

B) CRÓNICA JURISPRUDENCIAL

AUSTRIA

EL ESTATUTO JURÍDICO DE LOS TESTIGOS DE JEHOVÁ EN AUSTRIA: CASO *VEREIN DER FREUNDE DER CHRISTENGEMEINSCHAFT AND OTHERS V. AUSTRIA* Y CASOS *LÖFFELMANN, GÜTL Y LANG v. AUSTRIA*.¹

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1. EL MODELO AUSTRIACO DE RECONOCIMIENTO DE PERSONALIDAD JURÍDICA DE LOS COLECTIVOS RELIGIOSOS: CONFESIONES RELIGIOSAS *VERSUS* COMUNIDADES DE CREENCIAS DE CARÁCTER RELIGIOSO.

En numerosos trabajos anteriores² hemos tenido ocasión de posicionarnos críticamente respecto la legislación austriaca en

¹ Con el patrocinio del Departamento de Educación, Universidades e Investigación del Gobierno Vasco (Resolución 30 de octubre de 2007).

² Puede consultarse a este respecto la monografía: TORRES GUTIÉRREZ, ALEJANDRO. *El Derecho de Libertad de Conciencia en Austria*. Dykinson. Madrid. 2006. 494 páginas. Otras obras del autor sobre esta materia:

1) TORRES GUTIÉRREZ, ALEJANDRO. *El reconocimiento estatal de las Confesiones Religiosas en Austria: la Ley Federal sobre reconocimiento de la personalidad jurídica de las comunidades confesionales de carácter religioso*. (BGBl. 19/1998). En: *Laicidad y Libertades. Escritos Jurídicos*. Número 1. Madrid. 2001. Páginas 455 a 490.

2) TORRES GUTIÉRREZ, ALEJANDRO. *El desarrollo jurídico en Austria de la Ley federal sobre reconocimiento de la personalidad jurídica de las comunidades confesionales de carácter religioso*. (BGBl. 19/1998). *El caso de la*

materia de reconocimiento de la personalidad jurídica de las confesiones religiosas, que recapitulando,³ consistente básicamente en distinguir entre:

1) Las **Confesiones Religiosas plenamente reconocidas** por parte del Estado, que se equiparan a **Corporaciones de Derecho Público**, y que gozan por lo tanto de un estatuto jurídico

Comunidad Libre de Cristo - Comunidad Pentecostal. En: *Laicidad y Libertades. Escritos Jurídicos*. Número 2. Madrid. 2002. Páginas 353 a 382.

3) TORRES GUTIÉRREZ, ALEJANDRO. *Reconocimiento jurídico de las minorías religiosas en Austria*. En: AMÉRIGO, FERNANDO. (Coord.) *Religión, Religiones, Identidad, Identidades. Minorías*. Actas del V Simposio de la Sociedad Española de Ciencias de las Religiones. SECR. Valencia. 2003. Páginas 401 a 423.

4) TORRES GUTIÉRREZ, ALEJANDRO. *Riconoscimento giuridico delle minorie religiose in Austria*. En: *Il Diritto Ecclesiástico*. Fasc 2-2004. Giuffrè. Milán. 2004. Páginas 424 a 444.

5) TORRES GUTIÉRREZ, ALEJANDRO. *Du Droit Fondamental à la Liberté Religieuse en Autriche*. En: *Civitas Europa*. Volumen 13. Diciembre de 2004. Bruylant. Bruselas. 2004. Páginas 275 a 292.

6) TORRES GUTIERREZ, ALEJANDRO. *El derecho de asociación religiosa y la autonomía interna de las Confesiones Religiosas en la jurisprudencia reciente del Tribunal Constitucional austriaco*. En: *Laicidad y Libertades. Escritos Jurídicos*. Número 4. Madrid. 2004. Páginas 525 a 527.

7) TORRES GUTIÉRREZ, ALEJANDRO. *Interpelaciones a la Comisión Europea en el Parlamento Europeo sobre la legislación en materia de libertad religiosa en Austria en el año 2004*. En: *Laicidad y Libertades. Escritos Jurídicos*. Número 5. Volumen II. Madrid. 2005. Páginas 63 a 65.

8) TORRES GUTIÉRREZ, ALEJANDRO. *Análisis de la nueva legislación federal sobre el estatuto legal de las Iglesias Orientales Ortodoxas, la redenominación dada a la Iglesia "Evangélica"-Metodista, y la nueva política de extranjería en materia de integración de inmigrantes en Austria*. En: *Laicidad y Libertades. Escritos jurídicos*. Número: 6. Volumen II. 2006. Páginas 35 a 69.

9) TORRES GUTIÉRREZ, ALEJANDRO. *Reconocimiento de personalidad jurídica de los Testigos de Jehová en Austria: El caso Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. En: *Laicidad y Libertades. Escritos jurídicos*. Número: 8. Volumen II. 2008. Páginas 419 a 479.

³ Véase: TORRES GUTIÉRREZ, ALEJANDRO. *Reconocimiento de personalidad jurídica de los Testigos de Jehová en Austria: El caso Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. En: *Laicidad y Libertades. Escritos jurídicos*. Número: 8. Volumen II. 2008. Páginas 419 y siguientes.

privilegiado. La Ley austriaca de reconocimiento de las Confesiones Religiosas de 20 de mayo de 1874, en vigor aún, ha constituido la legislación básica en la materia hasta 1998, y se caracterizaba por su amplia redacción, pues en esencia el reconocimiento quedaba supeditado a la no contradicción con la Ley o el orden público, y a que se ofrecieran unas garantías mínimas de estabilidad y permanencia.⁴ Conforme a esta legislación, una docena larga de Confesiones religiosas han obtenido pleno reconocimiento estatal.⁵

⁴ Además se incorporaban algunas otras limitaciones que podemos calificar de *secundarias*, como que *sólo pueden ser nombrados miembros de la Junta Directiva de una Confesión Religiosa, los fieles de la misma que ostenten la ciudadanía austriaca y que se encuentren en el pleno goce de los derechos civiles*, (artículo 9), y el que *como ministros de culto pueden solamente ser designados por la Confesión Religiosa quienes ostenten la ciudadanía austriaca, con una conducta honesta y sean ciudadanos sin tacha, que demuestren una instrucción general mediante la finalización de los estudios de bachillerato*, (artículo 10).

La ausencia de dirigentes y ministros de culto de origen austriaco fue una de las dificultades con las que se encontraron los anglicanos y metodistas para su reconocimiento inmediato conforme a la Ley de 1874. HEINZ, DANIEL. *Church, State and Religious Dissent. A History of Seventh-day Adventists in Austria. 1890-1975*. En: *Archives of International Adventist History*. Tomo 5. Verlag Peter Lang GmbH. Frankfurt am Main. 1993. Página 107.

El artículo 12 establece asimismo ciertas facultades de intervención de la Administración respecto al funcionamiento interno de la Confesión Religiosa, al legitimar al ejecutivo a que exija *la separación de su puesto de un ministro de culto si este fuera reconocido culpable de acciones criminales o delictivas, incurriera en codicia, contraviniera la moralidad pública, produjera escándalo público, o perdiera la ciudadanía austriaca*.

Y en el artículo 15 se hace una quizás en exceso indeterminada referencia a que *la Administración estatal de cultos*, -hoy hay que entender aquí comprendidos a la autoridad administrativa local, al Gobernador Civil y al Ministro Federal de Educación y Asuntos Culturales-, *debe velar por que la Confesión Religiosa reconocida, sus comunidades y órganos, no excedan la esfera de sus competencias y las prescripciones de la presente Ley, así como el fundamento mismo de las disposiciones promulgadas por la autoridad estatal, y que persista la vigencia de las disposiciones de esta Ley. A este fin la autoridad pública puede imponer sanciones por un importe suficiente sobre su patrimonio, así como aplicar las demás medidas legales coercitivas oportunas*.

⁵ Véase: TORRES GUTIÉRREZ, ALEJANDRO. *El Derecho de Libertad de Conciencia en Austria*. Dykinson. Madrid. 2006. Páginas 219 y siguientes.

2) Las meras *Comunidades de creencias de carácter religioso*, a las que se les aplica un mero estatuto de *derecho privado*, y que gozan de una serie de derechos mucho más limitados, aunque al menos tienen ya personalidad jurídica como entidades de naturaleza religiosa, y que vienen reguladas por una Ley de 1998,⁶ de reconocimiento estatal de las comunidades de creencias de carácter religioso. Para acceder a esta categoría:

a) Será necesaria una solicitud de reconocimiento, que cumpla los requisitos legalmente establecidos.

b) Pero cabe la denegación de este *status* de *Comunidad de creencias de carácter religioso* cuando sea preciso para la protección en una sociedad democrática, de los intereses de la seguridad pública, del orden público, la salud y la moral públicas, o para la tutela de los derechos y libertades de terceros. Tal denegación se producirá asimismo en aquellos casos de intimidación con amenazas ilegales, con menoscabo del libre desarrollo psíquico, o con violación de la integridad psíquica debida al empleo de métodos psicoterapéuticos, especialmente con el propósito de interferir en las creencias de un individuo.⁷ Habiendo sido aprobada la asociación en el territorio federal será lícita la difusión del fin y de la doctrina religiosa de la Comunidad de creencias de carácter religioso, y el ejercicio del proselitismo.

La nueva categoría legal de *Comunidad de creencias de carácter religioso* se presenta como una fórmula de pendencia hasta la consecución del pleno reconocimiento por parte del Estado, pues el artículo 11 de la Ley Federal sobre reconocimiento de la personalidad jurídica de las Comunidades de creencias de carácter religioso,⁸ exige adicionalmente para el pleno reconocimiento de las mismas:⁹

⁶ BGBl. 19/1998.

⁷ Artículo 5.1.

⁸ BGBl. 19/1998.

