APPLICATION N° 24645/94

Cristoforo BUSCARINI, Emilio DELLA BALDA and Dario MANZAROLI
v/SAN MARINO

DECISION of 7 April 1997 on the admissibility of the application

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Article 25, paragraph 1 of the Convention *Applicants who complain that their freedom of conscience and religion has been infringed by an obligation to swear an oath on the Gospels in order to exercise elected office (on pain of being stripped of that office) do not lose their claim to be "victims" because the wording of the oath has been changed, where such change is made after the applicants have sworn and where their office remains dependent on the old oath, since the change cannot then repair the alleged injury*

Article 26 of the Convention

Exhaustion of domestic remedies

a) The obligation to exhaust domestic remedies requires normal use of remedies which are effective, sufficient and available

b) The burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule

c) A remedy cannot be regarded as effective where it can lead only to the clarification of the nature of the measure under challenge or to a declaration of lack of jurisdiction

d) With regard to San Marino, neither an application to a court which could only clarify the nature of the contested measure or issue a declaration of lack of jurisdiction, nor the mechanism for reviewing acts of the Captains-Regent which would not have affected the measure at issue, constitutes an effective remedy in the case of a challenge to a measure taken by the Grand and General Council

Six-month period

The running of the six month period is interrupted by the first letter from the applicant setting out summarily the object of the application, provided that the letter is not followed by a long delay before the application is completed

In order to interrupt the running of the six-month period, all that is required is that the applicant should be clearly identifiable and should have set out, at least in substance, his complaints, the other formalities can be completed later

Article 27, paragraph 2 of the Convention

a) *An application motivated by the desire for publicity or propaganda may be an abuse of process if it is not supported by any facts or is outside the scope of the Convention's operation*

b) *An application does not constitute an abuse of process simply because the applicants have told the press of their intention to apply to the Convention organs The confidentiality of Commission proceedings was respected, since the applicants did not make public any information concerning them once their application had been introduced*

Rule 32, paragraph 2 of the Commission's Rules of Procedure *It is not compulsory for an applicant to be represented by a lawyer in proceedings before the Commission*

THE FACTS

The applicants are citizens and residents of the Republic of San Marino They are currently members of the "Grand and General Council" (*Consiglio Grande e Generale*), the Parliament of the Republic of San Marino Respectively, they were born in 1943, 1937 and 1953 and are a civil servant, a financial expert and a doctor

a *Particular circumstances of the case*

The facts of the case, as submitted by the parties, may be summarised as follows

The applicants were elected to the Grand and General Council in the elections of 30 May 1993

Shortly afterwards, they requested permission from the Regents, who preside over the Council, to swear the oath required by section 55 of the Election Act (Law No 36 of 1958) without making reference to any religious text. The Act in question referred to a Decree of 27 June 1909, which laid down the wording of the oath sworn by Members of Parliament as follows.

> "I, , swear on the Holy Gospels ever to be faithful to and obey the Constitution of the Republic, to support and defend freedom with all my might, ever to observe the Laws and Decrees, whether old, new, or to come, and to nominate and support as candidates to the judiciary and other public office only those whom I consider loyal, apt and fit to serve the Republic, without allowing myself to be swayed by any feelings of hatred or love or by any other consideration "

In support of their request, the applicants invoked section 4 of Constitutional Law No. 59 of 1974, which guarantees the right to freedom of religion, and Article 9 of the Convention

At the Grand and General Council session of 18 June 1993, the applicants swore an oath in writing, following the wording laid down in the Decree of 27 June 1909 but omitting the reference to the Gospels The first applicant also emphasised the obligations which the Republic of San Marino had undertaken in ratifying the European Convention on Human Rights

On 12 July 1993, at the Regents' request, the Secretariat of the Grand and General Council gave an opinion on the oath sworn by the applicants, concluding that it was invalid, and referred the matter to the Council

At its session of 26 July 1993, the Grand and General Council adopted a resolution proposed by the Regents, ordering the applicants to re-swear the oath, this time on the Gospels (" . *sopra i Santi Evangeli* . ."), or be stripped of their parliamentary seats

The applicants bowed to the Council's dictate and swore on the Gospels, albeit complaining that their freedom of religion and conscience had been violated On the same occasion, the two first applicants announced their intention of applying to the European Commission of Human Rights. The situation was reported in a number of press articles In particular

a) on 19 June 1993 the Italian daily newspaper *Il Resto del Carlino* published an interview with the third applicant, who declared his intention of "pursuing the matter to the bitter end, right up to the European Court of Human Rights";

b) in two articles dated 19 June and 14 July 1993, San Marino's daily newspaper (*Il Quotidiano Sanmarinese*) reproduced the text of the applicants' speeches in the Grand and General Council, as did the Italian daily newspaper *Il Messaggero* on 27 July 1993.

