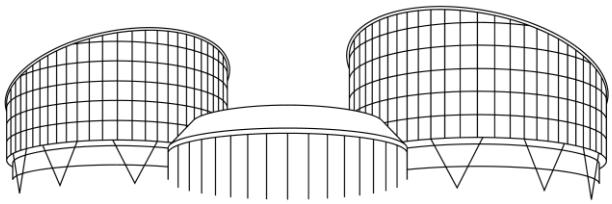

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

THIRD SECTION

# CASE OF BAYATYAN v. ARMENIA

*(Application no. 23459/03)*

JUDGMENT

STRASBOURG

27 October 2009

Referral to the Grand Chamber

10/05/2010

*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 Bayatyan v. Armenia,**

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

Josep Casadevall, *President,*
Elisabet Fura,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Ann Power, *judges,*
and Stanley Naismith, *Deputy Section Registrar,*

Having deliberated in private on 6 October 2009,

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

# PROCEDURE

1. The case originated in an application (no. 23459/03) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Vahan Bayatyan ("the applicant"), on 22 July 2003.

2. The applicant was represented by Mr J. M. Burns, Mr A. Carbonneau and Mr R. Khachatryan, lawyers practising in Georgetown (Canada), Patterson (USA) and Yerevan respectively. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

3. The applicant alleged that his conviction for refusal to serve in the army had unlawfully interfered with his right to freedom of thought, conscience and religion.

4. By a decision of 12 December 2006, the Chamber declared the application admissible under Article 9 of the Convention and the remainder inadmissible. The question of applicability of Article 9 to the case was joined to the merits.

5. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*) the parties were invited to submit further written observations (Rule 59 § 1).

6. On 14 February 2007 the applicant and the Government each filed further written observations. On 20 March 2007 the applicant replied in writing to the Government's observations.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1983 and lives in Yerevan.

### A. Background to the case

8. The applicant is a Jehovah's Witness. From 1997 he attended various Jehovah's Witnesses religious services and he was baptised on 18 September 1999 at the age of 16.

9. On 16 January 2000 the applicant was registered as a person liable for military service with the Erebuni District Military Commissariat (*Էրեբունի համայնքի զինվորական կոմիսարիատ*).

10. On 16 January 2001 the applicant, at the age of 17, was called to undergo a medical examination, following which he was declared fit for military service. The applicant became eligible for military service during the 2001 spring draft (April-June).

11. On 1 April 2001, at the outset of the draft, the applicant sent identical letters to the General Prosecutor of Armenia (*ՀՀ գլխավոր դատախազ*), the Military Commissioner of Armenia (*ՀՀ պաշտպանության նախարարության հանրապետական զինկոմիսար*) and the Human Rights Commission of the National Assembly (*ՀՀ ազգային ժողովին առընթեր մարդու իրավունքների հանձնաժողով*), with the following statement:

> "I, Vahan Bayatyan, born in 1983, inform you that I have studied the Bible since 1996 and have trained my conscience by the Bible in harmony with the words of Isaiah 2:4, and consciously refuse to perform military service. At the same time I inform you that I am ready to perform alternative civilian service in place of military service."

12. In early May a summons to appear for military service on 15 May 2001 was delivered to the applicant's home. On 14 May 2001 an officer with the Erebuni Military Commissariat telephoned the applicant's home and asked his mother whether the applicant was aware that he had been called to appear at the Commissariat to commence military service the following day. That same evening, the applicant temporarily moved away from his home in fear of being forcefully taken to the military.

13. On 15 and 16 May 2001 officials from the Commissariat telephoned the applicant's mother, demanding to know his whereabouts. They threatened to take him to the military by force if he did not come voluntarily. On 17 May 2001, early in the morning, the officials came to the

applicant's home. His parents were asleep and did not open the door. On the same date, the applicant's mother went to the Commissariat where she stated that the applicant had left home and she did not know when he would come back. The applicant submits that the Commissariat made no further efforts to contact his family.

14. On 29 May 2001 the Parliamentary Commission for State and Legal Affairs (*ՀՀ ազգային ժողովի պետական-իրավական հարցերի հանձնաժողով*) sent a reply to the applicant's letter of 1 April 2001, stating:

> "In connection with your declaration, ... we inform you that in accordance with the legislation of the Republic of Armenia every citizen ... is obliged to serve in the Armenian army. Since no law has yet been adopted in Armenia on alternative service, you must submit to current law and serve in the Armenian army."

15. In early to mid-June 2001 the applicant returned home, where he lived until his arrest in September 2002.

16. On 12 June 2001 the Parliament declared a general amnesty which applied only to those who had committed crimes before 11 June 2001 and was subject to implementation until 13 September 2001.

### B. Criminal proceedings against the applicant

17. On 26 June 2001 the Erebuni Military Commissar (*Էրեբունի համայնքի զինկոմիսար*) sent notice to the Erebuni District Prosecutor (*Էրեբունի համայնքի դատախազ*) that the applicant had failed to appear for military service on 15 May 2001 and was intentionally avoiding service in the army.

18. During July and on 1 August 2001 the applicant, together with his father and his defence counsel, went on several occasions to the District Prosecutor's Office to inquire with the relevant investigator about his situation and to discuss the forthcoming trial.

