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COUNCIL OF EUROPE
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EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

26 February 2019

Case Document No. 3

European Organisation of Military Associations (EUROMIL) v. Ireland
Complaint No. 164/2018

SUBMISSIONS BY THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 13 February 2019

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Complaint Number: 164/2018

EUROPEAN ORGANISATION OF MILITARY ASSOCIATIONS (EUROMIL)
COMPLAINANT

V.

IRELAND
RESPONDENT

OBSERVATIONS OF THE RESPONDENT ON THE MERITS

13 February 2019

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I. Defence Act 1954 (Unofficial Consolidated Version as compiled by Law Reform Commission)

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I INTRODUCTION AND SUMMARY

1. The Respondent refutes the assertions made by the complainant in their entirety.

2. In particular, it is submitted that the Revised European Social Charter (the "Charter") is not engaged by this collective complaint (the "Complaint"). The Complaint fails to demonstrate any nexus between the provisions of the Charter which it invokes (namely Articles 1(2) and 26(2)) and the purported obligation of a Contracting State to record conscientious objection as a reason for discharge from the military. In any event, there exists no provision in Irish law for compulsory military service. As will be outlined below, personnel enter service voluntarily and any member of the Permanent Defence Forces is free to seek his or her discharge in accordance with the Defence Act 1954 and the Defence Force Regulations A.10. In those circumstances, the Respondent provides an "exit mechanism"[1] for personnel who no longer wish to serve, whether for moral reasons or otherwise. Insofar as the complaint impugns provisions under Irish law for "periods of emergency"[2], it is recalled that the Charter expressly recognises the entitlement of Contracting States to derogate from its provisions in time of war or public emergency. In any event, enlistment remains voluntary under Irish law during such periods.

II RELEVANT DOMESTIC LAW

A. Enlistment and Discharge

3. There is no provision in Irish law for compulsory military service. Ireland does not impose any statutory obligation on citizens to serve in the military. The decision to become a member of the Permanent Defence Force is entirely voluntary. Clear provision is also made in the Defence Act 1954 (the "1954 Act" or the "Act") and the Defence Force Regulations A.10 (the "Regulations") for the decision of a career soldier to discharge at his own request from the Permanent Defence Force. The unofficial consolidated version of the Defence Act 1954 as compiled by the Irish Law Reform

[1] See page 4 of Complaint, paragraph 3
[2] See page 2 of the Complaint

Commission is contained at **Appendix I** and an unofficial consolidated version of the Regulations, as compiled internally by the relevant government Department, is contained at **Appendix II.**

4. Section 53 of the 1954 Act provides for enlistment in the Permanent Defence Force for service during a fixed period and Section 54 provides for enlistment for service during a period of emergency. Neither provision imposes any statutory obligation for enlistment. In accordance with Section 53, the initial period of enlistment is for 12 years only. Sections 63 to 68 of the Act set out conditions of engagement, re-engagement and continuance in service. Sections 73 to 77 of the Act provide for discharge from the Permanent Defence Force otherwise than on completion of service and Sections 80 to 84 of the Act contain general provisions as to discharge. Under Section 81(2), the Minister may make regulations as to the manner in which and the persons by whom the discharge of members is to be carried out. Paragraph 58 of the Regulations accordingly contains a table which sets out the various reasons for which a member of the Permanent Defence Force may be discharged and the wording to be used in recording the reason for discharge.

5. Section 75 of the Act provides that any member of the Permanent Defence Force is entitled, except during a period of emergency, to his discharge from the Permanent Defence Force by purchase as may be prescribed. The scale of payment pertains to whether the member of the Permanent Defence Force is line class or technical class and to the period of service. The relevant categories of payment are set out at paragraph 61 of the Regulations. It might be noted that discharge by purchase only arises during the initial period of enlistment of 12 years and is not necessary if a member of the Permanent Defence Force chooses to re-engage after 12 years of service. Under paragraph 60(1)(a) of the Regulations, a Certificate of Service is issued and is sent to the member of the Permanent Defence Force on the date on which his/her service terminates.

B. Period of Emergency

6. Section 54 provides for enlistment in the Permanent Defence Force for service during a period of emergency to serve for that period of emergency only. **Application for**

enlistment in this regard is not compulsory. Section 71(1) provides that every person enlisted under Section 54 to serve for a period of emergency shall upon the expiration of that period of emergency be discharged from the Permanent Defence Force with all convenient speed.

