

## CHAPTER 9

### THE NUMERICAL IMPORTANCE OF CASES

421. The Government, as well as its witnesses at the hearings before the Commission, emphasised the very small proportion of persons who have been affected by the application of the provisions relating to the duty of faithfulness, in comparison with the numbers employed in the public service.<sup>1</sup> Moreover, in submitting statistical information to the Commission, the Government questioned the relevance of such data; whether Convention No. 111 or human rights were being violated did not depend on the number of persons affected.

422. A summary of the statistical information made available to the Commission is set out below, as well as indications given by certain witnesses and other informants concerning the alleged indirect effect of the measures taken in application of the provisions concerning the duty of faithfulness to the free democratic basic order.

#### Public service employment in general

423. As regards officials at both federal and Länder levels, the Federal Government gave, for the period May 1975 to 1982, figures of 111 disciplinary proceedings against officials for life for violation of their duty of faithfulness, plus 39 cases of dismissal of officials on probation. Of these 150 cases, 90 concerned persons classified as left-wing extremists, and 15 persons classified as right-wing extremists; in 45 cases information on the political ideology of the persons concerned was not available. The Government added that the number of disciplinary proceedings initiated could not be equated with the number of dismissals. In many cases the proceedings were either abandoned or less severe disciplinary sanctions were imposed.

424. The Government also provided information on the number of persons in the public service who are regarded as extremists, taken from the 1984 report of the Federal Office for the Protection of the Constitution. At the end of 1984 there were 2,220 known left-wing and 256 right-wing extremists in the public service. A majority of those defined as left-wing extremists were members of the DKP, a majority of those defined as right-wing extremists were members of the NPD. The actual number was considered to be substantially higher; thus it was estimated that as many as 3,000 to 4,000 public servants belonged to left-wing extremist organisations. Of the 2,476 known political extremists, 1,080 were officials and 1,094 salaried employees. Of the known left-wing extremists, 221 were in federal employment, 1,473

employed by the Länder (including 1,139 in schools and universities), and 526 by communal authorities. Of the 256 known right-wing extremists, 111 were employed at federal level, 91 by the Länder (including 34 in schools and universities), and 54 by communal authorities.

#### Employment by federal authorities

425. In information submitted to the Commission, the Government stated that in 1976 four applicants for federal employment were refused because of failure to guarantee faithfulness to the basic order; in 1977 there had been one such refusal; since 1980 no such refusals had occurred. From May 1975 until 1980, no official for life in the direct employment of the federal authorities was dismissed for violation of the duty of faithfulness. In 1981 there were three dismissals on this ground (one official for life, two salaried employees), and in 1984 one further dismissal of an official for life. At the time of the reply to questions in the Federal Diet (July 1985), ten disciplinary proceedings were pending, nine against officials for life, and one against an official on probation.

426. The Federal Disciplinary Prosecutor indicated that in the past ten years there had been an annual average of 12 to 20 pending disciplinary proceedings on account of alleged violation of the duty of faithfulness. Only some of these had led to judicial decisions; in other cases the proceedings were discontinued, because the persons concerned gave up their status of official or because of lack of evidence of any violation of duty.<sup>2</sup>

427. The Chief of the Department for Personnel Matters of the Federal Ministry of Posts and Telecommunications stated that since 1978 disciplinary proceedings for a violation of the duty of faithfulness had been initiated against 18 officials.<sup>3</sup> In the information submitted by the Deutscher Gewerkschaftsbund (DGB) in January 1986, reference was made to 24 cases of measures arising out of the duty of faithfulness with which the Deutsche Postgewerkschaft (DPG) was concerned. The DPG witness stated that additional cases had arisen very recently in which members were being questioned about membership of the DKP.<sup>4</sup>

428. Of the 73 documented cases brought to the attention of the Commission, 20 concern federal employment. Most of them have arisen in recent years and are still pending. All but four of the federal cases concern public servants in the postal and telecommunications service. Two cases concern officials of the Federal Railways, one a customs official, and one a person dismissed from employment in the social security administration.

## Länder employment

429. According to the information provided by the Government, in the years 1980 to 1982 there were 96 cases of refusal to admit applicants to employment at Länder level for failure to guarantee faithfulness to the basic order.

430. Of the 73 documented cases brought to the attention of the Commission, 53 concern employment by Länder authorities. The following statistical data are available for individual Länder.

431. Baden-Württemberg. In his evidence before the Commission, the representative of the Land authorities stated that from 1979 to 1985 there had been 256,000 inquiries about applicants for employment to the Office for the Protection of the Constitution in the Ministry of the Interior, which had transmitted information in 412 cases. As a result, 44 applicants had been rejected. In the same period there were 12 cases of dismissal in application of the provisions relating to the duty of faithfulness.<sup>5</sup>

432. Of the documented cases brought to the attention of the Commission, 11 concern persons employed or seeking employment in Baden-Württemberg. During the hearings, the WFTU representative handed over a list, received from the "Koordinierungsausschuss der Bürgerinitiativen gegen Berufsverbote in Baden-Württemberg", of 30 teachers refused employment in Baden-Württemberg, with brief descriptions of 15 of these cases. Only two of them are among the documented cases received by the Commission.

433. In its meeting with representatives of the Baden-Württemberg branch of the Gewerkschaft Erziehung und Wissenschaft (GEW), the Commission received figures based on the number of cases in which the GEW Land section had been asked for legal assistance. In 1986 (up to August) there had been no new cases. In 1985 there were five new cases concerning officials and one case of an applicant for a position of tutor in a university. In the years 1982 to 1984, there had been eight, six and three new cases respectively. Eleven cases from before 1982 were still pending.

434. Bavaria. Written information provided to the Commission shows that, from 1979 to 1985, 141,983 inquiries were made to check upon applicants. In 492 cases this resulted in information being transmitted to the employing authority; 39 applicants were rejected. Thirty-two of these rejections were definitive. In a further 11 cases applicants for the preparatory service for lawyers were refused admission with the status of official, but admitted under another relationship. As regards persons already in the service, information was transmitted to the employing authority in 46 cases in the same period. Disciplinary action was taken in nine of the 35 cases on which information on the measures subsequently taken is available. In one of the nine cases the disciplinary measure imposed was dismissal. Two cases were still pending.

435. Of the documented cases before the Commission, ten concern the refusal of employment or refusal of admission to preparatory service with the status of official in Bavaria. In most of these cases the grounds for the measures were not membership of the DKP, but activities in various organisations held to be influenced by the DKP (Association of Democratic Lawyers, German Peace Union, pacifist organisations, socialist student association).

436. Lower Saxony. Of the documented cases before the Commission, 16 concern disciplinary proceedings against public servants, and another three a refusal of employment in Lower Saxony.

437. The witness representing the authorities of Lower Saxony provided detailed statistics regarding the application of the provisions concerning the duty of faithfulness from 1972 to 1985.<sup>6</sup> These statistics can be summarised as follows:

### Applicants for employment (in round figures)

Number of inquiries to the Office for the Protection of the Constitution	146 000
Number of cases of information provided by that Office	12 000
Information regarded as serious	700
Favourable decisions for applicant after hearing by committee	360
Applications rejected - doubts re faithfulness	140
Applications withdrawn	100
Applications not accepted for other reasons	100
Judicial proceedings taken by rejected applicants (78 persons; in 8 cases complaints to Labour Court as well as Administrative Court)	86
Court proceedings completed:	79
rejection upheld	65
rejection annulled/applicant employed	14

### Disciplinary proceedings for violation of duty of faithfulness

Number of cases	263
Dismissals (officials - 33; salaried employees - 26)	59
Decisions in favour of official or lesser measures	81

Still to be decided 25

Termination of employment for other reasons 98

438. The figures submitted show that the years with the largest number of rejected applicants were 1975 (21 rejections) and 1976 (34 rejections). From 1980 to 1985, there was a steady decline in the number of rejections; from 15 in 1980 to two in 1985. However, the rejections refer to decisions that have become finally effective, and thus do not include cases in which the decisions of the authorities have been challenged in the courts and a final decision has not yet been given. Asked by the Commission why the number of rejected applications in the mid-eighties was lower than it had been in the mid-seventies, the witness representing the Land authorities stated that the procedures had become less strict; furthermore, there were no longer extremists of a certain type, particularly those belonging to Maoist groups.<sup>7</sup>

