



Bayatyan v Armenia

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This article discusses the recent landmark judgment in the case of *Bayatyan v Armenia* (No. 23459/03) 7.07.11 in which the European Court of Human Rights (ECtHR) broke with previous case law and decided to include conscientious objectors within the scope of Art. 9 of the European Convention on Human Rights (ECHR): the right to freedom of thought, conscience and religion.

Mr. Bayatyan is a Jehovah's Witness. He became eligible for military service in spring 2001. On 1 April 2001 he wrote to the relevant Armenian authorities saying that he refused to perform military service due to his religious beliefs but offered to perform civilian service instead. Later on in 2001 a criminal case was instituted against him for draft evasion. On 28 October 2002 he was found guilty as charged and sentenced to one and a half years in prison. Following an appeal by the prosecutors, the sentence was increased to two and a half years. On 22 July 2003 he was released on parole. He brought proceedings before the ECtHR claiming that his conviction for refusal to serve in the army had violated Art. 9 of the ECHR.

In its judgment of 27 October 2009 the Chamber interpreted Art. 9 in the light of Art. 4(3)(b) of the ECHR, which, when referring to conscientious objectors, uses the words "*in countries where they are recognised*". The Chamber took this to mean that the choice of recognising conscientious objectors is left to each contracting party. They therefore found that Art. 9 did not guarantee the right to refuse military service on conscientious grounds and that a contracting party which had not recognised that right could not be held to be in violation of its ECHR obligations.

Previous case law

The approach of the Chamber was in line with previous case law.

The case of *Grandrath v Germany* (No. 2299/64)¹ set out the position. It concerned a Jehovah's Witness who sought exemption from military and civilian service. The European Commission of Human Rights (the Commission) observed that while Art. 9 guaranteed the right to freedom of thought, conscience and religion in general, Art. 4 of the ECHR contained a provision, which expressly permitted compulsory service exacted in the place of military service in the case of conscientious objectors. It therefore concluded that a person is not entitled to exemption from civilian service under the ECHR, but refrained from interpretation of the term '*freedom of conscience and religion*' used in Art. 9. This approach was subsequently confirmed by the Commission in later cases,² where the Commission reiterated that Art. 9, as qualified by Art. 4(3)(b), did not impose on a State the obligation to recognise conscientious objectors and, consequently, to make special arrangements to exercise that right. Therefore, these Articles did not prevent a State, which had not recognised conscientious objectors, from punishing those who refused to do military service.

In its more recent judgments concerning conscientious objection, *Thlimmenos v. Greece* (No. 34369/97) 6.4.00 and *Ülke v Turkey* (No. 39437/98) 24.1.06, the ECtHR found it unnecessary to examine the applicability of Art. 9 as the complaints were dealt with under other provisions of the ECHR, namely Articles 14 and 3.

Grand Chamber judgment

When the Grand Chamber (GC) came to consider the Bayatyan case, it ruled that the interpretation of Art. 4(3)(b), given by the Commission and the ECtHR, did not reflect the true purpose and meaning of that provision. It concluded "*The Travaux préparatoires confirm that the sole purpose of sub-paragraph (b) of Article 4 § 3 is to provide a further elucidation*

of the notion 'forced or compulsory labour'. In itself it neither recognises nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by Article 9". The ECtHR took the view that Art. 9 should no longer be read in conjunction with Art. 4(3)(b) and that complaints must be considered solely under Art. 9. In making its decision, the GC emphasised the ECHR's status as a living instrument and the need to take a "*dynamic and evolutive approach*".

The GC also took into consideration Armenia's changing attitude towards conscientious objection. Although Armenian law did not provide for conscientious objectors at the time of the applicant's conviction, shortly afterwards, a law on alternative service was introduced and therefore "*Mr Bayatyan's conviction for conscientious objection was in direct conflict with the official policy of reform*".

The ECtHR has now set out a clear test for the applicability of Art. 9 to conscientious objection: "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genu-

inely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Art. 9."

In its judgment, the GC gave weight to the fact that at the material time there was an almost total consensus among Member States recognising the right to conscientious objection. The case therefore represented a timely opportunity for the ECtHR to harmonise its approach with the domestic laws and social policy of Member States.

Venice Commission

After publication of the GC judgment, the Armenian Government sought the opinion of the European Commission for Democracy through

Law (the Venice Commission) on its draft Law on Amendments and Additions to the Law on Alternative Service. The Venice Commission's opinion, published on 20 December 2011, welcomes the Law as a step in the right direction towards ensuring Armenia's conformity with international standards relating to conscientious objection to military service. How-

ever, it makes several recommendations as to how the proposed amendment and the law in force could be improved. In particular, it notes that according to Art. 3 of the existing law, alternative service is available to a citizen for whom military service is "contrary to his religious belief or convictions." Noting the application of Art. 9 of the ECHR to conscientious

objection following the Bayatyan judgment, the opinion states that this wording appears restrictive and recommends that Art. 3 be amended in order to match more closely the wording of Art. 9 of the ECHR.

1 *Grandrath v Germany* (No. 2299/64), Commission report of 12.12.66, Yearbook, vol. 10, p. 626.

2 *A v Switzerland* (No. 10640/83), Commission decision of 09.05.84, DR 38, p. 219.