⁹ RGBl. 68/1874.

a) Existencia durante al menos 20 años, de los cuales un mínimo de 10 como Comunidad de creencias de carácter religioso con personalidad jurídica en el sentido de esta Ley. Es lo que la doctrina ha denominado como *Bewährungsprobe*, o *Bewährungsfrist*, es decir, período o plazo de *prueba condicional*.¹⁰

Sin embargo la Ley Federal sobre el estatuto legal de las Iglesias Orientales Ortodoxas en Austria, publicada en el BGBl. el 25 de abril de 2003,¹¹ ha desarrollado mediante una Ley *ad hoc* el pleno estatuto de *Corporación de Derecho Público* de la Iglesia Copta Ortodoxa en Austria,¹² que mediante la Resolución de la Ministra Federal de Educación y Asuntos Culturales de 20 de julio de 1998,¹³ gozaba ya del *simple* estatuto de *Comunidad de creencias de carácter religioso*, sin tener que pasar por el proceloso cauce de la Ley de 1998, y sin llegar a esperar los 10 años que la misma prevé. KALB¹⁴ ya había señalado con anterioridad que la Iglesia Copta Ortodoxa, podría tener problemas para ser reconocida plenamente mediante el procedimiento de la Ley de 1998, (por estar lejos de cumplir el requisito de contar con el 2 por 1000 de fieles, respecto al total de la población) por ello el legislador austriaco decidió aplicar la

¹⁰ KALB, HERBERT. Die Anerkennung von Kirchen und Religionsgemeinschaften in Österreich. En: POTZ, RICHARD y KOHLHOFER, REINHARD. (Coords.) Die "Anerkennung" von Religions- gemeinschaften. Verlag Österreich. Viena. 2002. Página 54.

KALB, HERBERT, POTZ, RICHARD, y SCHINKELE, BRIGITTE. *Religionsrecht*. WUV. Universitätsverlag. Viena. 2003. Página 97.

¹¹ BGBl. 20/2003.

¹² Además del de la Iglesia Armenia Apostólica, (BGBl. 5/1973), y la Iglesia Siria Ortodoxa (BGBl. 129/1988), que ya estaban plenamente reconocidas por el Estado.

¹³ El reconocimiento tiene efectos desde el 11 de julio de 1998. GZ 7836/18-9c/98.

¹⁴ KALB, HERBERT. Die Anerkennung von Kirchen und Religionsgemeinschaften in Österreich. En: POTZ, RICHARD y KOHLHOFER, REINHARD. (Coords.) Die "Anerkennung" von Religions- gemeinschaften. Verlag Österreich. Viena. 2002. Página 53.

Ley de 1874, a una confesión que no se encuentra *bajo sospecha*, si se nos permite esta expresión *políticamente poco correcta*.

b) Un número de miembros que alcance un mínimo del 2 por 1000 de la población austriaca conforme al último censo. Un requisito que muy pocas de las Confesiones Religiosas que esperan el pleno reconocimiento del Estado bajo la nueva legislación de 1998, van a poder reunir.

La Ley de 20 de mayo de 1874, relativa al reconocimiento legal de las Confesiones Religiosas,¹⁵ no requería un número mínimo de miembros de la Iglesia o Confesión Religiosa, sino la mera garantía del establecimiento y la estabilidad de al menos *una* comunidad de culto, sin determinar si la misma debía estar compuesta por un determinado número de fieles, por lo que era algo que quedaba al prudente arbitrio de los poderes públicos, incluso hay que recordar que el artículo 7 de la Ley de 21 de marzo de 1890, *Israelitengesetz*, que reguló la estructura externa de las Comunidades Religiosas judías,¹⁶ tan sólo exigía la solicitud de 30 cabezas de familia israelitas, para solicitar la constitución de una *Kultusgemeinde*, es decir, para crear una *comunidad de culto*, sic.¹⁷

c) Destino de los ingresos y del patrimonio a fines religiosos (a tal efecto contarán no sólo los fines estrictamente religiosos, sino también los afectos a un interés común o caritativo).

d) Una *actitud positiva* frente a la sociedad y el Estado.¹⁸

e) Ninguna perturbación ilegal contra la sociedad o contra una Iglesia o Confesión legalmente reconocidas, así como contra otra Comunidad de creencias de carácter religioso.

¹⁵ RGBl. 68/1874.

¹⁶ RGBl. 57/1890.

¹⁷ GAMPL, INGE. *Österreichisches Staatskirchenrecht*. Springer Verlag. Viena. 1971. Página 133.

¹⁸ El tenor literal de la Ley es: positive Grundeinstellung gegenüber Gesellschaft und Staat.

2. ANTECEDENTES PRÓXIMOS EN LA JURISPRUDENCIA DEL T.E.D.H. AL CASO *VEREIN DER FREUNDE DER CHRISTENGEMEINSCHAFT AND OTHERS V. AUSTRIA* DE 26 DE FEBRERO DE 2009: EL CASO *RELIGIONSGEMEINSCHAFT DER ZEUGEN JEHOVAS AND OTHERS V. AUSTRIA*, DE 31 DE JULIO DE 2008.

En nuestros trabajos anteriores¹⁹ nos aventuramos a pronosticar que esta dualidad de regímenes se encontraba *bajo sospecha*, tanto desde el punto de vista del pleno reconocimiento del derecho a la libertad religiosa, (artículo 9 del Convenio Europeo de Derechos Humanos), como desde el punto de vista del principio de no discriminación ... por motivos religiosos, (artículo 14 del Convenio Europeo de Derechos Humanos). El paso del tiempo creemos que ha venido a darnos la razón.

El pronunciamiento del Tribunal Europeo de Derechos Humanos en el caso *Relionsgemeinschaft der Zeugen Jehovas and others v. Austria*, de 31 de julio de 2008, que tuvimos ocasión de analizar en el número anterior de *Laicidad y Libertades*,²⁰ supuso una severa condena a Austria por violación de los artículos 6, 9 y 14 del Convenio Europeo de Derechos Humanos, al producirse un trato discriminatorio hacia los mismos por parte de las autoridades austriacas, que han venido retrasando en el tiempo el pleno reconocimiento de la personalidad jurídica de los Testigos de Jehová, otorgándoseles el mero estatuto de *comunidad de creencias de carácter religioso*, de contenido notablemente más reducido, obligándoseles a un dilatado periodo de espera, que no se ha exigido a otras confesiones religiosas, ya plenamente reconocidas por el Estado, como por ejemplo la

¹⁹ Véase la segunda nota a pié de página de este trabajo.

²⁰ TORRES GUTIÉRREZ, ALEJANDRO. Reconocimiento de personalidad jurídica de los Testigos de Jehová en Austria: El caso *Relionsgemeinschaft der Zeugen Jehovas and others v. Austria*. En: *Laicidad y Libertades*. Escritos jurídicos. Número: 8. Volumen II. 2008. Páginas 419 a 479.

Iglesia Copta Ortodoxa, que gozó de pleno reconocimiento de personalidad jurídica *ex lege* de carácter *ad hoc* en 2003, pese a no haber transcurrido el plazo de 10 años como *comunidad de creencias de carácter religioso* que la Ley de 1998 prevé, ya que obtuvo dicho reconocimiento como *Comunidad de creencias de carácter religioso* mediante Resolución de la Ministra Federal de Educación y Asuntos Culturales de 20 de julio de 1998.²¹ La perplejidad resulta aún mayor, si tenemos en cuenta que los Testigos de Jehová cuentan con un mayor número de fieles en el país, por lo que no resulta fácil explicar esta diferencia de trato desde un punto de vista estrictamente jurídico.²²

Pues bien, en el caso *Verein der Freunde der Christengemeinschaft and others v. Austria*, de 26 de febrero de 2009, el TEDH reitera la condena a Austria por violación del artículo 9 del Convenio Europeo de Derechos Humanos, al someter al colectivo recurrente, cuya personalidad jurídica se encontraba reconocida como asociación, desde el 24 de agosto de 1945,²³ al plazo de 10 años de espera contemplado en la Ley de 1998, por entender que el mismo no se encuentra justificado en este caso concreto, aplicando la misma filosofía que en el caso *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, de 31 de julio de 2008, sosteniendo que esta diferencia de tratamiento no está basada en ninguna *justificación objetiva y razonable*, por lo que se habría vulnerado los artículos 9 y 14 del Convenio Europeo de Derechos Humanos.²⁴

3. LOS CASOS LÖFFELMANN, GÜTL Y LANG v. AUSTRIA.

²¹ El reconocimiento tiene efectos desde el 11 de julio de 1998. GZ 7836/18-9c/98.

²² *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 84.

²³ *Verein der Freunde der Christengemeinschaft and others v. Austria*. § 41.

²⁴ *Verein der Freunde der Christengemeinschaft and others v. Austria*. § 44 y 45.

Los casos Löffelmann²⁵ y Gütl²⁶ contra Austria, de 12 de marzo de 2009, y Lang²⁷ contra Austria, de 19 de marzo de 2009, han supuesto tres nuevas condenas de Austria por parte del Tribunal Europeo de Derechos Humanos, por violación de los artículos 9 y 14 del Convenio Europeo de Derechos Humanos. En estos tres pleitos se sustancia la discriminación negativa de la que son objeto las personas que desempeñan entre los Testigos de Jehová un papel equivalente al de los *ministros de culto*, frente a las personas que realizan análogo papel en el seno de las *confesiones religiosas* plenamente reconocidas por el Estado, respecto a la exención del cumplimiento del servicio militar obligatorio y del servicio civil alternativo.

El que una colectivo religioso goce en Austria del pleno reconocimiento como *confesión religiosa*, o como una mera *comunidad de creencias de carácter religioso*, tiene notables consecuencias prácticas,²⁸ pues las primeras van a tener la posibilidad de contar con un representante en los departamentos educativos de los *Länder*, con derecho a voz aunque sin voto,²⁹ además están exentas de la necesidad de probar su capacidad para gestionar escuelas privadas, cosa que de otro modo deben justificar,³⁰ sus ministros de culto quedan exentos de la obligación de asumir el cargo de tutor,³¹ el de jurado,³² las donaciones realizadas a favor de las mismas son deducibles en el Impuesto sobre la Renta de las Personas Físicas,³³ los inmuebles de su propiedad gozan de beneficios fiscales en el Impuesto sobre

²⁵ Application 42967/98.

²⁶ Application 49686/99.