19. On 1 August 2001 the investigator instituted criminal proceedings on account of the applicant's draft evasion. According to the applicant, the superior prosecutor refused to bring charges against him until further investigation had been carried out. On 8 August 2001 the applicant, who apparently wanted to benefit from the above amnesty act, complained about this to the General Prosecutor's Office (*ՀՀ գլխավոր դատախազություն*). He received no reply to this complaint.

20. On 1 October 2001 the investigator issued five orders in respect of the applicant: (1) to bring a charge of draft evasion against the applicant; (2) to apply to court for authorisation of the applicant's detention on remand; (3) to declare the applicant a fugitive and institute a search for him; (4) to apply to court for authorisation to monitor the applicant's

correspondence; and (5) to suspend the proceedings until the applicant had been found. This last order stated:

> "... since, having undertaken investigative and operative search measures, the attempts to find the wanted [applicant] within two months ... have been unsuccessful and his whereabouts are unknown, ... [it is necessary] to suspend the investigation ... and ... to activate operative search measures to find the accused."

21. Neither the applicant nor his family were notified of these orders, despite the fact that since mid-June 2001 he had been living at the family home and that he had met with the investigator on several occasions in July-August 2001.

22. On 2 October 2001 the Erebuni and Nubarashen District Court of Yerevan (*Երևան քաղաքի Էրեբունի և Նուբարաշեն համայնքների առաջին ատյանի դատարան*) authorised the monitoring of the applicant's correspondence and his detention on remand. Neither the applicant nor his family were notified about these decisions, and the investigating authority made no attempts to contact them until his arrest in September 2002.

23. On 26 April 2002 the Convention entered into force in respect of Armenia.

### C. The applicant's arrest and trial

24. On 4 September 2002, while the applicant was at work, two police officers came to his family home, informing his parents that he was on the wanted list and inquiring about his whereabouts.

25. On 5 September 2002 the police officers returned and accompanied the applicant to a local police station, where they drew up a record of the applicant's voluntary surrender which stated that the applicant, having found out that he was on the wanted list, decided to appear at the police station. On the same date, the applicant was placed in the Nubarashen detention facility.

26. On 9 September 2002 the investigating authority resumed the criminal proceedings against the applicant.

27. On 11 September 2002 the applicant was presented with the 1 October 2001 charge for the first time. During his questioning on the same date the applicant submitted that he consciously refused to perform military service because of his religious beliefs but was ready to perform alternative civilian service instead.

28. On the same date, the applicant and his defence counsel were granted access to the case file. The indictment was finalised on 18 September 2002 and approved by the prosecutor on 23 September 2002.

29. On 22 October 2002 the applicant's trial commenced in the Erebuni and Nubarashen District Court of Yerevan. The trial was adjourned until

28 October 2002 because the applicant had not been served with a copy of the indictment.

30. On 28 October 2002, at the court hearing, the applicant made the same submissions as during his questioning. On the same date, the Erebuni and Nubarashen District Court found the applicant guilty as charged and sentenced him to one year and six months in prison.

31. On 29 November 2002 the prosecutor lodged an appeal against this judgment, seeking a harsher punishment. The appeal stated:

> "The [applicant] did not accept his guilt, explaining that he refused [military] service having studied the Bible, and as one of Jehovah's Witnesses his faith did not permit him to serve in the armed forces of Armenia.
>
> [The applicant] is physically fit and is not employed.
>
> I believe that the court issued an obviously mild punishment and did not take into consideration the degree of social danger of the crime, the personality of [the applicant], and the clearly unfounded and dangerous reasons for [the applicant's] refusal of [military] service."

32. On 19 December 2002 the applicant's defence counsel lodged objections in reply to the prosecutor's appeal, in which he argued that the judgment imposed was in violation of the applicant's freedom of conscience and religion guaranteed by Article 23 of the Constitution, Article 9 of the Convention and other international instruments. He further argued that the absence of a law on alternative civilian service could not serve as a justification for imposing criminal liability on a person refusing military service for reasons of conscience.

33. On 24 December 2002, in the proceedings before the Criminal and Military Court of Appeal (*ՀՀ քրեական և զինվորական գործերով վերաքննիչ դատարան*), the prosecutor argued, *inter alia*, that a harsher sentence should be imposed also because of the fact that the applicant had hidden from the investigation. The applicant submits that during the appeal hearing pressure was put on him to abandon his religious beliefs regarding military service: both the prosecutor and one of the judges offered to terminate his case if he dropped his objection and went to perform his military duty.

34. On the same date, the Court of Appeal decided to grant the prosecutor's appeal and increased the applicant's sentence to two and a half years, stating that:

> "The court of first instance, when sentencing [the applicant], took into account that [the applicant] had committed not a grave crime, that he was young, he had not been guilt-stained in the past, that he had confessed his guilt, had actively assisted in the disclosure of the crime and had sincerely repented.
>
> However, in the course of the appeal proceedings it was established that not only did [the applicant] not accept his guilt, nor did he repent of having committed the crime,

not only did he not assist in the disclosure of the crime, but he hid from preliminary investigation and his whereabouts were unknown, for which reason a search for him was initiated.

Based on these circumstances, as well as taking into account the nature, motives and degree of social danger of the crime, the Court of Appeal considers that the prosecutor's appeal must be granted, and a harsher and adequate punishment must be imposed on [the applicant].”

