



GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF
ARMED FORCES (DCAF)

WORKING PAPER – NO. 164

HUMAN RIGHTS AND FUNDAMENTAL
FREEDOMS OF ARMED FORCES PERSONNEL:
THE EUROPEAN COURT OF HUMAN RIGHTS

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University of Durham, UK*

Preliminary Research, Not for Quotation

Presentation for the Working Group on 'Human Rights and Fundamental Freedoms of Armed Forces Personnel', Hotel Warwick, Geneva, 22 April 2005 as part of the 9th meeting of the International Advisory Board of the Geneva Centre for the Democratic Control of Armed Forces

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HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF ARMED FORCES PERSONNEL: THE EUROPEAN COURT OF HUMAN RIGHTS

Ian Leigh

Introduction

What should be the approach to the rights of members of the armed forces?

The OSCE Code of Conduct on Politico-Military Aspects of Security Paragraph 32 commits participating states to ensure that military, paramilitary and security service personnel will be able to enjoy and exercise their human rights and fundamental freedoms. ..in conformity with relevant constitutional and legal provisions ‘ One valuable source of guidance is the jurisprudence under the European Convention on Human Rights 1950. The Convention treats members of the armed forces as ‘Citizens in uniform’ ie service personnel retain their civil and political rights but modified in an appropriate way according to the military context. (In the same way paragraph 32 of the OSCE is qualified by its final words ‘ in conformity with *the requirements of service*).

The General Approach

The general approach can be seen in the case of *Engel v Netherlands* (European Court of Human Rights, 1976)

54. ‘...the Convention applies in principle to members of the armed forces and not only to civilians. It specifies in Articles 1 and 14 (art. 1, art. 14) that "everyone within (the) jurisdiction" of the Contracting States is to enjoy "without discrimination" the rights and freedoms set out in Section I.

Nevertheless, when interpreting and applying the rules of the Convention in the present case, the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces.'

This approach can be seen in operation in relation to several of the most important civil and political rights: freedom of expression, the right to respect for private life home and correspondence, freedom of thought, belief and conscience, and freedom of association. These are all 'qualified' rights within the Convention system- that is they are rights that states may restrict provided certain conditions are met. Limitations must be 'in accordance with law' or 'authorised by law' and 'necessary in a democratic society' for one of a number of specified interests. That most relevant to the armed forces is 'in the interests of national security' although on occasion 'the prevention of disorder' and the protection of the 'rights and freedom of others' have also been cited.

Several factors are taken into account in adapting human rights standards to the armed forces in these instances.

The Nature of Military Discipline

Military discipline implies some limit on freedom of expression. *In Engel v Netherlands* the European Court of Human Rights stated:

100. Of course, the freedom of expression guaranteed by Article 10 (art. 10) applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings.

In *Le Cour Grandmaison and Fritz v France*, Appl. No. 11567/85, 53 DR 150 (1987) no violation of Art. 10 was found when 2 conscripts were imprisoned for a year after distributing material calling for French army units to withdraw from Germany. Similarly, no violation of Art. 10 occurred when military personnel were dismissed for criticizing government policy on television: *E.S. v Germany*, Appl. No. 23576/94 84 DR 58 (1995).

In part (although this obviously applies only to regular servicemen and not to conscripts) this is taken to be a voluntary surrender of human rights by the individual by submitting to military life. The Court of Human Rights in *Kalaç v. Turkey* (1999) 27 EHRR 552 held that the dismissal of a senior legal adviser in the Turkish air force did not violate Art. 9 protecting freedom of thought, belief and conscience). He had been dismissed for having adopted 'unlawful fundamentalist opinions'. The Turkish government argued that the complainant had manifested a lack of commitment to the secularist foundation of the Turkish state. The Court held that the complainant had voluntarily accepted limitations on manifestation of his beliefs in embracing a system of military discipline. Within these limitations he was permitted to pray five times daily, to observe Ramadan, and to attend Friday prayers. The dismissal was found to be based on his conduct and attitude, rather than the way in which he manifested his religion. In the words of the Court: 'in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account' (para. 27). The limitations here on his rights, said the Court, were self-chosen.

28. In choosing to pursue a military career Mr Kalac 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 . . . 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.

Another feature of the Convention approach suggests that rights may have to be modified to take account of the hierarchical structure of the armed forces:

This may mean, for example, that superior officers receive better treatment than other ranks in a way that would otherwise infringe human rights non-discrimination requirements. In the *Engel* case the Court stated (paragraph 72):

'A distinction based on rank may run counter to Article 14 (the non-discrimination provision)...

The hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere. Such inequalities are

traditionally encountered in the Contracting States and are tolerated by international humanitarian law (paragraph 140 of the Commission's report: Article 88 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War). In this respect, the European Convention allows the competent national authorities a considerable margin of appreciation.'