²⁷ Application 28648/03.

²⁸ Löffelmann contra Austria, § 39.

²⁹ Parágrafo 8 de la Ley Federal de supervisión escolar, *Bundes-Schulaufsichtsgesetz*.

³⁰ Conforme a la Ley de Escuelas Privadas, *Privatschulgesetz*.

³¹ Parágrafos 192 a 195 del Código Civil, *ABGB*.

³² Parágrafos 3 (4) de la Ley del Jurado de 1990, *Geschworenen- und Schöffengesetz*.

³³ Parágrafo 18 (1) (5), de la Ley del Impuesto de la Renta de las Personas Físicas.

Bienes Inmuebles,³⁴ las donaciones a favor de sus instituciones locales van a gozar de un tratamiento fiscal beneficioso,³⁵ y además, conforme al parágrafo 24 (3) de la Ley del Servicio Militar, los sacerdotes que hayan sido debidamente ordenados, las personas dedicadas al auxilio espiritual, o la enseñanza religiosa tras su graduación en estudios teológicos, los miembros de las órdenes religiosas que han hecho un voto solemne, y los estudiantes de teología que estén preparándose para asumir funciones pastorales, y que pertenezcan a una *confesión religiosa reconocida*, quedarán exentos del servicio militar. El parágrafo 13 de la Ley del Servicio Civil, establece una exención semejante a favor de los mismos, respecto al servicio civil alternativo.³⁶

Los tres demandantes habían venido desempeñando funciones análogas dentro de la comunidad de los Testigos de Jehová, a las que dan lugar respecto a los miembros de las *confesiones religiosas* plenamente reconocidas, a la exención en el servicio militar y en el servicio civil alternativo:

1) El señor Löffelmann³⁷ había venido realizando la función de *predicador*³⁸ o *pionero general*,³⁹ y desde el 27 de noviembre de 1996, había servido como *diácono*⁴⁰ o *siervo ministerial*.⁴¹

2) El señor Gütl⁴² había trabajado desde el 1 de diciembre de 1995 como *predicador*, o *siervo especial a tiempo completo*,⁴³ y *pionero general*.⁴⁴

³⁴ Parágrafo 2 de la Ley del Impuesto sobre Bienes Inmuebles, *Grundsteuergesetz*.

³⁵ Consistente en el momento de autos, en la tributación a un tipo reducido del 2,5%, conforme al parágrafo 8 (3) (a) de la Ley de Sucesiones y Donaciones de 1955, *Erbschafts- und Schenkungsteuergesetz*.

³⁶ Löffelmann contra Austria, § 39, Gütl contra Austria, § 23, y Lang contra Austria, § 14.

³⁷ Löffelmann contra Austria, § 8.

³⁸ En alemán: *Prediger*, sic.

³⁹ En alemán: *allgemeiner Pionier*, sic. También puede traducirse como *pionero regular*.

⁴⁰ En alemán: *Diakon*, sic.

⁴¹ En alemán: *Dienstamtgehilfe*, sic.

3) El señor Lang⁴⁵ había asumido las funciones de *predicador*⁴⁶ y desde el 6 de noviembre de 1997, las de *anciano*,⁴⁷ una tarea que incluía la labor de dispensar auxilio pastoral a la comunidad, conduciendo los servicios religiosos y predicando.

A pesar de ello, ninguno de los tres consiguieron la exención de sus obligaciones para con el Estado. Las autoridades austriacas alegaban que los Testigos de Jehová recurrentes no habían podido demostrar que hubieran estudiado teología en una Universidad o en otro centro de formación semejante,⁴⁸ o que sus funciones como *predicadores* fueran equiparables a las de una persona que desempeña tales labores en una *confesión religiosa* legalmente reconocida.⁴⁹

El Tribunal Europeo de Derechos Humanos entendió en los tres casos que aunque los Testigos de Jehová carezcan de universidades propias, o de facultades de *teología*, dentro de las universidades estatales o *eclesiásticas*, no por ello carecen de una intensa preparación clerical, que consiste tanto en estudios teóricos, como en experiencia práctica. De modo que los *ancianos* y *diáconos* se encuentran al cuidado del auxilio espiritual, dirigen el culto de la comunidad, dispensan asistencia social, realizan celebraciones litúrgicas, bautismos, matrimonios y funerales, y supervisan la labor misionera.⁵⁰ Es decir, el Tribunal Europeo de Derechos Humanos encuentra un paralelismo evidente en cuanto a las funciones desempeñadas por las personas que realizan este tipo de tareas dentro de los Testigos

⁴² Gütl contra Austria, § 7.

⁴³ En alemán: Sondervollzeitdiener, sic.

⁴⁴ En alemán: *allgemeiner Pionier*, sic. También puede traducirse como *pionero regular*.

⁴⁵ Lang contra Austria, § 6.

⁴⁶ En alemán: *Prediger*, sic.

⁴⁷ En alemán: *Ältester*, sic.

⁴⁸ Löffelmann contra Austria, § 41, y Lang contra Austria, § 18.

⁴⁹ Gütl contra Austria, § 6.

⁵⁰ Löffelmann contra Austria, § 44, Gütl contra Austria, § 29, y Lang contra Austria, § 21.

de Jehová, respecto a lo que ocurre en supuestos similares en el caso de *confesiones religiosas* plenamente reconocidas por parte del Estado.

Por otro lado el Tribunal Europeo de Derechos Humanos no toma en consideración las alegaciones del gobierno austriaco centradas en la falta de formación *teológica reglada ad hoc*, por entender que la causa real de esa negativa a reconocerles dichas exenciones en el cumplimiento del servicio militar y en el servicio civil alternativo a los recurrentes, es que los mismos no pertenecen a una *confesión religiosa* plenamente reconocida por el Estado,⁵¹ sino a una mera *comunidad de creencias de carácter religioso*, de las reguladas por la Ley de 1998.

El Tribunal Europeo de Derechos Humanos recuerda su doctrina sobre toda diferencia de trato incompatible con el artículo 14 del Convenio, y por lo tanto discriminatoria, es decir, cuando no se encuentra objetivamente justificada, no persigue la realización de un fin legítimo, o no hay una razón de proporcionalidad entre los medios empleados y los fines perseguidos, así como sobre la teoría del margen de apreciación de los Estados que son parte del Convenio,⁵² entendiendo que la conducta de las autoridades austriacas en estos tres casos, suponen una infracción de dicho artículo 14, considerándola arbitraria y discriminatoria.⁵³

No faltará quien entienda que *la uniformidad entendida como tratamiento absolutamente paritario de las realidades comparadas, sin atención a sus elementos diferenciadores y, por tanto, identificativos, es algo ajeno a la virtud, principio o derecho de igualdad de cualquier índole, también y sobre todo jurídica, y crea que confundir el necesario trato diferenciado*

⁵¹ Löffelmann contra Austria, § 51, Gütl contra Austria, § 39, y Lang contra Austria, § 28.

⁵² Löffelmann contra Austria, § 49, Gütl contra Austria, § 34, y Lang contra Austria, § 26.

⁵³ Löffelmann contra Austria, §§ 53, 54 y 55, Gütl contra Austria, §§ 37, 38, 39 y 40, y Lang contra Austria, §§ 29, 30, 31 y 32.

*entre realidades distintas ... con la discriminación injustificada o arbitraria es una tentación demasiado frecuente en nuestros sistemas democráticos y órganos legislativos, ejecutivos o judiciales, advirtiéndonos del riesgo de acabar violentando la historia de las instituciones jurídicas y demás realidades sociales bajo el amparo de la siempre atractiva apelación a una igualdad más próxima a la uniformidad desconocedora de los múltiples hechos diferenciadores que a una auténtica y efectiva idea de justicia.*⁵⁴

Para quienes llevamos muchos años abogando por un modelo de derecho común a favor de todas las confesiones religiosas, hemos de reconocer que tales afirmaciones no dejan cuando menos de *inquietarnos*, porque al igual que el Tribunal Europeo de Derechos Humanos,⁵⁵ no alcanzamos a ver en ninguno de los tres casos, *Löffelmann*, *Gütl* y *Lang contra Austria*, elementos que nos permitan dispensar un trato diferente a los Testigos de Jehová, que a día de hoy no gozan en Austria del estatuto de confesión religiosa plenamente reconocida por el Estado, que otros colectivos que sí gozan del mismo, por poner un ejemplo, la Iglesia Copta Ortodoxa, a la que graciosamente se otorgó en 2003 dicho reconocimiento, sin necesidad de cumplir el plazo legal de 10 años como *comunidad de creencias de carácter religioso*, contemplado en la Ley de 1998.

¿Por qué no dar un tratamiento igual a circunstancias que son objetivamente iguales? ¿Es que no estamos hablando de lo mismo, del reconocimiento del pleno disfrute del derecho de libertad religiosa? ¿Dónde está la diferencia? ¿En que son menos? ¿En que *están bajo sospecha*? No podemos compartir la *obsesión* por encontrar la *diferencia* que justifique precisamente un tratamiento *diferenciado*, sobre todo cuando se está poniendo en cuestión el pleno disfrute de derechos fundamentales, y menos cuando lo que está en juego es la libertad de conciencia, la máxima expresión de la dignidad humana.

Reconocemos que sentimos una *tentación demasiado fuerte* por reconocer a todos los ciudadanos el pleno disfrute de este derecho. El conocimiento de la historia de nuestras instituciones, si para algo puede servirnos, es para comprender mejor aquello que debemos cambiar, para perfeccionar de cara al futuro nuestros ordenamientos jurídicos, y creo que estos tres pronunciamientos van en esa línea. Afortunadamente.

⁵⁴ COBACHO LÓPEZ, ÁNGEL. La protección jurisdiccional de la libertad religiosa en Austria a raíz de las Sentencias del Tribunal Europeo de Derechos Humanos N° 76581/01, 49686/99, 42967/98 y 28648/03. En: Revista General de Derecho Canónico y Derecho Eclesiástico del Estado. Número 20. 2009. Página 7.

⁵⁵ *Löffelmann contra Austria*, §§ 53, 54 y 55, *Gütl contra Austria*, §§ 37, 38, 39 y 40, y *Lang contra Austria*, §§ 29, 30, 31 y 32.