35. On an unspecified date, the applicant's defence counsel brought a cassation appeal against this judgment, in which he raised arguments similar to the ones made in his objections of 19 December 2002. He reiterated the applicant's willingness to perform alternative civilian service and submitted that, instead of spending two and a half years in prison, the applicant could have done socially useful work. According to him, such a possibility was envisaged under Section 12 of the Military Liability Act (*«Զինապարտության մասին» ՀՀ օրենք*). Furthermore, he argued that the principle of alternative service was enshrined in Section 19 of the Freedom of Conscience and Religious Organisations Act (*«Խղճի ազատության և կրոնական կազմակերպությունների մասին» ՀՀ օրենք*), and the absence of appropriate implementation mechanisms could not be blamed on the applicant.

36. On 24 January 2003 the Court of Cassation (*ՀՀ վճռաբեկ դատարան*) upheld the judgment of the Court of Appeal, finding, *inter alia*, that the rights guaranteed under Article 23 of the Constitution were subject to limitations under its Article 44 such as in the interests of State security, public safety and the protection of public order. Similar limitations were envisaged also by Article 9 § 2 of the Convention.

37. On 22 July 2003 the applicant was released on parole after having served about ten and a half months of his sentence.

## II. RELEVANT DOMESTIC LAW

### A. The Constitution of Armenia of 1995 (prior to the amendments introduced in 2005)

38. The relevant provisions of the Constitution read as follows:

**Article 23**

“Everyone has the right to freedom of thought, conscience and religion.”

**Article 44**

"The fundamental rights and freedoms of man and citizen enshrined in Articles 23-27 of the Constitution can be restricted only by law if necessary for the protection of State security and public safety, the public order, the health and morals of society, and the rights, freedoms, honour and good name of others."

**Article 47**

"Every citizen is obliged to participate in the defence of the Republic of Armenia in accordance with a procedure prescribed by law."

## B. The Criminal Code of 1961 (no longer in force as of 1 August 2003) (*ՀՀ քրեական օրենսգիրք՝ ուժը կորցրել է 01.08.03 թվականից*)

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

**Article 75: Evasion of a regular call-up to active military service**

"Evasion of a regular call-up to active military service is punishable by imprisonment for a period of one to three years."

## C. The Military Liability Act of 1998

40. The relevant provisions of the Military Liability Act read as follows:

**Section 11: Conscription to compulsory military service**

"1. Male conscripts and officers of the first category reserve whose age is between 18 and 27 [and] who have been found physically fit for military service in peacetime shall be drafted to compulsory military service."

**Section 12: Exemption from compulsory military service**

"1. [A citizen] can be exempted from compulsory military service: (a) if the national recruiting commission recognises him to be unfit for military service on account of poor health, striking him off the military register; (b) if his father (mother) or brother (sister) perished while performing the duty of defending Armenia or in [the Armenian] armed forces and other troops, and he is the only male child in a family; (c) by a decree of the Government; (d) if he has performed compulsory military service in foreign armed forces before acquiring Armenian citizenship; or (e) he has a science degree (candidate of science or doctor of science) and is engaged in specialised, scientific or educational activities."

**Section 16: Granting deferral of conscription to compulsory military service on other grounds**

"2. In specific cases the Government defines categories of citizens and particular individuals to be granted deferral from conscription to compulsory military service."

## D. The Freedom of Conscience and Religious Organisations Act of 1991

41. The relevant provisions of the Freedom of Conscience and Religious Organisations Act read as follows:

**Section 19**

"All civic obligations envisaged by law apply equally to believing members of religious organisations as they do to other citizens.

In specific cases of contradiction between civic obligations and religious convictions, the matter of discharging one's civic obligations can be resolved by means of an alternative principle, in the procedure prescribed by law, by mutual agreement between the relevant State authority and the given religious organisation."

## E. The Alternative Service Act adopted on 17 December 2003 and entered into force on 1 July 2004 *(«Այլընտրանքային ծառայության մասին» ՀՀ օրենք)*

42. The relevant provisions of the Act, with their subsequent amendments introduced on 22 November 2004, read as follows:

**Section 2: The notion and types of alternative service**

"1. Alternative service, within the meaning of this Act, is the service replacing the compulsory fixed-period military service which does not involve the carrying, keeping, maintenance and use of arms, and which is performed both in military and civilian institutions.

2. Alternative service includes the following types: (a) alternative military [service, namely] military service performed in the armed forces of Armenia which does not involve being on combat duty, and the carrying, keeping, maintenance and use of arms; and (b) alternative labour [service, namely] the labour service performed outside the armed forces of Armenia.

3. The purpose of alternative service is to ensure the fulfilment of a civic obligation before the motherland and society and it does not have a punitive, depreciatory and degrading nature."

**Section 3: Grounds for performing alternative service**

"1. An Armenian citizen, whose creed or religious beliefs do not allow him to carry out military service in a military unit, including the carrying, keeping, maintenance and use of arms, can perform alternative service."

## III. RELEVANT INTERNATIONAL DOCUMENTS

### A. Opinion No. 221 (2000) of the Parliamentary Assembly of the Council of Europe (PACE): Armenia's application for membership of the Council of Europe

43. The relevant extract from the Opinion stipulates:

"13. The Parliamentary Assembly takes note of the letters from the President of Armenia, the speaker of the parliament, the Prime Minister and the chairmen of the political parties represented in the parliament, and notes that Armenia undertakes to honour the following commitments: ... iv. human rights: ... d. to adopt, within three years of accession, a law on alternative service in compliance with European standards and, in the meantime, to pardon all conscientious objectors sentenced to prison terms or service in disciplinary battalions, allowing them instead to choose, when the law on alternative service has come into force, to perform non-armed military service or alternative civilian service."

### B. Recommendation 1518 (2001) of the PACE: Exercise of the right of conscientious objection to military service in Council of Europe member states

44. The relevant extract from the Recommendation provides:

"2. The right of conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Universal Declaration of Human Rights and the European Convention on Human Rights.

3. Most Council of Europe member states have introduced the right of conscientious objection into their constitutions or legislation. There are only five members states where this right is not recognised."

### C. Charter of Fundamental Rights of the European Union (2000)

45. The relevant provisions of the Charter read as follows:

**Article 10: Freedom of thought, conscience and religion**

"1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in

community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

46. The applicant complained that his conviction for refusal to serve in the army had violated Article 9 of the Convention which reads 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. The parties' submissions

#### *1. The Government*

47. The Government submitted that the rights guaranteed by the Convention and the Armenian Constitution, including the right to freedom of thought, conscience and religion, were to be applied to everyone equally and without discrimination. The applicant was an Armenian citizen which meant that he was entitled to all the rights and freedoms, and was subject to all the obligations prescribed by the Constitution and laws, regardless of his convictions. Military service was a constitutional obligation of all citizens. While Section 12 of the Military Liability Act prescribed a number of exceptions to this rule, they did not include such grounds as being a Jehovah's Witness. Thus, exemption from compulsory military service on a ground not prescribed by law would have been in breach of the principle of equality and non-discrimination. The fulfilment of an obligation prescribed by the Constitution could not be considered as an interference with the applicant's rights, since all citizens were subject to such duties regardless of their religious convictions. In the case of *Valsamis v. Greece* the Commission considered that Article 9 did not confer a right to exemption

from disciplinary rules which applied generally and in a neutral manner (judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 36). Furthermore, this Article did not give conscientious objectors the right to be exempted from military or substitute civilian service, and it did not prevent a Contracting Party from imposing sanctions on those who rejected such service (see *Heudens v. Belgium*, application no. 24630/94, Commission decision of 22 May 1995, unreported). Relying on this and a similar finding made in the case of *Peters v. the Netherlands* (application no. 22793/93, Commission decision of 30 November 1994, unreported), the Government contended that there had been no interference with the applicant's freedom of thought or conscience. In sum, there had not been a violation of Article 9.

48. The Government agreed that the Convention was a "living instrument" which had to be interpreted in the light of present day conditions. However, the question of whether this or that Article of the Convention was applicable to the present case was to be considered from the point of view of the interpretation of the Convention existing at the time when the events of the case took place. The applicant was convicted in the years 2001-2002 and his conviction at that time was in line with the approach of the international community. Moreover, as already indicated above, the conviction for conscientious objection was also considered to be lawful and justified under the Convention. Nor did the rights guaranteed by Article 9 in any way concern exemption from compulsory military service on religious, political or any other grounds. The above-mentioned cases of *Heudens* and *Peters*, even if about ten years old, were the latest decisions on the matter and the Court had not rendered since then a single judgment which reached different conclusions. Besides, the Court did not recognise the applicability of Article 9 to the disputed relations even in its more recent judgments. In the case of *Thlimmenos v. Greece* the Court did not find it necessary to examine whether the applicant's initial conviction and the authorities' subsequent refusal to appoint him to a chartered accountant's post amounted to interference with his rights under Article 9. The Court did not address the question of whether, notwithstanding the wording of Article 4 § 3 (b), the imposition of such sanctions on conscientious objectors to compulsory military service might in itself infringe the rights guaranteed by Article 9 ([GC], no. 34369/97, § 43, ECHR 2000-IV). The Court had a similar approach in the case of *Ülke v. Turkey* (no. 39437/98, §§ 53-54, 24 January 2006). Based on the above, the Government insisted that up until now, and moreover in the period when the circumstances of the case took place, conviction for conscientious objection was not considered to infringe the rights guaranteed by Article 9 and the Armenian authorities had therefore acted in compliance with the requirements of the Convention. Given the established case-law on this matter, they could not anticipate the possibility of a new interpretation of Article 9 by the Court and

consequently could not make their actions comply with that possible "new approach". In conclusion, the fact that the Convention was a "living instrument" did not in this case imply modification of the Court's approach to the question of applicability of Article 9.

49. The Government further submitted that there were fifty-eight registered religious organisations at present in Armenia, including the Jehovah's Witnesses, nine branches of religious organisations and one agency. Each of them was provided with equal opportunities under the law, including equal rights and obligations. So if each of them insisted that military service was against their religious convictions, a situation would arise in which not only members of Jehovah's Witnesses but also those of other religious organisations would be able to refuse to perform their obligation to defend their home country. Furthermore, the Constitution prescribed three types of obligations towards the State, namely defence of home country, payment of taxes and duties, and respect for laws and the rights and freedoms of others. Consequently, members of Jehovah's Witnesses or any other religious organisation might equally assert that, for instance, payment of taxes and duties was against their religious convictions and the State would be obliged not to convict them as this might be found to be in violation of Article 9. Such an approach was not acceptable taking into account the fact that a person, in order to avoid the fulfilment of his or her obligations towards the State, could become a member of this or that religious organisation. Based on the above, the Government asserted that religious convictions could not serve as a means for a citizen to avoid the fulfilment of obligations prescribed by the Constitution.