Finally, Law No 115 of 29 October 1993 gave newly-elected members of the Grand and General Council a choice between the traditional oath and one in which the reference to the Gospels was replaced by the words "on my honour"

b. *Other relevant domestic law*

Under section 10 of Law No 68 of 28 June 1989 on the administrative courts, "measures taken by the Grand and General Council, and measures taken by the Congress of State having a political content, are outwith the jurisdiction of the administrative courts".

Section 1(1) of the same Law provides, *inter alia*, that judicial protection of private interests vis-à-vis the Government is the province of the Administrative Court

Under section 15(1) of Law No 59 of 8 July 1974 (Declaration of the Rights of Citizens and of the Fundamental Principles of the Law of San Marino), "judicial protection of legitimate rights and interests is guaranteed before the ordinary and administrative courts"

Moreover, section 16 of the same Law states that, "the courts are bound to observe the principles of this Declaration in interpreting and applying the law. Where there is a doubt as to the lawfulness of a legislative provision, a court may request clarification from the Grand and General Council, after obtaining the opinion of experts"

Moreover, section XIX of Volume I of the Laws of the Republic governs the procedure known as "Supervision of the Regency" (*Sindacato della Reggenza*). Essentially, this mechanism provides that the acts or omissions of former Captains-Regent (*Capitani Reggenti*) can be reviewed, at the request of any citizen, by a body made up of two persons appointed by the Grand and General Council from among its members.

COMPLAINT

The applicants, invoking Article 9 of the Convention, claim that their freedom of religion and conscience has been violated by their being obliged by the Grand and General Council (in the last instance, at the end of the debate on 26 July 1993) to swear on the Gospels. They emphasise that this obligation implies that, in the Republic of San Marino, only persons publicly professing the Catholic religion may be allowed to exercise parliamentary office, which makes a fundamental political right subject to the profession of a particular faith

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 17 November 1993 and registered on 20 July 1994 Specifically, the applicant sent a letter dated 17 November 1993 setting out precisely the object of the application and making explicit that he was acting on behalf of the two other applicants as well as his own Two application forms, one signed by the first applicant and one by the second, and referring to the contents of the letter of 17 November 1993, were received by the Commission on 1 and 18 July 1994 respectively At the request of the Commission Secretariat, the third applicant sent a formal declaration of his participation in the application, dated 24 August 1995

On 11 September 1995, the Commission decided to communicate the application to the respondent Government and to invite them to submit their written observations on its admissibility and merits

The Government submitted observations on 14 December 1995, after an extension of the time-limit fixed for that purpose The applicants replied on 25 January 1996

THE LAW

The applicants, invoking Article 9 of the Convention, claim that their freedom of religion and conscience has been violated by their being obliged by the Grand and General Council to swear an oath on the Gospels

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 in 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

The respondent Government claim, first, that the application is inadmissible for abuse of process in that the applicants made a number of statements announcing their intention to apply to the Strasbourg organs

Secondly, the Government argue that the application is inadmissible because out of time, in that the application form, which the Government claim is indispensable for a valid application to the Commission, was not sent until 1 July 1994 in the case of the first applicant and 18 July 1994 in that of the second, that is, more than six months after the date of the final domestic decision As for the third applicant, the Government underline the fact that he has not submitted an application form at all

The Government also claim that the application is procedurally invalid for other reasons. They observe that the first applicant has no formal authority to act on behalf of the other two applicants and that he is not a lawyer, so that no implicit authority for him to represent the second and third applicants before the Commission can be inferred Indeed, the second applicant did not send in his application form until 18 July 1994 and the third applicant did not formally declare himself a party to the application until 24 August 1995. His declaration, which referred to an application submitted two years previously by another person who did not hold a power of attorney, could have effect only from the date on which it was made