The position of superior officers may also justify additional restrictions on their human rights. This is clear from *Larissis v. Greece* (1999) 27 EHRR 329 in which the Court of Human Rights found that convictions of Jehovah's Witness servicemen for proselytism of other (subordinate) airmen were not contrary to Article 9. It was permissible for the Greek authorities to protect subordinates in this way from the unwanted religious attentions of their superiors. Proselytism of civilians was treated differently, however: here the authorities could not intervene since the potential element of misuse of power was absent.

51. the Court notes that the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power. It must be emphasised that not every discussion about religion or other sensitive matters between individuals of unequal rank will fall within this category. Nonetheless, where the circumstances so require, States may be justified in taking special measures to protect the rights and freedoms of subordinate members of the armed forces...."

In view of the above. the Greek authorities were in principle justified in taking some measures to protect the lower ranking airmen from improper pressure applied to them by the applicants in their desire to promulgate their religious beliefs. the measures taken were not particularly severe and were more preventative than punitive in nature. ... In all the circumstances of the case, it does not find that these measures were disproportionate.

The same need to obey orders means that restrictions on trade union rights (and other aspects of freedom of association) are commonplace. A number of countries

prohibit union membership (and the practice is expressly recognized under Art 11.2 of the ECHR

'This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state'

(Similar restrictions appear in International Covenant on Civil and Political Rights, Art. 22)

This restriction was applied by the European Commission on Human Rights to reject the claim of a violation of Art. 11 from workers at a UK intelligence establishment affected by a change in their conditions of service denying them the right to belong to a trade union: *CCSU and Others v UK* Appl. No. 11603/85 50 DR 228 (1987). What is questionable perhaps is whether the state's interest could be adequately protected by restrictions on the taking of industrial action, rather than membership of unions per se. Likewise in a more recent case from Hungary (*Rekneyi v Hungary*) it was found that there was no violation of Article 11 in a prohibition members of the armed forces, the police and security services from joining any political party.

Protection of morale is obviously a consideration, although it is one that in recent cases the European Court of Human Rights has tended to take somewhat skeptically. Arguments on these lines were rejected in the litigation from the UK concerning homosexual and lesbian service personnel (*Smith and Grady v. United Kingdom* (2000) 29 EHRR 493; *Lustig-Prean and Beckett v. United Kingdom* (2000) 29 EHRR 548)). It is interesting to observe also that, like *Kalaç*, that although the case involved dismissals for violations of military discipline, the judgments do *not* argue that since the service personnel had willingly accepted a system of military discipline incompatible with expression of their sexual orientation, Art. 8 did not apply.

Conclusion

Overall, the European Court has tended to give states a wide 'margin of appreciation' in cases involving restrictions of the rights of service personnel. In part this is due to a generally deferential attitude to claims of 'national security'. Nevertheless, if a state is unable to show that a restriction has a legal basis it would be unable to take advantage of these restrictions.

Moreover, in some instances the Court has demonstrated a more sceptical approach. In addition to the *Gay in the Army* case, two free speech cases can be mentioned. Hence in *VDSÖ and Gübi v Austria*, E. Ct. HR 18 December 1994, the Court found that a magazine distributed by soldiers was not threat to discipline since, although sometimes critical, it contained information about complaints and appeal procedures and did not recommend disobedience to orders. In *Grigoriades v Greece* E. Ct HR, 25 November 1997 the Court found that Article 10 had been violated when a junior officer sent a long letter of complaint to his superior (which was not otherwise published) and was sentenced to 3 months' imprisonment for insulting the armed forces. Accordingly the prosecution was not 'necessary in a democratic society' as required by Article 10. 2. As these instances show the Court will, on occasion, exercise an independent assessment of whether a justified ground for restricting rights exists.

The proportionality test employed by the Convention system requires consideration of the nature and extent to which a restriction on rights is justified by the legitimate objective. Similar tests have been used by other legal systems in considering the requirements of military discipline within constitutions protecting human rights (for example in Canada and South Africa). This is a potentially fruitful approach for resolving the paradox with which I began- the rights of citizens in uniform.



Established in 2000 on the initiative of the Swiss government, the Geneva Centre for the Democratic Control of Armed Forces (DCAF), encourages and supports States and non-State governed institutions in their efforts to strengthen democratic and civilian control of armed and security forces, and promotes international cooperation within this field, initially targeting the Euro-Atlantic regions.

The Centre collects information, undertakes research and engages in networking activities in order to identify problems, to establish lessons learned and to propose the best practices in the field of democratic control of armed forces and civil-military relations. The Centre provides its expertise and support to all interested parties, in particular governments, parliaments, military authorities, international organisations, non-governmental organisations, academic circles.

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