50. The Government finally submitted that, as far as Armenia's obligations undertaken upon accession to the Council of Europe were concerned, on 17 December 2003 the Alternative Service Act was adopted. By adopting this Act, which established a substitute service, the authorities accepted the possibility of exemption from military service on religious grounds, while conscientious objectors were provided with an alternative for performing their constitutional obligation. Thus, at present conscientious objectors were being convicted only if they also refused to perform the alternative service. As regards the obligation to pardon all conscientious objectors sentenced to prison terms, the Government insisted that the authorities had complied with it by exempting the applicant from serving the imposed sentence. In particular, after having being sentenced to two years and six months' imprisonment, the applicant had been released six months after the decision of the Court of Cassation.

*2. The applicant*

51. The applicant submitted, relying on PACE Recommendation 1518, that his refusal to serve in the army had been a manifestation of his freedom of thought and conscience, and his conviction amounted to an interference

with this freedom. The Government, claiming in their observations that there had not been such an interference, relied on ten year-old decisions of the Commission, not taking into consideration the gradual recognition of the right to conscientious objection under Article 9, as stated in the above Recommendation, and its development into a customary practice within member states of the Council of Europe. Furthermore, this right was also confirmed by the 2004 Treaty Establishing a Constitution for Europe. Considering the "living instrument" doctrine, the applicant asked the Court to review the Commission's and Court's case-law which allowed Article 4 § 3 (b) to override the guarantees of Article 9, in the light of the evolution of the law and the current practice among member states, the greater majority of which had recognised the right of conscientious objection. The fact that the recognition of conscientious objection to military service was now a binding rule was reflected in the policy of the Council of Europe which required that new member states undertake to recognise this as a condition of their admission into the organisation, as most recently happened with Armenia.

52. The applicant further submitted that the Government's reasoning concerning the "living instrument" doctrine ignored the present-day conditions in Council of Europe member states. Furthermore, such reasoning by the Government crystallised the interpretation of the Convention to previous Court decisions thereby "freezing" Convention rights and preventing an evolutive interpretation. Armenia itself had conceded this right before becoming a member of the Council of Europe, after it obtained Special Guest status with the PACE on 26 January 1996. It follows also from PACE Opinion No. 221 (2000) that the Armenian authorities were well aware of the general recognition by member states of the right to conscientious objection and of the different resolutions previously adopted by the Council of Europe on the rights of conscientious objectors. The Armenian Government, at that time, assured the Committee of Ministers of its full compliance with this principle by committing itself to "pardon all conscientious objectors sentenced to prison terms". This was in conformity with "present-day" conditions which existed in the Council of Europe in 2000. Thus, the claim by the Government that they "could not anticipate the possibility of new interpretation of Article 9" was misleading. Furthermore, the Government's arguments concerning the refusal to pay taxes could not apply to the present case since, as opposed to the recognition of the right of conscientious objection, the non-payment of taxes because of religious convictions could not be said to be regional practice that had become a binding rule on new members of the Council of Europe.

53. The applicant further claimed that the interference with his right to freedom of religion and belief had not been prescribed by law, since his conviction was not lawful in the light of Armenia's Constitution, international obligations and other provisions of international and domestic

law. It did not pursue a legitimate aim since Article 9 § 2 does not permit limitations in the interests of national security. As far as public safety and the protection of public order were concerned, no court made any attempt to explain how his conviction was connected with the pursuit of such aims. Finally, given the customary practice now adopted by most of the member states, the imposition of criminal sanctions on conscientious objectors, even in those few member states that had not yet implemented alternative civilian service, could not be regarded as necessary in a democratic society. Armenia acknowledged this when it undertook a commitment to refrain from imprisonment of conscientious objectors even before such a law was passed as a condition of membership in the Council of Europe. Thus, deprivation of liberty in a penal colony with convicted criminals was wholly disproportionate in a modern democratic State.

54. The applicant finally submitted that the adoption of the Alternative Service Act did not have a direct bearing on the present case since it was adopted after the events complained about. At the material time, the applicant was denied the opportunity to perform alternative civilian service and was instead imprisoned. Furthermore, this Act provided for alternative service which was under the control and supervision of the military. Thus genuine civilian alternative service in compliance with European standards was still not available in Armenia. This was recently confirmed by PACE Monitoring Committee Resolution 1532 (2007) and the European Commission against Racism and Intolerance in its second report on Armenia of 30 June 2006. Such alternative service was not acceptable to conscientious objectors who were Jehovah's Witnesses like the applicant. At present there were 64 other Jehovah's Witnesses serving prison terms for refusing to perform such service. As regards the Government's submission that the applicant had been exempted from serving his sentence, the applicant had been neither pardoned nor exempted from military service. On the contrary, he had been imprisoned for ten months and seventeen days before being released on parole.

### B. The Court's assessment

#### *1. Recapitulation of the relevant case-law*

55. The Court considers it necessary first of all to recapitulate the existing case-law under the Convention regarding the disputed matter.

56. One of the earliest Commission decisions on this matter was in the case of *X. v. Austria*, in which the Commission stated that, in interpreting Article 9 of the Convention, it had also taken into consideration the terms of Article 4 § 3 (b) of the Convention which states that forced or compulsory labour shall not include “any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service

exacted instead of compulsory military service". This provision clearly showed that, by including the words "in countries where they are recognised" in Article 4 § 3 (b), a choice was left to the High Contracting Parties to the Convention whether or not to recognise conscientious objectors and, if so recognised, to provide some substitute service. The Commission, for this reason, found that Article 9, as qualified by Article 4 § 3 (b), did not impose on a state the obligation to recognise conscientious objectors and, consequently, to make special arrangements for the exercise of their right to freedom of conscience and religion as far as it affected their compulsory military service. It followed that these Articles did not prevent a State which had not recognised conscientious objectors from punishing those who refused to do military service (no. 5591/72, Commission decision of 2 April 1973, Collection 43, p. 161).