Thirdly, the Government raise a preliminary objection to the effect that domestic remedies have not been exhausted They argue that the Grand and General Council's instruction to the applicants of 26 July 1993 was a political measure It follows, according to the Government, that Law No 68 of 1989, and in particular section 10 thereof, which rules out any legal challenge to measures taken by the Grand and General Council, does not apply, since that Law concerns only administrative measures taken by the Council (such as, for example, the expropriation of archives of significant historical interest) and not political ones Accordingly, the Government claim the applicants could and should have applied to the ordinary civil courts for redress for non pecuniary damage resulting from a violation of a right, pursuant to the principle enshrined in section 15(1) of Law No 59 of 1974 No provision of the law of San Marino would have prevented them from doing so

Moreover, the applicants could have applied to the administrative courts at the same time as to the civil ones, with a view to obtaining a declaration that section 10 of Law No 68 of 1989 was unlawful under the provisions of section 15(1) of Law No 59 of 1974, using the procedure set out in section 16 of the latter.

Further, the applicants, according to the Government, could also have challenged the Regents, using the procedure known as "Supervision of the Regency". While admitting that the competent body is a special tribunal, the Government deny that this is an extraordinary remedy

In any case, the Government consider that, before applying to the Commission, the applicants should either have obtained a judicial decision - if only to clarify the nature of the disputed measure, since it would not, in any event, be appropriate for the Commission to undertake such a task in the place of the domestic authorities - or else a declaration that the domestic courts lacked jurisdiction

On the merits, the Government consider that the wording of the oath in question does not have a strictly religious significance, but is rather rooted in the history, society and traditions of the Republic of San Marino, which was founded by a religious In fact, San Marino is a secular State and freedom of religion is expressly enshrined in Article 4 of its Charter of Rights of 1974. The wording of the oath sworn by members of the Grand and General Council, like that taken by certain civil servants, has lost its original religious nature and is now merely historical, like certain religious feast-days which are observed as secular public holidays. The Government also recall that, on several occasions in the past, the applicants had sworn an oath using the disputed wording

The Government then argue that, even supposing that the disputed oath could be considered as a limitation on freedom of religion, this limitation would be entirely justified as necessary to protect public order, since respect for tradition has always been a factor contributing to social cohesion in, and preserving the independence of, San Marino. The Commission should not contemplate reducing the wide margin of appreciation which the State must enjoy in this area.

Lastly, the Government assert that, in any event, there is no longer any reason for the applicants to pursue their application, given that Law No 115 of 1993 has given the secular nature of the oath - which already existed for all practical purposes - explicit expression, taking due account of modern secular consciousness The Government emphasise that the reason for enacting this Law was not that it was necessary to bring the Decree of 1909 into conformity with the fundamental principles of the Republic of San Marino

The applicants dispute the Government's arguments, affirming, first, that political measures taken by the Grand and General Council cannot be challenged in any way, given, *inter alia*, the nature and scope of its powers and prerogatives as set out in Section III of Volume I of the Laws of the Republic. Therefore, no action could have been brought, whether before the ordinary courts or - given the provisions of section 10 of Law No 68 of 1989 - the administrative courts

With regard to the possibility of requesting a review of the lawfulness of the measure under section 16 of Law No. 59 of 1974, the applicants observe that such a review (even supposing that it could be considered effective, given that it would be carried out by the body which had adopted the measure) would not be directly accessible, since it must be requested by a court. As for the mechanism for reviewing acts of the Captains-Regent, the applicants observe that the measure of which they are complaining was taken not by the Captains-Regent but by the Grand and General Council

Further, the applicants submit that Law No 115 of 1993 has not really resolved the problem, since it applies only to members of the Grand and General Council and not to holders of other offices such as the Regents or members of the Government, and that, in any event, they have not obtained compensation for the injury which they

themselves have suffered According to the applicants, the problem stems from the Concordat made between San Marino and the Catholic Church on 2 April 1992, under which the Church has privileges over other religions In any case, they say, the Government could easily have modified the Decree of 1909 by adopting a Legislative Decree between 18 June 1993, the date on which the first applicant made his speech, and 26 July 1993, the date of the resolution

Lastly, the applicants rebut the other procedural objections raised by the respondent Government, emphasising that they have never divulged confidential documents relating to their application but merely declared their intention of applying to the Convention organs

