion the case should be distinguished from the cases *Löffelmann v. Austria* (no.42967/98) and *Gütl v. Austria* (no. 49686/99), both adopted today, and it should be struck out of the list of cases under Article 37 § 1 (b) of the Convention.

2. The applicant assumed the function of a preacher and an elder in the community of Jehovah's Witnesses. He was called up to perform military service, as the authorities found that exemption from the obligation to perform military service applied only to members of recognized religious societies and not to members of registered religious communities such as the Jehovah's Witnesses. So far, the applicant was in the same situation as the applicants in the *Löffelmann* and *Gütl* cases, in which the Court unanimously found a violation of Article 14 in conjunction with Article 9 of the Convention. However, and contrary to the applicants in these two cases, on 26 August 2003 Mr Lang requested the Federal Ministry for Defence to take no action until the European Court of Human Rights had decided on his application. The applicant was informed that an instruction had been issued to the relevant Military Authority not to call him up until further notice. Thus, he has never been required to perform any kind of military service (see paragraph 12 of the judgment).

3. In the meantime the European Court of Human Rights adopted a judgment in the case of *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (no. 40825/98, 31 July 2008), in which it found a breach of Article 14 of the Convention taken in conjunction with Article 9 because of the impossibility for the Jehovah's Witnesses in Austria to obtain the (privileged) status of a religious society and register as such (see paragraph 30 of the judgment). Since this status question is the key element in the cases concerning the performance of military service by applicants who assumed religious functions within the Jehovah's Witnesses, comparable to functions within recognized religious societies, the Court followed the approach adopted in the above-mentioned case to find further breaches of the same Articles, on the basis of the same reasoning, in the above-mentioned cases of *Gütl v. Austria* and *Löffelmann v. Austria*, where the applicants were obliged to perform their (civilian) military service.

4. In cases in which a matter has been resolved at the domestic level, it is the Court's established case-law to accept that there is no need to continue the examination of such applications (for instance, where an applicant obtains permission to remain in a country instead of being expulsed, cf. *Barakat Saleh v. the Netherlands*, no. 15243/04, 3 June 2008; *Yuusuf Nuur v. the Netherlands*, no. 1734/04, 31 January 2008; and *Sisojeva v. Latvia*, [GC], 60654/00, 5 January 2001, §§ 102-104). In my opinion, the same

approach should be applied in cases where a matter has been resolved by the European Court of Human Rights, as in the present case. It is clear that the Austrian authorities, which since 2003 have stayed the order for the applicant to perform his military service, will not call him up following the Court's adoption of judgments in the cases of *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, *Gütl v. Austria* and *Löffelmann v. Austria*, in which it has decided both the question of principle underlying the problem at issue and also the issue relating to the performance of military service for persons assuming religious functions, such as obtained in the present case.

5. Consequently, and in the light of all the relevant circumstances of the case, I consider that the fact that the applicant's conscription was postponed in 2003 pending the outcome of the Strasbourg proceedings (see paragraph 12 of the judgment) and the fact that the Court has in the meantime adopted the above-mentioned judgments, in which it found a breach of Convention rights in analogous cases, are adequate and sufficient to remedy the applicant's complaint. The matter giving rise to his complaint can therefore now be considered to be "resolved" within the meaning of Article 37 § 1 (b). No particular reason relating to respect for human rights as defined in the Convention requires the Court to continue its examination of the application under Article 37 § 1 *in fine*.

6. Thus, in my opinion the application should be struck out of the Court's list of cases.