ANEXO.

**CASE OF VEREIN DER FREUNDE DER
CHRISTENGEMEINSCHAFT AND OTHERS v. AUSTRIA**

(Application no. 76581/01)

STRASBOURG

26 February 2009

**In the case of Verein der Freunde der Christengemeinschaft and
Others v. Austria,**

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

Christos	Rozakis,	<i>President,</i>
Nina		Vajić,
Anatoly		Kovler,
Elisabeth		Steiner,
Khanlar		Hajiyev,
Dean		Spielmann,
Sverre	Erik	Jebens,
and Søren-Nielsen,	<i>Section Registrar,</i>	<i>judges,</i>

Having deliberated in private on 5 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 76581/01) against
the Republic of Austria lodged with the Court under Article 34 of
the Convention for the Protection of Human Rights and

Fundamental Freedoms (“the Convention”) by a religious community, Verein der Freunde der Christengemeinschaft, three Austrian nationals, Martin David, Christoph Leisegang, Erich Cibulka and one German national, Ute König (“the applicants”), on 28 September 2001.

2. The applicants were represented by Mr M. Machold, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicants alleged in particular, that the Austrian authorities’ decision to grant the first applicant legal personality of a more limited scope *vis-à-vis* other religious communities infringed their right to freedom of religion under Article 9 of the Convention read alone and in conjunction with Article 14. They further alleged that the proceedings for granting legal personality had lasted an unreasonably long time and that they had no effective remedy by which to receive a decision on their request for recognition.

4. By a decision of 23 March 2006 the Court declared the application admissible.

5. Neither of the parties made further observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first applicant is a religious community established in Austria on 11 July 1998, and the four other applicants are members of it. The second applicant is the chair of the Vienna branch of the first applicant, and the fifth applicant is its deputy chair and is a minister in Vienna. The third and fourth applicants are also members of the first applicant’s Vienna branch. The second to fourth applicants are Austrian nationals, and the fifth applicant is a German national. The second to fifth applicants live in Vienna.

A. First set of proceedings

7. On 14 March 1995 the applicants requested the Federal Minister for Education, Arts and Sports (*Bundesminister für Unterricht, Kunst und Sport*) to recognise the first applicant as a religious society (*Religionsgesellschaft*) under the 1874 Recognition Act (*Anerkennungsgesetz*).

8. On 4 October 1995 the Constitutional Court found that under the 1874 Recognition Act, a religious body had a subjective right to recognition as a religious society provided that the conditions laid down in that Act were met and that a decision on this matter should be subject to review by the Austrian courts (see *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, no. 40825/98, § 21, 31 July 2008).

9. On 11 March 1996 the applicants filed an application with the Administrative Court (*Verwaltungsgerichtshof*) against the Minister's failure to give a decision (*Säumnisbeschwerde*).

10. On 26 January 1998 the Administrative Court rejected the application. It noted that, upon the entry into force of the Act on the Legal Status of Registered Religious Communities (*Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften*, hereafter referred to as "the 1998 Religious Communities Act") on 10 January 1998, the applicants' request for recognition under the 1874 Recognition Act had to be dealt with as a request under section 11(2) of the 1998 Religious Communities Act. Thus, the six-month time-limit for the Minister to give a decision had started again on 10 January 1998 and consequently there had been no failure to give a decision on the part of the Minister. The Administrative Court's decision was served on the applicants' lawyer on 11 March 1998.

11. On 20 July 1998 the Minister decided that the first applicant had acquired legal personality as a registered religious community within the meaning of the 1998 Religious Communities Act as from 11 July 1998. The first applicant, however, was not thereby granted legal personality as a religious society within the meaning of the 1874 Recognition Act.

12. On 9 September 1998 the applicants lodged a complaint against that decision with the Constitutional Court (*Verfassungsgerichtshof*), arguing that the refusal to confer legal personality to the first applicant under the 1874 Recognition Act was in breach of Article 9 of the Convention and Article 14 of the Basic Law.

13. On 17 December 1998 the Federal Minister submitted observations in reply, which arrived at the Constitutional Court on 23 December 1998.

B. Second set of proceedings

14. Meanwhile, on 16 July 1998, the applicants had filed another request with the Federal Minister for the first applicant to be recognised as a religious society under the 1874 Recognition Act.

15. On 1 December 1998 the Federal Minister dismissed the applicants' request of 16 July 1998. It found that, pursuant to section 11(1) of the 1998 Religious Communities Act, a religious community could only be recognised as a religious society under the 1874 Recognition Act if it had already existed as a registered religious community for a minimum of ten years.

16. On 12 January 1999 the applicants lodged a complaint against that decision with the Constitutional Court. They submitted that the transitory provisions in the 1998 Religious Communities Act, which introduced new conditions for recognition as a religious society under the 1874 Recognition Act were unconstitutional as being in breach of Article 9 of the Convention and Article 14 of the Basic Law.

17. On 16 April 1999 the Federal Minister submitted observations in reply to the Constitutional Court.

18. On 3 March 2001 the Constitutional Court dismissed the applicants' complaints of 9 September 1998 and 12 January 1999. It found that the ten-year waiting period for registered religious communities as a precondition for a successful application for recognition as a religious society under the 1874 Recognition Act

was in conformity with the Federal Constitution. In particular, it served the legitimate aim of ensuring that the competent authority could verify during this period of time whether the religious community was ready to integrate into the existing legal order, for example, whether it performed unlawful activities as a consequence of which legal personality had to be withdrawn (section 9(2) and section 5(1) of the 1998 Religious Communities Act). Examples of such unlawful activities were incitement to commit criminal offences, endangering the psychological development of minors, violating the psychological integrity of persons or using psychotherapeutic methods to disseminate its religious beliefs. That decision was served on the applicants' lawyer on 4 April 2001.

II. RELEVANT DOMESTIC LAW

A. Constitutional provisions

1. Basic Law 1867 (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger)

19. Under Article 14 of the Basic Law, everybody is granted freedom of conscience and belief. The enjoyment of civil and political rights is independent from religious belief; however, the manifestation of religious belief may not derogate from civic obligations.

20. Article 15 provides that recognised churches and religious communities have the right to manifest their faith collectively in public, to organise and administer their internal affairs independently, and to remain in possession of acquired institutions, foundations and funds dedicated to cultural, educational and charitable purposes; however, they are, like all other societies, subordinate to the law.

21. Article 16 entitles the supporters of non-recognised religious communities to domestic manifestation of their faith unless it is unlawful or *contra bonos mores*.

2. Treaty of St Germain of 10 September 1919 between the Allied Powers and the Republic of Austria

22. Article 63 § 1 states that Austria undertakes to ensure full and complete protection of life and liberty to all inhabitants of Austria without distinction on the basis of birth, nationality, race or religion.

23. Article 63 § 2 guarantees to all inhabitants of Austria the right to manifest publicly and privately their thought, religion and beliefs, unless these are incompatible with the protection of public order or morals.

B. Statutory provisions

1. Recognition of religious societies

(a) Act of 20 May 1874 concerning the Legal Recognition of Religious Societies (Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften), RGBI (Reichsgesetzblatt, Official Gazette of the Austrian Empire) 1874/68

24. Section 1 of the Act provides that all religious faiths which have not yet been recognised in the legal order may be recognised as a religious society if they fulfil the conditions set out in the Act, namely that their teaching, services and internal organisation, as well as the name they choose, do not contain anything unlawful or morally offensive and that the setting up and existence of at least one community of worship (*Cultusgemeinde*) satisfying the statutory criteria is ensured.

25. Section 2 provides that if the above conditions are met, recognition is granted by the Minister for Religious Affairs (*Cultusminister*). Recognition has the effect that a religious society obtains legal personality under public law (*juristische Person öffentlichen Rechts*) and enjoys all rights which are granted under the legal order to such societies. Sections 4 et seq. regulate the setting up of communities of worship, membership of them, delimitation of their territory, and their bodies and statutes. Sections 10 to 12 deal with the nomination of religious ministers (*Seelsorger*) of religious societies, the qualifications such persons must have and how their nomination must be communicated to

the authorities. Section 15 provides that the public authorities responsible for religious matters have a duty to monitor whether religious societies comply with the provisions of the Act.

(b) Examples of recognised religious societies

(i) Recognition by international treaty

26. The legal personality of the Roman Catholic Church is, on the one hand, regarded as historically recognised, and, on the other hand, explicitly recognised in an international treaty, the Concordat between the Holy See and the Republic of Austria (Federal Law Gazette II, No. 2/1934 – *Konkordat zwischen dem Heiligen Stuhle und der Republik Österreich, BGBl. II Nr. 2/1934*).

(ii) Recognition by a special law

27. The following are examples of special laws recognising religions societies:

(a) Act on the External Legal Status of the Israelite Religious Society, Official Gazette of the Austrian Empire, No. 57/1890 (*Gesetz über die äußeren Rechtsverhältnisse der Israelitischen Religionsgesellschaft, RGBl. 57/1890*);

(b) Act of 15 July 1912 on the recognition of followers of Islam [according to the Hanafi rite] as a religious society, Official Gazette of the Austrian Empire No. 159/1912 (*Gesetz vom 15. Juli 1912, betreffend die Anerkennung der Anhänger des Islam [nach hanefitischen Ritus] als Religionsgesellschaft, RGBl. Nr. 159/1912*);

(c) Federal Act on the External Legal Status of the Evangelical Church, Federal Law Gazette No. 182/1961 (*Bundesgesetz vom 6. Juli 1961 über die äußeren Rechtsverhältnisse der Evangelischen Kirche, BGBl. Nr. 182/1961*);

(d) Federal Act on the External Legal Status of the Greek Orthodox Church in Austria, Federal Law Gazette No. 229/1967 (*Bundesgesetz über die äußeren Rechtsverhältnisse der*

Griechisch-Orientalischen Kirche in Österreich, BGBl. Nr. 182/1961);

(e) Federal Act on the External Legal Status of the Oriental Orthodox Churches in Austria, Federal Law Gazette No. 20/2003 (*Bundesgesetz über äußere Rechtsverhältnisse der Orientalisch-Orthodoxen Kirchen in Österreich, BGBl. Nr. 20/2003*).

(iii) Recognition by a decree (Verordnung) under the 1874 Recognition Act

28. Between 1877 and 1982 the competent ministers recognised a further six religious societies.

2. Registration of religious communities

Act on the Legal Status of Registered Religious Communities (Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften), Federal Law Gazette - BGBl I 1998/19

29. The Religious Communities Act entered into force on 10 January 1998. Pursuant to section 2(3) of the Act, the Federal Minister for Education and Culture has to rule in a formal written decision (*Bescheid*) on the acquisition of legal personality by the religious community. In the same decision the Minister has to dissolve any association whose purpose was to disseminate the religious teachings of the religious community concerned (section 2(4)). The religious community has the right to call itself a “publicly registered religious community”.

30. Section 4 specifies the necessary contents of the statutes of the religious community. Among other things, they must specify the community’s name, which must be clearly distinguishable from the name of any existing religious community or society. They must further set out the main principles of the religious community’s faith, the aims and duties deriving from it, the rights and duties of the community’s adherents, including the conditions for terminating membership (it is further specified that no fee for leaving the religious community may be charged), how its bodies are appointed, who represents the religious community externally

and how the community's financial resources are raised. Lastly, the statutes must contain provisions on the liquidation of the religious community, ensuring that the assets acquired are not used for ends contrary to religious purposes.

31. Under section 5, the Federal Minister must refuse to grant legal personality to a religious community if, in view of its teachings or practice, this is 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 freedom of others; this is in particular the case if its activities involve incitement to commit criminal offences, obstruction of the psychological development of adolescents or undermining of people's mental integrity, or if the statutes do not comply with section 4.

32. Under section 7, the religious community must inform the Federal Minister for Education and Cultural Affairs of the name and address of the persons belonging to its official bodies and of any change of its statutes without delay. The Minister must refuse to accept the notification if the appointment of the official bodies contravened the statutes or if the change of the statutes would constitute a reason for refusal of registration under section 5.

33. Section 9 specifies the reasons for termination of a community's legal personality. Legal personality ceases to exist if the religious community dissolves itself or if the acknowledgment of its legal personality is revoked. Reasons for revoking legal personality are set out in subsection (2): for example, if the reasons for granting legal personality no longer subsist or if for more than one year no bodies representing the religious community externally have been appointed.

34. The Act only regulates the granting of legal personality. Once legal personality has been granted to a religious community, it may pursue the activities referred to in its statutes. There are no specific laws in Austria regulating the acquisition of assets by religious societies or communities, the establishment of places of worship or assembly, or the publication of religious

material. However, provisions which contain explicit references to religious societies are spread over various statutory instruments (see below).

35. Since the entry into force of the 1998 Religious Communities Act on 10 January 1998, non-recognised religious associations may be granted legal personality upon application. A previous application for recognition under the 1874 Recognition Act is to be dealt with as an application under the 1998 Religious Communities Act pursuant to section 11(2).

36. Section 11(1) of the 1998 Religious Communities Act establishes additional criteria for a successful application under the 1874 Recognition Act, such as the existence of the religious association for at least twenty years in Austria and for at least ten years as a registered religious community; a minimum number of two adherents per thousand members of the Austrian population (at the moment, this means about 16,000 persons); the use of income and other assets for religious purposes, including charity activities; a positive attitude towards society and the State; and no illegal interference as regards the community's relationship with recognised or other religious societies.

3. Specific references to religious societies in the Austrian legal order

37. In various Austrian laws specific reference is made to recognised religious societies. The following list, which is not exhaustive, sets out the main instances.

Under section 8 of the Federal School Supervision Act (*Bundes-Schulaufsichtsgesetz*), representatives of recognised religious societies may sit (without the right to vote) on regional education boards.

Under the Private Schools Act (*Privatschulgesetz*), recognised religious societies, like public territorial entities, are presumed to possess the necessary qualifications to operate private schools, whereas other persons have to prove that they are qualified.

Under section 24(3) of the Military Service Act, ordained priests, persons involved in spiritual welfare or in religious teaching after graduation from theological studies, members of a religious order who have made a solemn vow and students of theology who are preparing to assume a pastoral function and who belong to a recognised religious society are exempt from military service and, under section 13 of the Civilian Service Act, are also exempt from alternative civilian service.

Under sections 192 and 195 of the Civil Code (*ABGB*), ministers of recognised religious societies are exempt from the obligation to submit an application to be appointed as guardians, and under section 3(4) of the 1990 Act on Juries of Assizes and Lay Judges (*Geschworenen- und Schöffengesetz*) they are exempt from acting as members of a jury of an assize court or as lay judges of a criminal court.

Section 18(1)(5) of the Income Tax Act provides that contributions to recognised religious societies are deductible from income tax up to an amount of 100 euros per year.

Section 2 of the Land Tax Act (*Grundsteuergesetz*) provides that real property owned by recognised religious societies and used for religious purposes is exempt from real-estate tax.

Under section 8(3)(a) of the 1955 Inheritance and Gift Act (*Erbschafts- und Schenkungsteuergesetz*), which was still in force at the relevant time, donations to domestic institutions of recognised churches or religious societies were subject to a reduced tax rate of 2.5%.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 9

38. The applicants complained that the Austrian authorities had refused to grant the first applicant legal personality in the form of a religious society under the 1874 Recognition Act, whereby it would have acquired the status of a public-law entity,

and had merely granted it legal personality as a publicly registered religious community under the 1998 Religious Communities Act, thereby conferring on it the inferior status of an entity under private law. In particular, the 1998 Religious Communities Act established criteria for granting legal personality which were not objective and were discriminatory, such as a minimum number of members (section 11(1)) amounting to two-thousandths of the population of Austria (approximately 16,000 persons), which could hardly be fulfilled by any potential candidate for recognition. Also, the criterion of a ten-year waiting period before a religious community could apply for recognition as a religious society under the 1874 Recognition Act was arbitrary as no good reason for such a waiting period existed. The applicants relied on Article 9 and 14 of the Convention.

Article 9 of the Convention 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.”

Article 14 of the Convention reads as follows:

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

39. The Court considers that this complaint falls to be examined under Article 14 read in conjunction with Article 9 of the Convention (see *Religionsgemeinschaft der Zeugen Jehovas and Others*). Furthermore, although the applicants did not explicitly rely on it, in interpreting these provisions due regard to Article 11 of the Convention will be had.

A. Submissions by the parties

40. The applicants maintained that the Austrian authorities' refusal to confer on the first applicant the status of a recognised religious society constituted discrimination prohibited by the Convention. They gave various examples for the alleged discriminatory treatment between religious communities and religious societies. They disputed in particular the necessity of the criterion of a ten-year waiting period before a religious community could apply for recognition as a religious society under section 11(1) of the 1874 Recognition Act as, in their view, no good reason for such a waiting period existed. There was also no valid justification for the criterion of a minimum number of adherents, namely two-thousandths of the population of Austria (approximately 16,000 persons). This criterion could hardly be fulfilled by any potential candidate for recognition and many registered religious communities and even recognised religious societies had fewer members.

41. The Government referred to their observations in the case of *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* ((dec.), no. 40825/98 5 July 2005). They maintained in particular that the first applicant, even before it had become a publicly registered religious community on 11 July 1998, had had legal personality as a registered association since 24 August 1945. The status conferred on the first applicant as a registered religious community under the 1998 Religious Communities Act complied with the requirements of Article 9; it only provided a legal status and in no way restricted the exercise or enjoyment of the right to freedom of religion. In conclusion,

there was no interference with the applicants' rights under Article 9 of the Convention.

42. There was also no discrimination against the applicants in respect of the first applicant's status as a registered recognised community. In respect of the ten-year waiting period for registered religious communities, the Government referred to the Constitutional Court's finding of 3 March 2001 (*VfSlg. 12.102/2001*) that it served the legitimate aim of ensuring that the competent authority could verify during this period of time whether the religious community was ready to integrate into the existing legal order, in particular whether it performed unlawful activities as a consequence of which legal personality had to be withdrawn (section 9(2) and section 5(1) of the 1998 Religious Communities Act). Examples of such unlawful activities were incitement to commit criminal offences, endangering the psychological development of minors, violating the psychological integrity of persons or using psychotherapeutic methods to disseminate its religious beliefs. As regards the requirement of a certain number of adherents, the Government maintained that this criterion was not only important for the religious community's existence but also for ensuring that duties were fulfilled, such as organising and monitoring the teaching of its religion in schools.

B. The Court's assessment

43. In the case of *Religionsgemeinschaft der Zeugen Jehovas and Others* (cited above) the Court found a breach of Article 14 of the Convention taken in conjunction with Article 9 on the ground that the criterion of a ten-year waiting period before a religious community could apply for recognition as a religious society (section 11(1) of the 1998 Religious Communities Act) lacked any objective and reasonable justification. It held in particular as follows:

“92. The Court observes that under Austrian law, religious societies enjoy privileged treatment in many areas. These areas include exemption from military service and civilian service, reduced tax liability or exemption from specific taxes,

facilitation of the founding of schools, and membership of various boards (see ‘Relevant domestic law’ above). Given the number of these privileges and their nature, in particular in the field of taxation, the advantage obtained by religious societies is substantial and this special treatment undoubtedly facilitates a religious society’s pursuance of its religious aims. In view of these substantive privileges accorded to religious societies, the obligation under Article 9 of the Convention incumbent on the State’s authorities to remain neutral in the exercise of their powers in this domain requires therefore that if a State sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner.

93. The Court notes that in the present case the Federal Minister for Education and Cultural Affairs, on 1 December 1998, dismissed the request for recognition of the first applicant as a religious society, relying on section 11(1) of the Religious Communities Act, on the ground that it had not existed as a registered religious community for a minimum of ten years. Since only this element of section 11 was applied, the Court does not find it necessary to examine the other parts of this provision that were challenged by the applicants.

...

97. The Court finds that the imposition of a waiting period before a religious association that has been granted legal personality can obtain a more consolidated status as a public-law body raises delicate questions, as the State has a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs (see *Metropolitan Church of Bessarabia and Others*, cited above, § 116). Such a waiting period therefore calls for particular scrutiny on the part of the Court.

98. The Court could accept that such a period might be necessary in exceptional circumstances such as would be in the case of newly established and unknown religious groups. But it hardly appears justified in respect of religious groups with a long-standing existence internationally which are also long established in the country and therefore familiar to the competent authorities, as is the case with the Jehovah's Witnesses. In respect of such a religious group, the authorities should be able to verify whether it fulfils the requirements of the relevant legislation within a considerably shorter period. Further, the example of another religious community cited by the applicants shows that the Austrian State did not consider the application on an equal basis of such a waiting period to be an essential instrument for pursuing its policy in that field.

99. The Court therefore finds that the difference in treatment was not based on any 'objective and reasonable justification'. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 9."

44. In the present case the Federal Minister's refusal to recognise the first applicant as a religious society was based on the same ground – non-fulfilment of the ten-year waiting period – as in the case cited above. The Court observes further that the Government, in their own submissions, acknowledged the first applicant's existence in Austria in the form of an association from 24 August 1945 onwards. Thus, it can hardly be seen as a newly established and unknown religious group but rather as one which is long established in the country and therefore familiar to the competent authorities. For such a religious group a ten-year waiting period is not justified.

45. This being so, the Court must arrive at the same conclusion as in the case of *Religionsgemeinschaft der Zeugen Jehovas and Others*, namely that the difference in treatment was not based on any "objective and reasonable justification". Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 9.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

46. The applicants complained under Article 6 of the Convention about the length of the proceedings concerning their request for recognition of the first applicant as a religious society.

Article 6, as far as relevant, provides as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time... by [a] ... tribunal...”

A. Submissions by the parties

47. The applicants maintained that Article 6 was applicable to the proceedings at issue as the applicants' claim for recognition was based on the 1874 Recognition Act and concerned their civil rights and obligations.

48. The applicants further argued that the proceedings had lasted an unreasonably long time and stressed that from 14 March 1995 until 1 December 1998 the Austrian authorities had not taken any procedural steps. Such inactivity during a period of nearly five years was inexplicable.

49. The Government contested that Article 6 was applicable to the case, arguing that the subject matter of the proceedings was the applicants' request to obtain legal personality and the ensuing status of a public-law corporation under the 1874 Recognition Act. However, irrespective of the fact that the first applicant had obtained legal status as an association and had been registered as such since 24 August 1945, as well as the fact that the first applicant had been granted legal status under the 1998 Religious Communities Act as of 11 July 1998, the Government found that it was not discernible to what extent a decision in recognition proceedings determined “civil rights and obligations”, within the meaning of Article 6, since recognition also entailed the assumption of public tasks on the part of a religious community.

50. Assuming the applicability of Article 6, the duration of the proceedings had been reasonable and due to the complexity of the

case. As regards the conduct of the administrative authorities and courts, no delays had occurred. The Administrative Court and the Constitutional Court had taken the decisions as quickly as possible. In particular, several similar cases were pending before the Constitutional Court, from which the court had selected the applicants' complaints as a "leading case" and reviewed the constitutionality of several provisions of the 1998 Religious Communities Act. In the light of the extremely complex questions of law and different constellations of cases pending at the same time, the duration of two years and one and a half months in respect of the applicants' complaint of 12 January 1999 was not excessive.

B. The Court's assessment

1. Applicability of Article 6 § 1 of the Convention

51. In the case of *Religionsgemeinschaft der Zeugen Jehovas and Others* (cited above, § 108) the Court found that Article 6 § 1 was applicable to proceedings concerning a request for recognition as a religious society. It sees no reason to come to a different conclusion in the present case.

2. Compliance with Article 6 § 1 of the Convention

52. The Court notes at the outset that two different sets of proceedings need to be distinguished, namely the proceedings concerning the application for recognition submitted on 14 March 1995 and those concerning the application submitted on 16 July 1998.

(a) Proceedings concerning the request for recognition of 14 March 1995

53. As regards the period to be taken into account for the purpose of Article 6 § 1 the Court reiterates that in the case of *Religionsgemeinschaft der Zeugen Jehovas and Others* it found that the relevant period had started when the Constitutional Court, in its decision of 4 October 1995, had recognised that a religious body had a subjective right to recognition as a religious society. It was from that moment that the period to be taken into

consideration under Article 6 § 1 started to run (*ibid.*, § 110). The proceedings in the instant case ended on 4 April 2001, when the Constitutional Court's decision of 3 March 2001 was served on the applicants' lawyer. Thus, the proceedings lasted approximately five years and six months.

54. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what was at stake for the applicant in the litigation (see, for instance, *Humen v. Poland* [GC], no. 26614/95, § 60, 15 October 1999).

55. In the Court's view the proceedings were complex, as the domestic authorities decided on the applicants' case on the basis of a change in the Constitutional Court's case-law and new legislation enacted in the meantime. Moreover, at first instance the proceedings were interrupted by the applicants' application to the Administrative Court in which they complained that the Federal Minister had failed to determine their request for recognition in time. Once the Administrative Court, on 26 January 1998, had established that that application was not well-founded and that the Federal Minister was actually competent to deal with the request under a different set of rules, the Federal Minister dealt expeditiously with their request. As regards the period of approximately two years and five months during which time their complaint was pending before the Constitutional Court, that court examined the constitutionality of various provisions of the 1998 Religious Communities Act and gave a reasoned decision on the merits of the applicants' complaint. Thus, the lapse of time before the Constitutional Court may be explained by the complexity of the issue. In these circumstances, the Court does not find that the duration of the above proceedings exceeded the reasonable-time requirement under Article 6 § 1. (see, *e contrario*, *Religionsgemeinschaft der Zeugen Jehovas and Others*, cited above, §§ 116-117).

56. It follows that there has been no breach of the reasonable-time requirement as regards the proceedings concerning the first application for recognition.

(b) Proceedings concerning the request for recognition of 16 July 1998

57. On 16 July 1998 the applicants submitted another request for recognition of the first applicant as a religious society. The relevant period under Article 6 § 1 started on 1 December 1998, when the Federal Minister dismissed the applicants' request, as it was then that the "dispute" within the meaning of Article 6 arose. It ended on 4 April 2001 with the service of the Constitutional Court's decision. The proceedings thus lasted approximately two years and four months.

58. Given that during this period the case was dealt with by two levels of jurisdiction the Court does not find that the duration of the above proceedings exceeded the reasonable-time requirement under Article 6 § 1.

59. It follows that there has been no breach of the reasonable-time requirement as regards the proceedings concerning the second application for recognition either.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

60. The applicants complained under Article 13 of the Convention that they had no effective remedy at their disposal by which to receive a decision on their request for recognition.

Article 13 reads as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

61. The applicants maintained that their right to an effective remedy had been violated and claimed that the Constitutional Court had not addressed all of their arguments.

62. This was disputed by the Government, who argued that the Federal Constitution provided for remedies for legal protection, in particular a complaint to the Constitutional Court, of which the applicants had made use.

63. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

64. The Court observes that after having been granted recognition as a religious community under the Act on the Legal Status of Registered Religious Communities on 20 July 1998, the applicants applied to the Constitutional Court, challenging particular provisions of that Act. It is true that the Constitutional Court dismissed that complaint on 3 March 2001, but the effectiveness of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome (see, among other authorities, *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 62, § 40). The applicants consequently had available to them a remedy satisfying the requirements of that provision and it follows that there has been no breach of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. Article 41 of the Convention provides:

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

A. Damage

66. The applicants claimed an award in respect of non-pecuniary damage but left it to the Court to determine the appropriate sum.

67. The Government submitted that in fixing this sum the Court should bear in mind that there had to be a causal link between the violation at issue and the damage sustained.

68. Having regard to awards in comparable cases, the Court, on an equitable basis, awards 4,000 euros (EUR) to the applicants jointly, plus any tax that may be chargeable.

B. Costs and expenses

69. The applicants claimed a total of EUR 12,839.09, including VAT, for costs and expenses incurred in the domestic proceedings and before the Court. Of this amount, EUR 4,518.37 plus VAT related to the proceedings before the Court.

70. The Government submitted that only those costs incurred in domestic proceedings in an attempt to prevent or redress the violation found by the Court could be reimbursed; this was clearly not the case for costs incurred in connection with the drafting of the first applicant's statutes and in the administrative proceedings for recognition, in which representation by a lawyer was not mandatory.

71. As regards the proceedings before it, the Court finds that the sum claimed, EUR 4,518.37, appears reasonable and therefore awards it in full plus any tax that may be chargeable to the applicants on that amount. As regards the costs incurred in the domestic proceedings, the Court agrees with the Government that not all of them were incurred in an attempt to prevent the violation found. Ruling on an equitable basis, it awards EUR 3,000 plus any tax that may be chargeable to the applicants on that amount.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 14 of the Convention read in conjunction with Article 9;
2. *Holds* that there has been no violation of Article 6 of the Convention;
3. *Holds* that there has been no violation of Article 13 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) in respect of non-pecuniary damage and EUR 7,518.37 (seven thousand five hundred and eighteen euros and thirty-seven cents) in respect of costs and expenses, plus any tax that may be chargeable to the applicants on these amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Christos
Registrar President

Rozakis

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Steiner is annexed to this judgment.

CONCURRING OPINION OF JUDGE STEINER

As regards the complaint under Article 14 of the Convention read in conjunction with Article 9, the present judgment follows closely the reasoning adopted by the Court in the case of *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (no. 40825/98, 31 July 2008). In that case I voted against finding a violation of Article 9 read alone and in conjunction with Article 14, and, for the reasons explained in my dissenting opinion attached to that judgment, I might have arrived at the same conclusions in the present case. However, for the sake of the uniformity and coherence of our case-law, I have voted in favour of finding a violation of Article 14 read in conjunction with Article 9 in the present case.