7. Section 85 of the 1954 Act provides that:

> *"Every officer and man of the Permanent Defence Force shall be liable at all times to render military service within the State and, if he is employed on a State ship or service aircraft, be liable at all times while so employed to render military service outside the territorial seas of the State."*[3]

8. The curtailment of discharge by purchase under Section 75(1) during periods of emergency must be read in light of "emergency" provisions contained in both the Irish Constitution and elsewhere under the 1954 Act. Article 28.8.3 of the Irish Constitution (Bunreacht na hÉireann) provides for laws which are expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion. Article 28.8.3 provides as follows:

> *"Nothing in this Constitution other than Article 15.5.2° shall be invoked to invalidate any law enacted by the Oireachtas* [the houses of parliament] *which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law. In this subsection "time of war" includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State and "time of war or armed rebellion" includes such time after the termination of any war, or of any such armed conflict as aforesaid, or of an armed rebellion, as may elapse until each of the Houses of the*

[3] See also section 4 of the Defence (Amendment) Act 2006 regarding military service outside the State.

Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist."

9. The meaning of the term "a period of emergency" to which Section 75(1) on discharge by purchase refers is set out at Section 4 of the 1954 Act. Under Section 4(1), the Government may declare that a state of emergency exists. Whenever an order is made by the Government under Section 4(1), then, so long as such order remains in force, a "period of emergency" shall be deemed for the purpose of the Act to exist (see Section 4(3)). Section 4(4) requires that every such order must be laid before the houses of parliament and published in the official journal. Section 4(5) provides that the houses of parliament must be summoned to meet as conveniently may be but in any event not later than 21 days after the order is made.

III SUBMISSIONS ON THE COMPLAINT

A. <u>Failure to establish nexus with Charter provisions</u>

10. The Complaint is premised on Articles 1(2) and 26(2) of the Charter. Neither of those provisions pertains to Freedom of Thought, Conscience, Religion or Speech. Neither contains a right to conscientious objection. Indeed, the Charter does not include any explicit provision on conscientious objection and does not contain any provision akin to Article 9 of the European Convention of Human Rights ("ECHR").

11. Article 1(2) of the Charter provides as follows:

"With a view to ensuring the effective exercise of the right to work, the Parties undertake:
... to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
... "

Article 26(2) provides:

"With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations:

… to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct."

12. Insofar as conscientious objection was previously invoked before the Committee, it is observed that a violation of Article 1(2) of the Charter was found in *Quaker Council for European Affairs v Greece*[4] because of an unreasonably lengthy period of *obligatory* service. It was stated:

> *"In the present case, the Committee observes however that the duration of civilian service is 18 months longer than that of the corresponding military service, be it of 18, 19 or 21 months, or reduced to 12, 6 or 3 months. A conscientious objector may therefore perform alternative civilian service for a period of up to 39 months. The Committee considers that these 18 additional months, during which the persons concerned are denied the right to earn their living in an occupation freely entered upon, do not come within reasonable limits, compared to the duration of military service. It therefore considers that this additional duration, because of its excessive character, amounts to a disproportionate restriction on "the right of the worker to earn his living in an occupation freely entered upon", and is contrary to Article 1 para. 2 of the Charter."*[5]

13. The complainant in that case successfully relied on Article 1(2) in circumstances where conscientious objectors were required to carry out periods of compulsory civilian service which were far in excess of the period of time required for compulsory military service. The case accordingly concerned an entirely different set of circumstances to the present case which (by contrast) concerns non-compulsory military service.

[4] *Quaker Council of European Affairs v Greece* (Complaint No. 8/2000)
[5] Ibid, paragraph 25

14. In this regard, it is submitted that the Dissenting Opinion for the Decision of Admissibility in the instant case is correct to point out that:

> *"Taking into account the Committees' interpretation of Article 1(2), the Charter provision allegedly violated (the right of the worker to earn a living 'in an occupation freely entered upon'), the Charter protects conscientious objectors when drafted to an unduly lengthy obligatory military service. Such situation is, however, not comparable to the one concerned by the current complaint concerning career soldiers as they are not facing a statutory obligation to serve but entered the service upon their own free decision."*

15. The onus to discharge the burden of proof falls on the complainant. Article 4 of the 1995 Additional Protocol to the Charter clearly provides that a collective complaint shall *"indicate in which respect the (Contracting Party concerned) has not ensured the satisfactory application"* of the provision allegedly violated. As the Dissenting Opinion explains: *"This implies that the complainant organisation must not only indicate which provision of the Charter it considers to be violated but additionally the factual and legal circumstances of the alleged violation."* The Respondent agrees with the Dissenting Opinion on Admissibility which states that:

> *"Workers having agreed to a fixed term contractual obligation must respect the relevant regulation of the notice period. In what perspective such obligation may amount to a violation of Article 1(2) is far from self-evident and therefore must be elaborated by the complaint. The same applies to the violation of Article 26(2), where no nexus to any interpretation by the Committee has been established."*