439. The figures provided did not give a breakdown by year for disciplinary proceedings. However, prior to 1981 activities such as holding office in the DKP or standing as a candidate at elections were not regarded by the Government of Lower Saxony as justifying disciplinary measures, but since 1981 a stricter policy has been followed in enforcing the provisions on the duty of faithfulness.<sup>8</sup> At its meeting with the Land authorities during its visit to the Federal Republic, the Commission was told that disciplinary proceedings were pending in 24 cases. Eighteen cases fell within the competence of the Ministry for Education, of which two concerned right-wing extremists, one a member of the KBW (Maoist), and 15 DKP members (of whom 13 were officials and two salaried employees).

440. Rhineland-Palatinate. Figures received from the Land authorities show that from 1979-85 inquiries about 63,664 applicants for employment were addressed by Land and communal administrations to the Office for the Protection of the Constitution, which provided information in 237 cases. This led to the subsequent rejection of 28 applications for public service employment. Between 1973 and 1985, 31 applicants rejected by the Land authorities appealed to the courts; with success in seven cases and with the proceedings ending in a settlement in two cases. The authorities indicated that from 1982 to 1986 disciplinary proceedings had been initiated against five public servants, all in the education service. One of these cases had been concluded by a court decision; one case ended in a settlement when the person concerned, an official on probation, showed by his conduct that he had dissociated himself from the organisation hostile to the Constitution; proceedings were pending in the three other cases.

441. Hessen. Figures handed over to the Commission by the Land authorities, which cover the years up to 1982, show a decline in the number of inquiries to the Office for the Protection of the Constitution, as well as of cases in which that Office had transmitted information. The decline came after the Land abandoned the practice

of routine inquiries about all applicants in 1979. The number of inquiries dropped from an average of about 16,000 a year in the years 1976 to 1978 to about 440 in 1981 and 170 in 1982. The number of cases in which information on the persons concerned was communicated dropped from about 1,000 a year in 1976 to 1978 to 33 in 1981 and five in 1982. From 1978 to 1982 a total of 47 applicants were rejected. The Land authorities told the Commission that there had been no further rejections in recent years. The number of dismissals declined from six in 1976 and 1977 to one in 1980. There were no dismissals in 1981 and 1982.

442. North Rhine-Westphalia. As in Hessen, there was a sharp decline in the number of inquiries about applicants addressed to the Office for the Protection of the Constitution after abandonment, in 1980, of the practice of routine inquiries. In the years 1976 to 1979, the number of inquiries ranged from 43,581 to 53,626. It dropped to 27 in 1980, to seven in 1982 and to three in 1983 and 1984. The Land authorities told the Commission that a decision not to address, in any given case, an inquiry to the Office in question meant that the employing department had no doubts about the applicant's faithfulness to the Constitution. On the other hand, a decision to make an inquiry did not necessarily result in rejection of the application for employment. Since 1980, virtually no applicants had been rejected by the Land authorities. The authorities also stated that, since the end of 1981, disciplinary proceedings had been initiated in only one case: a professor, who held high party office in the NPD and had agitated against foreigners. Proceedings were pending before the court of second instance.

443. Saarland. Here also the trend in figures reflects the changes in the Land Government's practice. From 1972 to 1979 there was a total of 16,880 inquiries. From 1980 to 1985, after the Government had abandoned routine inquiries, there was a total of five inquiries. Since 1985, when the Government revoked the guide-lines for the verification of applicants, there has been no inquiry. In the period up till 1985 as well as since then no applicant has been rejected. There have also been no proceedings against public servants on political grounds in Saarland.