CASO LÖFFELMANN v. AUSTRIA.⁵⁶

FIRST SECTION

CASE OF LÖFFELMANN v. AUSTRIA

(Application no. 42967/98)

JUDGMENT

STRASBOURG

12 March 2009

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

In the case of *Löffelmann v. Austria*,

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

Christos Rozakis, President,

Nina Vajiæ,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyev,

⁵⁶ El texto íntegro de los casos *Gütl y Lang contra Austria*, puede descargarse asimismo de la Base de Datos del Tribunal Europeo de Derechos Humanos: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

En las direcciones:

1) Caso *Gütl* contra Austria:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=G%FCtl%20%7C%20Austria&sessionid=31254355&skin=hudoc-en>

2) Caso *Lang* contra Austria:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=G%FCtl%20%7C%20Austria&sessionid=31254355&skin=hudoc-en>

Dean Spielmann,

Sverre Erik Jebens, judges,

and Soren Nielsen, Section Registrar,

Having deliberated in private on 17 February 2009,

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

PROCEDURE

1. The case originated in an application (no. 42967/98) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Philemon Löffelmann (“the applicant”), on 9 July 1998.

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

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

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. By a decision of 1 February 2005 the Court declared the application partly admissible.

6. Neither the applicant nor the Government filed further written observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1976 and lives in Maissau.

8. Upon his baptism on 9 July 1994 he became a member of the Jehovah's Witnesses in Austria, within which he assumed the function of a preacher or "regular pioneer" (Prediger, allgemeiner Pionier) and, since 27 November 1996, a deacon or "ministerial servant" (Diakon, Dienstamtgehilfe). In this function he assisted the clerical work of elders of the Jehovah's Witnesses.

9. On 17 November 1994 the Lower Austrian Military Authority (Militärkommando) found that the applicant was fit to perform military service. On 3 July 1995 the applicant started his military service; however, on 1 August 1995 he was discharged following a military medical expert opinion that had found him unfit for service.

10. On 28 September 1995 the Lower Austrian Military Authority issued a conscription order (Stellungsbescheid) in respect of the applicant, ordering him to undergo another examination as to his ability to perform military service pursuant to section 24(8) of the Military Service Act (Wehrgesetz), as in force at the relevant time. As to the applicant's argument that he should be exempted from military service under section 24(3) of the Military Service Act, it noted that the applicant was not a member of a recognised religious society.

11. The applicant appealed against that order, claiming in particular that he should be dispensed from military service since he performed a function within the Jehovah's Witnesses which was equivalent to that of members of a recognised religious society who were exempted from military service under section 24(3) of the Military Service Act. To restrict such a privilege to members of recognised religious societies was not objectively justified and was therefore in breach of the Federal Constitution.

12. On 16 November 1995 the Federal Minister for Defence (Bundesminister für Landesverteidigung) dismissed the applicant's appeal and confirmed the lower authority's decision.

13. On 8 January 1996 the applicant lodged a complaint with the Constitutional Court (Verfassungsgerichtshof), requesting it to repeal the wording "recognised religious societies" in section 24(3) of the Military Service Act.

14. On 1 December 1997 the Constitutional Court refused to deal with the applicant's complaint for lack of prospects of success. It referred to an earlier decision by which it had found that the obligation to perform military or civilian service raised no concerns as regards compliance with Article 9 of the Convention.

15. On 26 March 1998 the Administrative Court (Verwaltungsgerichtshof) dismissed the applicant's complaint. It noted that the applicant had solely complained about section 24(3) of the Military Service Act in conjunction with the 1998 Act on the Legal Status of Registered Religious Communities (Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften – hereafter referred to as the "1998 Act"), which had entered into force on 10 January 1998. However, the Administrative Court had to limit its examination of the legality of the drafting order to the legal situation at the time when the order had been issued. Referring to the case-law quoted by the Constitutional Court, it found no concerns as regards the legality of the drafting order and therefore also no indication to institute proceedings to review constitutionality (Gesetzesprüfungsverfahren) as proposed by the applicant.

16. On 14 May 1998 the Lower Austrian Military Authority issued another conscription order for an examination of the applicant's fitness to perform military service.

17. On 19 May 1998 the applicant lodged a complaint with the Constitutional Court against the order. He submitted in particular that by virtue of the 1998 Act, the Jehovah's Witnesses had been granted the status of a "registered religious

community”. However, the ten-year period for a successful application for recognition under the Recognition Act (Anerkennungsgesetz), newly introduced by section 11 of the 1998 Act, lacked objective justification. Furthermore, it precluded any recognition for the following ten years. Since section 24(3) of the Military Service Act referred to “recognised religious societies” and restricted exemption from military service to members of recognised religious societies, the applicant again requested the Constitutional Court to revoke this limitation and also to revoke the ten-year period prescribed in section 11 of the 1998 Act.

18. On 8 June 1998 the Constitutional Court refused to deal with the complaint for lack of prospects of success. It further held that the provision of the 1998 Act referred to was not directly applicable to the case at issue.

19. Subsequently, the applicant filed a request for recognition as a conscientious objector (Zivildiensterklärung), which was granted.

20. Between 1 February 1999 and 31 January 2000 he performed his civilian service in a social institution.

21. On 1 February 2000 the applicant joined the “Religious Order of the Jehovah's Witnesses” (Orden der Sondervollzeitdiener der Zeugen Jehovas), where he lived and worked as a preacher (Bethelmitarbeiter).

22. In February 2001 he left the order and continued to work as a preacher and deacon.

II. RELEVANT DOMESTIC LAW

A. The obligation to perform military or alternative service

23. Article 9a § 3 of the Federal Constitution reads as follows: “Every male Austrian citizen is liable for military service. Conscientious objectors who refuse to perform compulsory military service and who are dispensed from this requirement must perform alternative service. The details shall be regulated by ordinary law.”

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

“An exemption from the obligation to perform military service shall apply to the following members of recognised religious societies:

1. ordained priests,
2. persons involved in spiritual welfare or in clerical teaching after graduating in theological studies,
3. members of a religious order who have made a solemn vow, and
4. students of theology who are preparing to assume a clerical function.”

25. Section 24(8) of the Military Service Act provided, *inter alia*, that persons whose fitness for military service, having initially been established, became questionable had to undergo another examination. However, the latest decision on fitness for performance of military service remained valid until the final conclusion of the fresh examination.

B. Religious societies and religious communities

1. Recognition of religious societies

(a) Act of 20 May 1874 concerning the Legal Recognition of Religious Societies (Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften), RGBI (Reichsgesetzblatt, Official Gazette of the Austrian Empire) 1874/68

26. Section 1 of the Act provides that all religious faiths which have not yet been recognised in the legal order may be recognised as a religious society if they fulfil the conditions set out in the Act, namely that their teaching, services and internal organisation, as well as the name they choose, do not contain

anything unlawful or morally offensive and that the setting up and existence of at least one community of worship (Cultusgemeinde) satisfying the statutory criteria is ensured.

27. Section 2 provides that if the above conditions are met, recognition is granted by the Minister for Religious Affairs (Cultusminister). Recognition has the effect that a religious society obtains legal personality under public law (juristische Person öffentlichen Rechts) and enjoys all rights which are granted under the legal order to such societies. Sections 4 et seq. regulate the setting up of communities of worship, membership of them, delimitation of their territory, and their bodies and statutes. Sections 10 to 12 deal with the nomination of religious ministers (Seelsorger) of religious societies, the qualifications such persons must have and how their nomination must be communicated to the authorities. Section 15 provides that the public authorities responsible for religious matters have a duty to monitor whether religious societies comply with the provisions of the Act.

(b) Examples of recognised religious societies

(i) Recognition by international treaty

28. The legal personality of the Roman Catholic Church is, on the one hand, regarded as historically recognised, and, on the other hand, explicitly recognised in an international treaty, the Concordat between the Holy See and the Republic of Austria, Federal Law Gazette II, No. 2/1934 (Konkordat zwischen dem Heiligen Stuhle und der Republik Österreich, BGBl. II Nr. 2/1934).

(ii) Recognition by a special law

29. The following are examples of special laws recognising religious societies:

(a) Act on the External Legal Status of the Israelite Religious Society, Official Gazette of the Austrian Empire, No. 57/1890 (Gesetz über die äußeren Rechtsverhältnisse der Israelitischen Religionsgesellschaft, RGBl. Nr. 57/1890);

(b) Act of 15 July 1912 on the recognition of followers of Islam [according to the Hanafi rite] as a religious society, Official Gazette of the Austrian Empire No. 159/1912 (Gesetz vom 15. Juli 1912, betreffend die Anerkennung der Anhänger des Islam [nach hanefitischen Ritus] als Religionsgesellschaft, RGBl. Nr. 159/1912);

(c) Federal Act on the External Legal Status of the Evangelical Church, Federal Law Gazette No. 182/1961 (Bundesgesetz vom 6. Juli 1961 über die äußeren Rechtsverhältnisse der Evangelischen Kirche, BGBl. Nr. 182/1961);

(d) Federal Act on the External Legal Status of the Greek Orthodox Church in Austria, Federal Law Gazette No. 229/1967 (Bundesgesetz über die äußeren Rechtsverhältnisse der Griechisch-Orientalischen Kirche in Österreich, BGBl. Nr. 182/1961);

(e) Federal Act on the External Legal Status of the Oriental Orthodox Churches in Austria, Federal Law Gazette No. 20/2003 (Bundesgesetz über äußere Rechtsverhältnisse der Orientalisch-Orthodoxen Kirchen in Österreich, BGBl. Nr. 20/2003).

(iii) Recognition by a decree (Verordnung) under the Recognition Act 1874

30. Between 1877 and 1982 the competent ministers recognised a further six religious societies.

2. Registration of religious communities

Act on the Legal Status of Registered Religious Communities (Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften), Federal Law Gazette - BGBl I 1998/19

31. The Religious Communities Act entered into force on 10 January 1998. Pursuant to section 2(3) of the Act, the Federal Minister for Education and Culture has to rule in a formal written decision (Bescheid) on the acquisition of legal personality by the religious community. In the same decision the Minister has to

dissolve any association whose purpose was to disseminate the religious teachings of the religious community concerned (section 2(4)). The religious community has the right to call itself a “publicly registered religious community”.