16. It is far from self-evident how a violation of Article 1(2) can arise in circumstances where enlistment in the military is voluntary and personnel are entitled to seek their discharge in accordance with the Act and Regulations. Furthermore, no nexus has been established between Article 26(2) and the manner in which reasons for discharge are recorded. The Complaint does not explain how it is alleged that personnel are exposed to accusations of cowardice or ridicule. It should be stressed that the discharge papers of a member of the Defence Force are personal to him or her, with an entitlement to privacy in relation thereto, in accordance with law, to include the General Data

Protection Regulation[6] and the Data Protection Act, 2018. Consequently the contents thereof and any reasons recorded for discharge are private and not disclosed to a discharged member's colleagues. It is not credible, therefore, to assert that a failure to record conscientious objection as the basis for discharge can expose a member to accusations of cowardice or ridicule.

B. Absence of compulsory military service or conscription in Ireland

17. As set out above, there is no provision in Irish law for compulsory military service. Membership of the Permanent Defence Force is entirely voluntary in nature.

18. Any citizen can apply to become a member of the Defence Forces with selection being based on meeting the requirements set out in the legislation. All potential entrants are made aware of what service as a member of the Defence Forces entails. Indeed, the voluntary nature of military service is apparent from the Notice given to an applicant wishing to enlist in the Defence Forces, to which the attestation papers signed by each applicant refers. Any entrant will be aware of his/her obligations upon joining the military under Section 85 of the 1954 Act, namely that he/she shall be liable to render military service within the State and, if he/she is employed on a State ship or service aircraft, be liable at all times while so employed to render military service outside the territorial seas of the State.

19. In those circumstances, the Respondent fails to see what case can be made against it under Article 1(2) or Article 26(2) of the Charter. It is submitted that *Quaker Council of European Affairs v Greece* is not applicable to non-compulsory service. The complainant has not identified any decision upon which it can rely to impugn non-compulsory military service for a failure to accommodate conscientious objection.

20. It is not accepted that the complainant can rely on case-law of the European Court of Human Rights which concerns the right to Freedom of Thought, Conscience and Religion under Article 9 ECHR. No case has been made in the Complaint as to how such a right intersects with either Article 1(2) or Article 26(2) of the Charter.

[6] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Notwithstanding the foregoing, the jurisprudence of the European Court of Human Rights does not support the complainant's case.

21. Article 9 of the European Convention of Human Rights 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."

22. In the European Court of Human Right's Guide to "Freedom of thought, conscience and religion" updated as late as 31 December 2018[7], it was explained that:

"Article 9 does not explicitly mention the right to conscientious objection, whether in the military or civilian sphere. Nevertheless, the Court has ruled that the safeguards of Article 9 apply, in principle, to opposition to military service, when it is motivated by a serious, insuperable conflict between ***compulsory service in the army***[8] *and an individual's conscience or his or her sincere and deeply-held religious or other convictions."*

23. In *Bayatyan v Armenia*[9], it was concluded that the conviction of a Jehovah's witness for having evaded *compulsory military service* on religious grounds, where no alternative civilian service was provided for law, was in violation of Article 9 ECHR. In *Enver Aydemir v Turkey*[10] the Court decided to follow the opinion of the United Nations Human Rights Committee to the effect that conscientious objection is based on the right to freedom of thought, conscience and religion where it clashes with the

[7] https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf
[8] Emphasis added
[9] *Bayatyan v Armenia* [GC], paragraph 110 23459/03, 7th July 2001
[10] *Enver Aydemir v Turkey* [GC], paragraph 81 26012/11, 7th September 2016

compulsory use of force at the cost of human life (See paragraph 81). The Court in *Enver* further found that it is legitimate that the national authorities carry out a prior examination of the request for recognition of conscientious objector status, particularly given that the Contracting States have a certain margin of appreciation in defining the circumstances under which they recognize the right to conscientious objection and introducing mechanisms for considering requests for conscientious objector status in the military sphere.

24. It is accordingly that protection afforded to conscientious objectors in the above case-law is confined to those subjected to compulsory military service. Decisions of the European Court of Human Rights in cases such as *Bayatyan v Armenia*[11] and *Enver Aydemir v Turkey*[12] are irrelevant to the 1954 Act.

25. The complainant's references to both the Council of Europe Parliamentary Assembly Recommendation 1742/2006 and Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces, are misconceived. Firstly, these documents are not binding on Contracting States. In any event, it is submitted that they do not support the position adopted by the complainant. Neither Recommendation considers the right to conscientious objection as a component of any provision of the Charter. Rather, Recommendation 1742/2006 states that: *"The Assembly recalls that the right of conscientious objection is an essential component of the right to freedom of thought, conscience and religion as secured under the Universal Declaration of Human Rights and the European Convention on Human Rights."* Likewise, specific reference is made in Recommendation CM/Rec(2010)4 to Article 9 ECHR.