444. Information received from two other sources may be mentioned. The witness from the GEW indicated that from 1971 to 1980 the GEW had given legal assistance in 1,427 cases of refusals of applicants on political grounds and in 55 cases of disciplinary proceedings. He did not have figures for the period after 1980. He felt that they would show a declining trend, largely because of the decrease in the number of teachers being engaged.<sup>9</sup>

445. The "Bürgerinitiative gegen Berufsverbote", Freiburg, supplied the Commission with descriptions of some 600 cases concerning applicants as well as active public servants. Some cases are shown as having been finally decided in favour of the individual concerned; others as having been decided against him or as still pending. In 136 cases the relevant decisions have been taken since the adoption in

January 1979 of the revised federal principles for verification of faithfulness to the Constitution. In 118 other cases, although initial decisions date from before that time, further decisions or developments such as court judgements have occurred since 1979. A comparison between these two groups shows an increase in the number of cases in recent years in the postal and telecommunications service and in Lower Saxony, and a marked decline in Hamburg and Hessen and, as regards cases initiated by Land authorities, in North Rhine-Westphalia. For the most part, the cases described concern the DKP or its ancillary organisations. However, these case descriptions also indicate that a large proportion of cases in Bavaria concern other organisations, considered by the authorities to be influenced by the DKP, even though a majority of their members do not belong to the DKP.

#### Further considerations

446. One of the witnesses who appeared before the Commission stated that, although in the Federal Republic the authorities were under an obligation to disclose the reasons for rejecting an applicant, there were, as in other countries, probably also cases in which the true - political - reasons were not disclosed.<sup>10</sup> The GEW witness believed that the incidence of such "disguised" rejections had probably increased in recent years; in contrast to the situation before 1980, it was no longer possible to give employment to all those qualified as teachers, and it was therefore easier to give other reasons for not accepting applicants. That would tend to reduce the number of cases in which political grounds were invoked for refusal.<sup>11</sup>

447. Reference was also made to a "grey zone" of cases in which those concerned had preferred not to make their difficulties known so as not to damage prospects of obtaining employment elsewhere and avoiding other consequences of being identified as an enemy of the Constitution.<sup>12</sup>

448. Several witnesses who appeared before the Commission referred to the deterrent effect of measures for the enforcement of the duty of faithfulness. They observed that measures of exclusion from the public service on political grounds not only punished individuals by depriving them of their occupational existence, but also deterred many others from engaging in political activities.<sup>13</sup> The witness representing the Deutsche Angestelltengewerkschaft (DAG) referred to the deterrent effect of the practice of addressing, at a specified point in the engagement procedure, inquiries to the Office for the Protection of the Constitution as a matter of routine about all applicants, not only those suspected of not providing a guarantee of faithfulness to the Constitution. Although he himself favoured a more liberal procedure, he said that that practice could be defended as a preventive measure to keep persons hostile to the Constitution out of the public service.<sup>14</sup> The witness representing the authorities of Bavaria denied that young people and serving officials were being intimidated by the practices. He said that, irrespective of

their political opinions, public servants were greatly over-represented, for example, in Parliament and among office holders in all the democratic parties. Officials also engaged in protests against State decisions, such as the construction of nuclear generating or reprocessing plants in Bavaria. As long as elementary democratic rules and a certain form of expression were respected, there was no objection to this for reasons related to the laws governing officials.<sup>15</sup>

#### Notes

References below to statements made during the hearing of witnesses indicate the sitting and page of the Record of Hearings (German version).

<sup>1</sup> See Chapter 7, para. 397, and Metz, VIII/7-8; Ziegler, XIII/10-11; Claussen, X/3; Freundlieb, XI/1-2.

<sup>2</sup> Claussen, X/3.

<sup>3</sup> Freundlieb, XI/2.

<sup>4</sup> Ratz, VII/9.

<sup>5</sup> Ziegler, XIII/10.

<sup>6</sup> Frisch, IX/4-5.

<sup>7</sup> Frisch, IX/17.

<sup>8</sup> See Chapter 6, para. 369.

<sup>9</sup> Ortmann, VII/23-24.

<sup>10</sup> Däubler, V/29, VI/4.

<sup>11</sup> Ortmann, VII/24-25.

<sup>12</sup> Bitterwolf, III/22-23, Däubler, V/29.

<sup>13</sup> Paech, I/25-26; Bitterwolf, III/22-23; Däubler, VI/4.

<sup>14</sup> Halberstadt, XIV/4.

<sup>15</sup> Metz, VIII/8.