32. Section 4 specifies the necessary contents of the statutes of the religious community. Among other things, they must specify the community's name, which must be clearly distinguishable from the name of any existing religious community or society. They must further set out the main principles of the religious community's faith, the aims and duties deriving from it, the rights and duties of the community's adherents, including the conditions for terminating membership (it is further specified that no fee for leaving the religious community may be charged), how its bodies are appointed, who represents the religious community externally and how the community's financial resources are raised. Lastly, the statutes must contain provisions on the liquidation of the religious community, ensuring that the assets acquired are not used for ends contrary to religious purposes.

33. Under section 5, the Federal Minister must refuse to grant legal personality to a religious community if, in view of its teachings or practice, this is 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 freedom of others; this is in particular the case if its activities involve incitement to commit criminal offences, obstruction of the psychological development of adolescents or undermining of people's mental integrity, or if the statutes do not comply with section 4.

34. Under section 7, the religious community must inform the Federal Minister for Education and Cultural Affairs of the name and address of the persons belonging to its official bodies and of any change of its statutes without delay. The Minister must refuse to accept the notification if the appointment of the official bodies contravened the statutes or if the change of the statutes

would constitute a reason for refusal of registration under section 5.

35. Section 9 specifies the reasons for termination of a community's legal personality. Legal personality ceases to exist if the religious community dissolves itself or if the acknowledgment of its legal personality is revoked. Reasons for revoking legal personality are set out in subsection (2): for example, if the reasons for granting legal personality no longer subsist or if for more than one year no bodies representing the religious community externally have been appointed.

36. The Act only regulates the granting of legal personality. Once legal personality has been granted to a religious community, it may pursue the activities referred to in its statutes. There are no specific laws in Austria regulating the acquisition of assets by religious societies or communities, the establishment of places of worship or assembly, or the publication of religious material. However, provisions which contain explicit references to religious societies are spread over various statutory instruments (see below).

37. Since the entry into force of the Religious Communities Act on 10 January 1998, non-recognised religious associations may be granted legal personality upon application. A previous application for recognition under the Recognition Act is to be dealt with as an application under the Religious Communities Act pursuant to section 11(2).

38. Section 11(1) of the Religious Communities Act establishes additional criteria for a successful application under the Recognition Act, such as the existence of the religious association for at least twenty years in Austria and for at least ten years as a registered religious community; a minimum number of two adherents per thousand members of the Austrian population (at the moment, this means about 16,000 persons); the use of income and other assets for religious purposes, including charity activities; a positive attitude towards society and the State; and no

illegal interference as regards the community's relationship with recognised or other religious societies.

3. Specific references to religious societies in the Austrian legal order

39. In various Austrian laws specific reference is made to recognised religious societies. The following list, which is not exhaustive, sets out the main instances.

Under section 8 of the Federal School Supervision Act (Bundes- Schulaufsichtsgesetz), representatives of recognised religious societies may sit (without the right to vote) on regional education boards.

Under the Private Schools Act (Privatschulgesetz), recognised religious societies, like public territorial entities, are presumed to possess the necessary qualifications to operate private schools, whereas other persons have to prove that they are qualified.

Under section 24(3) of the Military Service Act, ordained priests, persons involved in spiritual welfare or in religious teaching after graduating in theological studies, members of a religious order who have made a solemn vow and students of theology who are preparing to assume a pastoral function and who belong to a recognised religious society are exempt from military service and, under section 13 of the Civilian Service Act, are also exempt from alternative civilian service.

Under sections 192 and 195 of the Civil Code (ABGB), ministers of recognised religious societies are exempt from the obligation to submit an application to be appointed as guardians, and under section 3(4) of the 1990 Act on Juries of Assizes and Lay Judges (Geschworenen- und Schöffengesetz) they are exempt from acting as members of a jury of an assize court or as lay judges of a criminal court.

Section 18(1)(5) of the Income Tax Act provides that contributions to recognised religious societies are deductible from income tax up to an amount of 100 Euros (EUR) per year.

Section 2 of the Land Tax Act (Grundsteuergesetz) provides that real property owned by recognised religious societies and used for religious purposes is exempt from real-estate tax.

Under section 8(3)(a) of the 1955 Inheritance and Gift Act (Erbchafts- und Schenkungsteuergesetz), which was still in force at the relevant time, donations to domestic institutions of recognised churches or religious societies were subject to a reduced tax rate of 2.5%.

THE LAW

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

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

Article 14 of the Convention provides:

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

Article 9 provides as follows:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are

necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

A. Submissions by the parties

41. The Government pointed out that Article 9 a § 3 of the Federal Constitution provided that every male Austrian citizen was liable to perform military service. Exemptions from this obligation were set out in section 24(3) and were linked to membership of a recognised religious society. However, there were also further criteria which the applicant did not satisfy either. The applicant had stated that his function was comparable to those of persons who were involved in spiritual welfare or in clerical teaching after graduating in theological studies or who were preparing to assume such functions. In this connection, the Government stressed that the applicant had not stated at any time during the domestic proceedings that he had studied theology at a university or any equivalent institution. Therefore, notwithstanding his religious denomination, the applicant had failed to prove that he complied with any of the four criteria set out in the abovementioned provision. Thus, there was no need to consider whether or not the applicant had been discriminated against on the ground of his faith. Also members of recognised religious societies who did not comply with the criteria laid down in section 24(3) of the Military Service Act were not exempt from military service.

42. The Government submitted further that, as the Contracting States were under no obligation to accept a refusal to perform military service for religious reasons, non-exemption of a person from military or alternative civilian service did not raise any concerns under Article 9 of the Convention. In any event, the applicant's submissions did not indicate that the obligation to perform military or alternative civilian service entailed any concrete interference with his rights under Article 9.

43. The applicant contested this view and maintained that if the relevant domestic legislation provided for exemptions from

military or alternative civilian service, it should do so without any discrimination. During the time of his civilian service he had had to work forty hours a week, and thus had been unable to perform his functions as a deacon and preacher and had had to limit the practice of his religion to his spare time.

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

B. The Court's assessment

45. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no

room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, Reports of Judgments and Decisions 1997-I, § 33, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 34, ECHR 2000-X).

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

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

48. As the privilege at issue is intended to ensure the proper functioning of religious groups in their collective dimension, and thus promotes a goal protected by Article 9 of the Convention, the exemption from military service granted to specific representatives of religious societies comes within the scope of

that provision. It follows that Article 14 read in conjunction with Article 9 is applicable in the instant case.

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

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

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

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

53. In doing so the Court refers to the case of *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (no. 40825/98, 31 July 2008), in which the first applicant, the Jehovah's Witnesses in Austria, had been granted legal personality as a registered religious community, a private-law entity, but wished to become a religious society under the 1874 Recognition Act – that is, a public-law entity. The Court observed that under Austrian law, religious societies enjoyed privileged treatment in many areas, including, inter alia, exemption from military service and civilian service. Given the number of these privileges and their nature, the advantage obtained by religious societies was substantial. In view of these privileges accorded to religious societies, the obligation under Article 9 of the Convention incumbent on the State's authorities to remain neutral in the exercise of their powers in this domain required therefore that if a State set up a framework for conferring legal personality on religious groups to which a specific status was linked, all religious groups which so wished must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner (*ibid.*, § 92). The Court found, however, that in the case of the Jehovah's Witnesses one of the criteria for acceding to the privileged status of a religious society had been applied in an arbitrary manner and concluded that the difference in treatment was not based on any “objective and reasonable justification”. Accordingly, it found a violation of Article 14 of the Convention taken in conjunction with Article 9 (*ibid.*, § 99).

54. In the present case, the refusal of exemption from military and alternative civilian service was likewise based on the ground that the applicant was not a member of a religious society within the meaning of the 1874 Recognition Act. Given its

above-mentioned findings in the case of Religionsgemeinschaft der Zeugen Jehovas and Others, the Court considers that in the present case the very same criterion – whether or not a person applying for exemption from military service is a member of a religious group which is constituted as a religious society – cannot be understood 13 differently and its application must inevitably result in discrimination prohibited by the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

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

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

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

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

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

“2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.”

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. Article 41 of the Convention provides: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

61. The applicant claimed 4,000 Euros (EUR) for non-pecuniary damage for the suffering caused by the obligation to

leave his vocation as a full-time “pioneer” preacher and the restriction of his duties as a “ministerial servant” for one year. Furthermore, criminal proceedings had been initiated against him while his request for suspension of the order to perform civilian service was still pending before the Constitutional Court.

62. The Government maintained that the finding of a violation would constitute sufficient just satisfaction. In any event, the amount claimed was excessive.

63. The Court considers that the applicant has sustained non-pecuniary damage which cannot be compensated by the finding of a violation. It considers that the sum claimed by the applicant appears reasonable and awards the full amount, namely EUR 4,000, plus any tax that may be chargeable on this amount.

B. Costs and expenses

64. The applicant claimed EUR 8,198.53, plus value-added tax (VAT), for the costs of the domestic proceedings and EUR 4,475.99, plus VAT, for the costs of the proceedings before the Court.

65. The Government pointed out that the application had been declared only partly admissible.

66. The Court reiterates that, according to its case-law, it has to consider whether the costs and expenses were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum. The Court considers that these conditions are met as regards the costs of the domestic proceedings. It therefore awards the full amount claimed under this head, namely EUR 8,198.53, plus any tax that may be chargeable to the applicant on this amount.

67. As regards the proceedings before the Court, the applicant, who was represented by counsel, did not have the benefit of legal aid. However, the Court finds the claim is excessive as the application was only partly successful. Making an assessment on an overall basis, the Court awards EUR 2,500

under this head, plus any tax that may be chargeable to the applicant on this amount.

68. The Court, thus, awards a total amount of EUR 10,698.53 in respect of costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 9 of the Convention;

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

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

4. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 4,000 (four thousand Euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant;

(ii) EUR 10,698.53 (ten thousand six hundred and ninety-eight Euros and fifty-three cents) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on this amount;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the

above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen

Registrar

Christos Rozakis

President