26. It is submitted that the voluntary nature of service in the Irish Defence Forces obviates the necessity to provide explicitly for conscientious objection.

[11] *Bayatyan v Armenia* [GC], paragraph 110 23459/03, 7th July 2001
[12] *Enver Aydemir v Turkey* [GC], paragraph 81 26012/11, 7th September 2016

C. Statutory Provisions providing exit mechanism

27. Contrary to assertions made in the Complaint, the 1954 Act provides a clear exit mechanism for any member of the Permanent Defence Force who wishes to leave service. While no specific provision is made for conscientious objectors, it is open to any member of the Permanent Defence Force for this or any other reason not specified in the Act to seek discharge by purchase should he/she feel that he/she can no longer render military service in accordance with Section 85 of the 1954 Act.

28. Under Section 75 of the 1954 Act, the member shall be entitled, except during a period of emergency, to his/her discharge from the Permanent Defence Force as may be prescribed. The Complaint does not challenge any of the grounds on which discharge can be granted.

29. There is no evidence to suggest that those who wish to discharge for reasons not set out in Regulation are restricted from doing so. The order for discharge by purchase is required by the Act to be processed with "all convenient speed." It is clear from the foregoing that every person who enters the military does so of their own free will and any member of the military is free to avail of Section 75 to exit the military, irrespective of reasons.

30. It is unclear to the Respondent on what basis it could be alleged that the legal framework for discharge affects the "right to dignity at work" under Article 26(2). The Respondent refutes the allegation that personnel are exposed to accusations of cowardice and ridicule. The allegation has not been particularised or explained in the Complaint and it is not apparent on what basis it could be made.

31. As the Dissenting Opinion on admissibility sets out: *"Workers having agreed to a fixed term contractual obligation must respect the relevant regulation of the notice period."* It is entirely reasonable that provisions are set out prescribing the steps that a member of the Permanent Defence Force should take for the purpose of leaving military service. It is not clear to the Respondent how such provisions could give rise to a violation of the right to earn a living from an occupation freely entered upon.

32. Insofar as the complainant has invoked the Human Rights and Equality Commission Act 2014[13], the Respondent does not understand the relevance of this point to the Charter. Nonetheless, it might be noted that Section 2 of the Human Rights and Equality Commission Act 2014 does not include the Defence Forces in the definition of public bodies to which the Act applies. The Defence Forces are nonetheless committed to maintaining a work environment which encourages and supports the right to dignity at work. The diversity strategy of the Defence Forces encompasses equality, diversity and inclusion irrespective of gender, race, religious beliefs and the volunteer ethos of members of the Defence Forces. The Employment Equality Act 1998 is also applicable to the Permanent Defence Force save in relation to discrimination on the grounds of age and disability[14].

33. It is submitted that the statutory provisions on discharge from service ensure that members of the military are not compelled to remain in service when do so would require them to act against their conscience. Accordingly, it is unnecessary to provide specifically for discharge by reason of conscientious objection.

D. Provision for Period of Emergency

34. Insofar as Section 75(1) of the 1954 Act curtails discharge by purchase during periods of emergency, the provision must be read in light of the Act as a whole and in its constitutional context. Article 28.3.3 of the Constitution sets down specific constitutional provisions on laws enacted for periods of emergency. Section 4 of the Act itself defines the procedure to be followed in declaring a state of emergency such as to create a period of emergency. Section 54 specifically provides for enlistment to the military (still in a voluntary context) during periods of emergency and Section 71(1) provides that every person enlisted under Section 54 shall upon expiration of the period of emergency, be discharged from military service with all convenient speed. It is clear therefore, that a defined constitutional and statutory framework has been established to safeguard against abuse of any statutory exceptions for periods of emergency.

[13] A full copy of the Act is available at http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html
[14] A full copy of the Act is available at http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/html. See in particular, section 37(5).

35. The Charter expressly recognises the entitlement of Contracting States to derogate from its provisions in time of war or public emergency. Article F provides as follows:

Derogations in time of war or public emergency

1. In time of war or other public emergency threatening the life of the nation any Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. Any Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefore. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

36. To a certain extent, the Complaint appears to impugn provisions of the Act which allow certain exceptions to the regime for discharge by purchase, in periods of emergency. These provisions are clearly prescribed by law and are limited in nature. They are proportionate to the aim being pursued and are entirely consistent with Article F of the Charter.

IV CONCLUSION

37. For the reasons set out above, it is submitted that the Committee should declare that there is no violation of the Articles 1(2) and 26 (2) of the Charter by the Respondent.