57. This approach was subsequently confirmed by the Commission in the case of *X. v. Federal Republic of Germany* which concerned the applicant's conscientious objection to substitute civilian service (no. 7705/76, Commission decision 5 July 1977, Decisions and Reports (DR) 9, p. 196). In the case of *Conscientious objectors v. Denmark* the Commission reiterated that the right of conscientious objection was not included among the rights and freedoms guaranteed by the Convention (no. 7565/76, Commission decision 7 March 1977, DR 9, p. 117). In the case of *A. v. Switzerland* the Commission reaffirmed its position and added that neither the sentence passed on the applicant for refusing to perform military service nor the fact of its not being suspended could constitute a breach of Article 9 (no. 10640/83, Commission decision of 9 May 1984, DR 38, p. 219). The finding that the right of conscientious objection was not guaranteed by any article of the Convention was upheld by the Commission on numerous subsequent occasions (see, *mutatis mutandis*, *N. v. Sweden*, no. 10410/83, Commission decision of 11 October 1984, DR 40, p. 203; *Autio v. Finland*, no. 17086/90, Commission decision of 6 December 1991, DR 72, p. 245; *Peters*, cited above; and *Heudens*, cited above).

58. The issue of conviction for conscientious objection was brought on several occasions also before the Court. In the case of *Thlimmenos v. Greece* the applicant argued that his conviction for insubordination for refusing to wear military uniform and the authorities' subsequent refusal to admit him to the post of a chartered accountant due to this conviction violated his rights guaranteed under Article 9 and Article 14 taken in conjunction with it. The Court did not find it necessary in that case to examine whether the applicant's initial conviction and the subsequent refusal interfered with his rights under Article 9. It stated, in particular, that it did not have to address the question of whether, notwithstanding the wording of Article 4 § 3 (b), the imposition of such sanctions on conscientious objectors to compulsory military service might in itself

infringe the right to freedom of thought, conscience and religion guaranteed by Article 9 (see *Thlimmenos*, cited above, §§ 43 and 53).

59. In the case of *Ülke v. Turkey*, which concerned the applicant's multiple consecutive convictions for his repeated refusals to wear military uniform on grounds of conscience, the Court once again did not find it necessary to pursue the examination of applicability of Article 9 (see *Ülke*, cited above, §§ 53-54). Instead, this issue was examined under Article 3, a violation of which was found since the multiple convictions were considered to amount to degrading treatment as they caused the applicant severe pain and suffering which went beyond the normal element of humiliation inherent in any criminal sentence or detention (ibid., §§ 63-64).

60. In sum, as interpreted by the former Commission, Article 9 does not guarantee the right to conscientious objection.

*2. Application of the above principles to the present case*

61. The Court notes that the applicant was convicted for his refusal to perform compulsory military service on the ground that it was against his religious convictions as a Jehovah's Witness. The applicant requested the Court to review the Convention case-law concerning the issue of conscientious objection and applicability of Article 9 to this issue, relying on the "living instrument" doctrine.

62. The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26). It is legitimate when deciding whether a certain measure is acceptable under one of its provisions to take account of the standards prevailing amongst the member States of the Council of Europe (see *T. v. the United Kingdom* [GC], no. 24724/94, § 70, 16 December 1999).

63. The Court does not deny that the majority of member states of the Council of Europe have indeed adopted laws providing for various forms of alternative service for conscientious objectors. At the same time, the Court cannot overlook the provisions contained in Article 4 § 3 (b) of the Convention summarised above (see paragraphs 56-57 above). In the Court's opinion, since this Article clearly left the choice of recognising conscientious objectors to each Contracting Party, the fact that the majority of the Contracting Parties have recognised this right cannot be relied upon to hold a Contracting Party which has not done so to be in violation of its Convention obligations. Consequently, as far as this particular issue is concerned, this factor cannot serve a useful purpose for the evolutive interpretation of the Convention. In such circumstances, the Court concludes that Article 9, read in the light of Article 4 § 3 (b), does not guarantee a right to refuse military service on conscientious grounds.

64. The Court notes that at the material time the right to conscientious objection was not recognised in Armenia. On the other hand, Armenia had

officially committed itself to the outside world legally to recognise that right and – in the meantime – to pardon all convicted conscientious objectors, allowing them instead, when the law on alternative service had come into force, to perform alternative civilian service (see paragraph 43 above). The Court does not doubt that the applicant's objection to compulsory military service was based on his genuine religious convictions and accepts that the very fact that Armenia, by its declaration, officially committed itself to the outside world, must have given him a legitimate expectation to be allowed to perform alternative service after the entry into force of the new law instead of having to serve a prison sentence. Nevertheless, given its conclusion in paragraph 63 above, the Court considers that the authorities cannot be regarded as having acted in breach of their Convention obligations for convicting the applicant for his refusal to perform military service.

65. The Court further takes note of the fact that a law on alternative service has already been adopted in Armenia, thereby recognising the right to conscientious objection. The Court considers, however, that the substance of this law and the manner of its application in practice fall beyond the scope of the present application.

66. It follows that there has been no violation of Article 9.

## FOR THESE REASONS, THE COURT

*Holds* by six votes to one that there has been no violation of Article 9 of the Convention.

Done in English, and notified in writing on 27 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Stanley Naismith | Josep Casadevall |
| Deputy Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Elisabet Fura;

(b) dissenting opinion of Judge Ann Power.

J.C.M.
S.H.N.

# CONCURRING OPINION OF JUDGE FURA

1. Although I voted with the majority in finding no violation of Article 9 I did so out of discipline and respect for the Court's case-law. I would like to add the following.

2. It is somewhat surprising that the Court's case-law under Article 9 is not more developed. The existing case-law, however, is clear in as much as there is no right of conscientious objection to military service within the Convention generally or under Article 9 in particular. So to apply general law to someone who refuses to do military service on grounds of conscience would not violate Article 9.

3. A State may - but is not obliged to - recognise conscientious objection and only if it does so should it provide some kind of substitute non-military service as an alternative. A more harmonized view on these issues seems to be emerging in Europe as of late. In most States recognised conscientious objectors have the right to perform an alternative service. In some States, however, only religious grounds are accepted and in other States there seems to be no legal system enabling conscientious objectors to be recognised. Sometimes an alternative service may last for much longer than the military service.

4. Lately, the Court has shown some willingness to tackle the issue of conscientious objection by looking beyond Article 9. In *Thlimmenos v Greece* (2000) the applicant's previous conviction for refusing to wear a military uniform could not justify his exclusion from the chartered accountants profession. In that case it was held that the State's failure to distinguish his case from that of more serious criminal offences – from which it was significantly different (paragraph 44) – meant that Article 14 taken in conjunction with Article 9 had been violated. The Court has in other cases based its reasoning on Article 3 (degrading treatment) and Article 5 (unlawful detention): see *Ülke v Turkey* (2006) and *Tsirlis and Kouloumpas v Greece* (1997) respectively.

5. To date the Court has not found that the obligation to perform military service breaches Article 9 but it seems to have been prepared to examine the proportionality of sanctions imposed on conscientious objectors and to find a violation of Article 9 if excessive, like in *Thlimmenos,* where the objector served a prison sentence **and** was excluded from the profession of chartered accountants.

6. My preliminary conclusion in the case at hand was to relinquish and allow the Grand Chamber to re-examine the issue /revisit the case-law/ and maybe to take a step further and to state that to sentence someone who refuses to do military service on grounds of conscience would be in violation of Article 9. Present day conditions might have changed and lead to such a conclusion, at least when the sentence includes prison.

7. As an alternative I would have preferred to requalify the complaint and examine it under Article 3 since the applicant was imprisoned against the clear (and perhaps even legally binding) commitment of Armenia (see paragraph 43 of the judgment) and this might have amounted to degrading treatment, drawing inspiration from *Ülke v Turkey* and from the *Nuclear Test Case* decided by the International Court of Justice (*Nuclear Tests (Australia v. France), Judgement, I.C.J. Reports 1974, p.253, paragraphs 42-60).*

# DISSENTING OPINION OF JUDGE POWER

1. In consideration of its application for membership of the Council of Europe, the respondent state, in May 2000, made a unilateral declaration whereby it undertook to adopt, within three years of accession, a law on alternative service in compliance with European standards and, in the meantime, to pardon all conscientious objectors sentenced to prison terms, allowing them instead to choose to perform alternative civilian service when that law entered into force. Subsequent to that state's ratification of the Convention and more than two years after its declaration, the applicant was convicted and sentenced to a significant term of imprisonment because he refused to be drafted for compulsory military service. His refusal was based upon his religious beliefs which, it is uncontested, were genuinely held. He was at all times willing to perform alternative civilian service.

2. In finding no violation of Article 9, the majority, in my view, has failed to have sufficient regard to two important principles, namely, that the Convention is a 'living instrument' whose provisions must be interpreted in accordance with current legal standards and norms and that, notwithstanding the lawfulness of a permitted interference with a Convention right, the Court retains its supervisory role in assessing the proportionality of any measure taken.

*(i) The Convention is a 'Living Instrument'*

3. Compulsory military service is not *per se* prohibited under the Convention but the Court has repeatedly stressed that this treaty is a 'living instrument' and that its provisions must be approached in a dynamic and evolutive manner if its object and purpose is to be achieved. Its norms, in other words, must be interpreted and applied in the light of present day conditions.[1] Indeed, the Court has recognised that its decisions must be kept under review[2] and that in coming to a judgment it cannot but be influenced by the developments and commonly accepted standards and policy of the member states of the Council of Europe. [3]

4. Bound, as it considers itself, by the case law of the former Commission, the majority's finding, in my view, fails to reflect the almost universal acceptance within democratic societies that "*the right of conscientious objection is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Universal Declaration of*

[1] *Tyrer v. United Kingdom* (1978) 2 EHRR 1 § 31.
[2] *Rees v. United Kingdom (1986*) 9 EHRR § 56; see also the subsequent cases of *Cossey v. United Kingdom* (1990) 13 EHRR § 622; *Sheffield and Horsham v. United Kingdom* (1998) 27 EHRR § 163; and *Goodwin v. United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.
[3] *Tyrer*, § 31.

*Human Rights and European Convention on Human Rights".*[4] The Council of Europe (as far back as 1987), the United Nations High Commissioner for Human Rights and the European Parliament have all underscored this point.[5] Indeed, the respondent state's own declaration made in 2000 confirmed its acceptance of what were, even then, current and common European legal standards in this area and its subsequent conduct in convicting and imprisoning the applicant was inconsistent with its recognition of those standards and its commitment to apply them in practice.[6] Adopting the Court's general approach to interpreting and applying the Convention in the light of current legal norms and standards I cannot but conclude that there has been a violation of Article 9 in this case.

5. In any event, it is clear that the Court's position on the right of conscientious objection can be distinguished from the approach adopted by the former Commission. It is evident that the Court regards the question as one that raises important issues of human rights. In *Thlimmenos v. Greece* the Grand Chamber considered that, unlike other criminal offences, a conviction for refusing on religious and philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude and that the ongoing adverse consequences of the applicant's earlier criminal conviction in this regard (a prohibition on entry to a profession) was sufficient to constitute a violation of Article 14 in conjunction with Article 9.[7] In *Stefanov v. Bulgaria* the Court agreed to strike out the case when satisfied that a settlement reached between the parties "was based on respect for human rights" as defined in the Convention.[8] Its decision recorded in detail the terms of the settlement which provided for the dismissal of all criminal proceedings against the applicant (and others) for refusing to perform military service, the elimination of all penalties imposed, the furnishing of undertakings by the respondent state to introduce legislation providing for a total amnesty of these cases and for a purely civilian alternative to military service and, finally, for the payment of the

[4] Recommendation (1518) of the PACE (2001), § 44.

[5] See, *inter alia*, Recommendation No. R (87) 8, adopted by the Committee of Ministers on 9 April 1987; Recommendation No (1518) of the PACE (2001); Report of the United Nations Office of the High Commissioner for Human Rights, 27 February 2006; and Charter of Fundamental Rights of the European Union (2000).

[6] Notwithstanding the undertaking given by Armenia to adopt a law on alternative service in compliance with European standards, the Parliamentary Assembly of the Council of Europe was disappointed to note in 2007 that current law still does not offer conscientious objectors any guarantee of "*genuine alternative service of a clearly civilian nature, which should be neither deterrent nor punitive in character*" as provided for by Council of Europe standards. The Assembly was "*deeply concerned to note that for lack of a genuine form of civilian service, dozens of conscientious objectors, most of whom are Jehovah's Witnesses, continue to be imprisoned, since they prefer prison to an alternative service not of a truly civilian nature*". (PACE Monitoring Committee Resolution 1532 (2007).

[7] [GC], no. 34369/97, ECHR 2000-IV.

[8] Application no. 32438/96, admissibility decision of 6 April 2000.

applicant's costs and expenses. Six years later, in *Ülke v. Turkey* the Court found that the repeated imprisonment of a peace activist for refusing to serve in the military constituted a violation of Article 3. It considered that the domestic law had failed to make provision for conscientious objectors and did not provide an appropriate means of dealing with refusals to perform military service on account of one's beliefs.[9] In view of the foregoing, it would appear that the majority's finding is not just incompatible with current European standards on the question of conscientious objection but that it parts company with the Court itself in terms of the overall direction of the jurisprudence as discernible in the case law.

*(ii) Proportionality of Interference*

6. I accept that Article 4 § 3 (b) neither recognises nor excludes a right of conscientious objection but it does not follow that a state which excludes recognition thereby acquires a *carte blanche* in terms of how it deals with those who assert such an objection. The substantive rights under Article 9 § 1 remain and any permitted interference with the freedom to manifest one's religion or belief must be shown to be justified as "necessary" for the protection of the public interests listed in 9 § 2 (none of which, incidentally, includes the interests of national security).

7. The Court has consistently held that a margin of appreciation which a state enjoys in assessing whether and to what extent interference is necessary goes hand in hand with European supervision covering both the legislation and the decisions applying it.[10] When carrying out that supervision, the Court must ascertain whether the measures taken at national level are justifiable in principle and are proportionate[11] and it must look at the impugned judicial decisions against the background of the case as a whole.[12] The respondent state in this case has offered no justification as to what, if any, 'pressing social need' existed which necessitated the incarceration of the applicant in the particular circumstances of this matter.[13] The onus was on that state to demonstrate this necessity, all the more so in circumstances where it had already confirmed its recognition of and

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[9] *Ülke v. Turkey*, no. 39437/98, 24 January 2006, at § 61 and 62.

[10] *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, Series A no. 173; *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, Series A no. 165; and *Kokkinakis v. Greece*, 25 May 1993, § 47, Series A no. 260-A.

[11] *Groppera Radio AG and Others v. Switzerland*, § 72; see also *Barfod v. Denmark*, 22 February 1989, Series A no 149.

[12] *Kokkinakis v Greece*, 25 May 1993, § 47, Series A no. 260-A.

[13] See *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, §125, ECHR 2001-XII where the Court held that the mere assertion of a danger to national security did not absolve the state from indicating the justification for advancing such a claim.

commitment to current European standards in this area. It has not established that the applicant's imprisonment was necessary, thus failing the proportionality test, and this failure confirms me in my view that there has been a violation of Article 9. Insofar as the majority did not carry out the supervisory function reserved to this Court, its approach, it seems to me, is not consistent with the Court's practice in interpreting the necessity of state interference with a protected Convention right.