As regards the Government s objection that the application constitutes an abuse of process, the Commission notes that the applicants have confined themselves to announcing, in general, their intention of applying to the Convention organs, and considers that this alone is not enough to make the application an abuse of process, since the applicants have never published information relating to the proceedings before the Commission since their application was introduced In these circumstances, the applicants cannot be held to have breached their obligation to respect the confidentiality of Commission proceedings (see *a contrario*, No 26135/95, Dec 5 3 96, D R 84 B, p 156 at p 162) Further, the Commission recalls that an application motivated by, for example, the desire for publicity or propaganda, might be [found to be an abuse of process] if it appeared that [it] was clearly unsupported by evidence or outside the scope of the Convention , which is not the case here (see No 11208/84, Dec 4 3 86, D R 46, p 182 at p 186) Therefore, the Government's first preliminary objection must be rejected

As regards the Government's objection that the application was out of time, the Commission recalls that, in accordance with its established practice, the running of the six month period is interrupted by the first letter from the applicant setting out summarily the object of the application, provided that the letter is not followed by a long delay before the application is completed (see No 12158/86, Dec 7 12 87 D R 54, p 178) The essential thing is that, before the six month period has expired the applicant should be clearly identifiable and should have submitted his or her complaints, at least in substance, the other formalities can be completed later Further, the Commission recalls that neither the Convention nor its own Rules of Procedure require that an applicant should be represented by a lawyer (see Rule 32 para 2 of the Rules of Procedure)

In the instant case, the Commission notes that the first applicant sent a letter dated 17 November 1993 so within the six-month period setting out precisely the object of this application and expressly stating that he was acting on behalf of the two other applicants as well as his own Two application forms, one signed by the first and one by the second applicant, referring to the contents of that letter were received by the Commission on 1 and 18 July 1994 respectively Moreover, the third applicant sent a formal declaration of his participation in the application, dated 24 August 1995 Hence

the Commission considers that the application was introduced by all the applicants before the expiry of the period laid down by Article 26 of the Convention, and that it was duly completed at a later stage. This objection must therefore be rejected.

As regards the objection that domestic remedies have not been exhausted, the Commission recalls that the rule of exhaustion of domestic remedies laid down in Article 26 of the Convention demands the use only of such remedies as are available to the persons concerned and are sufficient, that is to say capable of providing redress for their complaints. Moreover, it is for the Government which raise the contention to indicate the remedies which, in their view, were available to the persons concerned and which ought to have been used by them until they had been exhausted (see Eur. Court HR, De Wilde, Ooms and Versyp v. Belgium judgment of 18 June 1971, Series A no. 12, p. 33, para. 60).

The Commission recalls that the existence of the remedies indicated by the Government must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, for example, Eur. Court HR, De Jong, Baljet and Van den Brink v. the Netherlands judgment of 22 May 1984, Series A no. 77, p. 19, para. 39).

In the instant case, the Commission considers that the respondent Government have failed to demonstrate that there were effective remedies available to the applicants to challenge the Grand and General Council's resolution of 26 July 1993. On the contrary, Law No. 68 of 1989 expressly rules out any possibility of challenging a measure of the Grand and General Council before the administrative courts, and the possibility of a challenge in the ordinary courts remains a totally theoretical one. Moreover, not only have the Government failed to produce a single precedent in which a measure taken by the Grand and General Council was reviewed by the courts, but they themselves have recognised that legal action could only have clarified the nature of the disputed measure or ended in the courts' declaring that they lacked jurisdiction in the matter, neither of which could meet the effective remedy requirement laid down in Article 26 of the Convention. The Commission notes that the mechanism for reviewing acts of the Captains Regent could not have redressed the situation either, as (apart from the question of its effectiveness, which may legitimately be doubted) it could not have affected the measure taken by the Grand and General Council and which, according to the applicants, constitutes a violation of the Convention. It follows that the Government's objection of non-exhaustion of domestic remedies must be rejected.

Lastly, the Government dispute that the applicants can be considered as victims. In that regard, the Commission observes that the applicants did not cease to qualify as victims when the wording of the oath was changed by Law No. 115 of 1993, because that Law's coming into force did not redress the injury done to them: their parliamentary office remained dependent on the oath which they had had to swear, using the old formula, on pain of being stripped of that office. In the Commission's opinion, this means that the applicants can claim to be victims of the alleged violation of the Convention.

In conclusion, the Commission considers that the application raises complex question of fact and law which cannot be resolved at this stage of the examination of the application but require an examination of the merits Consequently, this application cannot be declared manifestly ill-founded under Article 27 para 2 of the Convention

The Commission also notes that no other grounds for declaring the application inadmissible have been established

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits