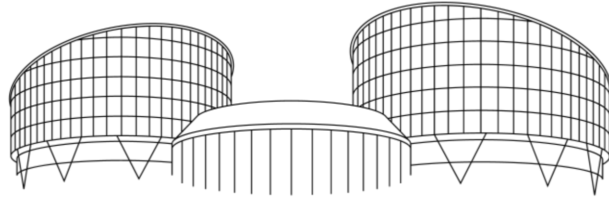

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF GLOR v. SWITZERLAND

(Application no. 13444/04)

JUDGMENT

STRASBOURG

30 April 2009

FINAL

06/11/2009

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Glor v. Switzerland**,**

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

Nina Vajić, *President*,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges*,
and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 7 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 13444/04) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Sven Glor ("the applicant"), on 22 March 2004.

2. The applicant, who had been granted legal aid, was represented by Ms D. von Planta-Sting, a lawyer practising in Zürich. The Swiss Government ("the Government") were represented by their Agent, initially Mr H. Koller, Director, Federal Office of Justice, then Mr F. Schürmann, Head of the Human Rights and Council of Europe Section, Federal Office of Justice, and their Deputy Agent, Mr A. Scheidegger.

3. The applicant complained that he had been required to pay a tax in order to be exempted from compulsory military service despite the fact that he had been willing to do any form of national service, military or otherwise, compatible with his minor disability. He alleged that the Swiss authorities' practice in the matter lacked a legal basis and amounted to discrimination within the meaning of Article 14 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 September 2005 the Court decided to give notice of the application to the Government and to invite the parties to submit observations on the admissibility and merits of the complaint of discrimination. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3 of the Convention).

6. On 1 April 2006 the application was allocated to the newly constituted Fifth Section of the Court (Rules 25 § 5 and 52 § 1).

7. On 19 January 2007 the application was allocated to the First Section (Rules 25 § 5 and 52 § 1).

8. On 6 November 2007 and 8 January 2008 the Court received additional observations from the parties.

9. On 6 May 2008 the Court decided to give notice of the application to the Government again and to invite the parties to submit additional observations on the admissibility and merits of the complaint of discrimination. On 23 June and 3 October 2008 it received the parties' observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1978 and lives in Dällikon (Canton of Zürich). By his own account, he is a lorry driver.

11. On 14 March 1997 a military doctor declared him unfit for military service as he was suffering from type 1 diabetes (*diabetes mellitus*).

12. On 22 February 1999 the applicant was also exempted from the civil protection service.

13. On 8 September 2000 that exemption was lifted and in October that year the applicant was assigned to the Dübendorf Civil Protection Reserve in the Canton of Zürich. According to the Government, it is unclear from the file whether the applicant was given any tasks to carry out in a civil protection capacity. The applicant alleges that he volunteered on several occasions, but because of staff cutbacks in the Canton of Zürich he was never called to do any civil protection duty.

14. On 9 August 2001 the Zürich cantonal authorities responsible for the military-service exemption tax sent him an order to pay the tax for 2000, in the amount of 716 Swiss francs (CHF) (approximately 477 euros (EUR)), based on his taxable income that year (CHF 35,800 – approximately EUR 23,866).

15. In a letter of 11 September 2001, the applicant challenged the tax demand, considering that he was being discriminated against. He pointed out that he had always stated his readiness to do military service.

16. On 20 September 2001 the federal tax authorities informed the applicant that all Swiss men who did not suffer from a "major" disability were required to pay a tax in order to be exempted from military service. They explained that a disability was considered "major" if the degree of physical or mental disability was at least 40%. They considered that further

examinations were needed in order to determine whether the applicant's disability met that requirement.

17. When he examined the applicant on 14 May 2002, a doctor from the Zürich University Hospital found that in most cases the type of diabetes the applicant suffered from did not make people unfit for work.

18. In another expert medical examination on 5 May 2003, a military doctor found the applicant's physical disability to be less than 40%.

19. By a decision of 15 July 2003, the Zürich cantonal authorities responsible for the military-service exemption tax decided, based on the findings of the medical examination and the expert examination of 14 May 2002, that the applicant did not qualify for exemption from the tax as his degree of invalidity was less than 40%. The applicant challenged that decision and the authorities confirmed it on 5 August 2003.

20. The Federal Tax Appeals Board for the Canton of Zürich upheld that decision on 7 November 2003. It considered that in adopting the criteria set out in section 4(1)(a) of the Federal Military-Service Exemption Tax Act of 12 June 1959 (see "Relevant domestic law and practice", paragraph 30 below) Parliament's intention had not been to generally exempt all people with disabilities from the obligation to pay the tax in question. In the applicant's case the medical examination of 14 May 2002 had shown that his disability was not a major one and that his condition was highly unlikely to be an obstacle in his future career. Thanks to medical progress, patients with the applicant's type of diabetes could live quite normal lives these days and practise almost any line of work. That being so, the people concerned were not considered to have disabilities for the purposes of section 4(1)(a) of the Federal Military-Service Exemption Tax Act. The Board further found that the applicant had failed to demonstrate that his condition, and in particular the need to administer himself four insulin injections a day, prevented him from working. Lastly, the Board did not consider that the distinction between major disabilities and other types of disability amounted, as the applicant alleged, to discrimination.

21. On 19 December 2003 the applicant filed an administrative complaint with the Federal Court. He claimed, in particular, that he was a victim of discriminatory treatment in so far as, on the one hand, he had been required to pay the exemption tax and, on the other, he had not been allowed to do his military service even though he had always stated his readiness to do it.

22. On 5 February 2004, when invited by the Federal Court to submit observations on the admissibility and merits of the complaint, the federal tax authorities recommended its rejection.

23. In a judgment of 9 March 2004, the Federal Court rejected the complaint. Based on the findings of the expert examination of 14 May 2002, it held that the applicant did not have a major physical or mental disability within the meaning of section 4(1)(a) of the Federal Military-Service

Exemption Tax Act. Accordingly, he did not qualify for exemption from the tax. The Federal Court also pointed out that although the medical examination showed that the type of diabetes the applicant had was unlikely to prevent him from holding a normal job, the particular constraints of military service nevertheless obliged the authorities to declare him unfit.

24. The Federal Court explained that the aim of the law was to provide a system of compensation between those citizens who did their military service and those who were exempted from it for whatever reason. The tax in issue was meant to replace the effort and inconvenience of military service. As to the complaint of discrimination, the court explained that it was for reasons of equality that the law did not provide for a blanket exemption for all people with disabilities.

25. The Federal Court considered that the cantonal authorities had merely correctly applied the law and that it was not the court's role to change the law.

26. It also held that the fact that the applicant had always declared his willingness to do military service and felt fit to do it as a professional driver did not make any difference, as the law provided for no alternative for someone in his situation but to pay the exemption tax.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic law and practice

1. The obligation to serve and the exemption tax in Swiss law

27. Article 59 § 1 of the Federal Constitution provides the foundation for compulsory military service in Switzerland. It reads as follows:

Article 59: Military service and substitute service

"1. All men of Swiss nationality shall do military service. The law provides for substitute civilian service.

2. Swiss women may serve in the army on a voluntary basis.

3. All men of Swiss nationality who do not do military service or substitute civilian service shall pay a tax. The tax shall be paid to the Confederation and fixed and levied by the cantons.

..."

28. Conscripts go to a training school for 18 to 21 weeks at the age of 19 or 20, followed by six or seven 19-day refresher courses staggered over several years. It is also possible to do the full 300 days' service in one uninterrupted stretch. Under section 42 of the Federal Army and Military Administration Act of 3 February 1995, ordinary servicemen must do 330 days' training. For ordinary servicemen and non-commissioned officers, military-service obligations end at the end of the year of their 30th birthday

or, if they have not completed their full training time, at the end of the year during which they reach the age of 34 (section 13(2)(a) of the same Act).

29. The Federal Military-Service Exemption Tax Act of 12 June 1959 imposes a tax on those who do not do all or part of their military service. Section 2 of the Act identifies the persons subject to the tax:

Section 2: Persons subject to the tax

> "The persons subject to the tax are men, resident in Switzerland or abroad, who are eligible for service and who, in the course of a calendar year (the year in which the tax is applicable):
>
> (a) for more than six months are not incorporated into an army corps or called upon to do civilian service;
>
> ...
>
> (c) do not do the military or civilian service required of them as men eligible for service.
>
> The tax shall not be levied on any man who, in the course of the year in which the tax is applicable, effectively did military service, even though he was not conscripted for the whole year ..."

30. Section 4 of the same Act lists the categories of people who are exonerated from paying the tax:

Section 4: Exoneration from the tax

> "Shall be exonerated from the tax those persons who, in the course of the year in which the tax is applicable:
>
> (a) because of a major physical or mental disability, have a taxable income which, after deduction of the insurance benefits mentioned in section 12(1)(c), and of the cost of support made necessary by the disability, does not exceed by more than 100% the minimum subsistence income for the purposes of debt recovery law;
>
> (a) *bis* are considered unfit for military service because of a major disability and receive a disability benefit or allowance from the federal disability insurance or accident insurance scheme;
>
> (a) *ter* are considered unfit for military service because of a major disability and do not receive a disability benefit or allowance, but meet one of the two minimum requirements to qualify for such an allowance;
>
> ...
>
> (d) have reached the age-limit at which ordinary servicemen and non-commissioned officers, except higher-ranking non-commissioned officers, are released from their military obligations;
>
> ..."

31. This last provision indicates that the obligation to pay the tax lasts until the year in which the person concerned reaches the age-limit at which ordinary servicemen and certain non-commissioned officers are freed from military obligations, that is to say from the age of 19 or 20 to the end of the year of their 30th birthday (according to the applicant, under section 13 of

the Federal Army and Military Administration Act he would be subject to the tax until the age of 34; see paragraph 28 above).

32. Under the legislation governing direct federal taxes, the military-service exemption tax is levied on the person's total net income. As a result, for a bachelor the income on which the exemption tax is based is the taxable income under the law governing direct federal taxes. The exemption tax is 2% of that income (but no less than CHF 200). According to the Government that method of calculating the tax has the advantage of sparing the person concerned the trouble of filling in an additional tax declaration for the exemption tax.

33. In its earlier wording the criterion adopted in section 1(1) of the order of 30 August 1995 on the military-service exemption tax to determine whether a disability should be considered "major" for the purposes of the Federal Military-Service Exemption Tax Act was the degree of disability used for disability insurance. However, in a judgment of 27 February 1998 (ATF 124 II 241), the Federal Court explained that the notion of "major" physical or mental of disability within the meaning of section 4(1)(a) of the Federal Military-Service Exemption Tax Act should be understood in the medical sense, not the disability insurance sense. Ruling on the merits of the case, it held that the disability caused by amputation of the leg at the knee was a "major" disability, corresponding to 40% on the disability scale (Appendix 3 to the order of 20 December 1982 on accident insurance).

34. In a judgment of 22 June 2000 (*Archiv für Schweizerisches Abgaberecht* 69, p. 668), the Federal Court decided that in order to determine whether a disability was "major" for the purposes of exemption from the tax, what should be taken into consideration were the tables used by the Swiss National Insurance Fund in the event of an accident to calculate compensation for bodily harm in accordance with the federal law on accident insurance. The court also considered that the authorities could base their decision on the federal tax authorities' "Instructions concerning exoneration from the tax because of a major physical, mental or psychological disability", which were based on those tables and could be considered to have the value of a presumption of law in so far as they were sufficiently relevant to the particular case.

2. Substitute service in Swiss law

35. According to the parties there is no "alternative" to military service under Swiss law.

36. Civilian service is a substitute service for people eligible for military service who cannot reconcile the obligation to do military service with their conscience. It is regulated by the Federal Civilian Service Act of 6 October 1995. The formal condition for eligibility for civilian service is fitness for military service.

37. Article 61 of the Federal Constitution provides separate regulations governing civil protection. The obligation to do civil protection service is unrelated to the obligation to serve in the army, so military service cannot be replaced by time spent in the civil protection service. Nor is there any possibility of choosing between military service and civil protection. On the other hand, all the training and work done in civil protection can be taken into account in the calculation of the exemption tax.

B. International law and practice

38. The Office of the United Nations High Commissioner for Human Rights presented a report to the United Nations Economic and Social Council on best practices in relation to conscientious objection to military service, which described the wide range of substitute services available (ECOSOC, Commission on Human Rights, *Civil and Political Rights, Including the Question of Conscientious Objection to Military Service*, Doc. E/CN.4/2006/51, 27 February 2006, available on the Internet). In this report the Office of the High Commissioner addressed the question of paying a tax instead of doing military service:

> "53. An issue related to conscientious objector status, or more broadly exemption from or a reduction of compulsory military service for any reason, is the payment of a special tax. Although this is not widespread, it has been reported to occur in a number of countries. Switzerland, for example, levies a tax on earned income for all male citizens who cannot perform their compulsory military service for whatever reason. Other types of taxes relating to exemption or reduction in the period of military service have been reported to occur or to have occurred in countries such as Albania, Ecuador, Georgia, Turkey and Uzbekistan."

39. The non-governmental organisation Conscience and Peace Tax International, which has special consultative status with the United Nations, submitted observations to the former Commission on Human Rights of the United Nations Economic and Social Council (ECOSOC, Commission on Human Rights, *Written Statement submitted by Conscience and Peace Tax International*, Doc. E/CN.4/2006/NGO/108, 18 February 2006), in which it stated (p. 2):

> "... a surprising number of States continue to accept financial contributions in lieu of military service. In Colombia, Ecuador, Bolivia and Switzerland all or most of those excused military service for whatever reason – including those who are willing but physically incapable – are required to pay a special military tax. In other countries there is legal provision that exemption (Albania, Georgia, Mongolia) or (Iran, Uzbekistan) the commutation of military service to a brief period of training may be purchased for cash ..."

C. Statistical data concerning reductions in the Swiss army and the exemption tax

40. Staff reductions in the army, in particular on the occasion of the "Army 95" and "Army XXI" reforms, went hand in hand with a decrease in

the length of military service. When the “Army 95” reform was introduced the age by which compulsory military service had to be completed was lowered from 50 to 42 years for most people, and that age was further lowered by the “Army XXI” reform to 30 or 34 years.

41. For the years 2001 and 2002 79.8% of the population eligible for conscription (56,380 out of 70,634 people) were found fit for military service. During the subsequent training school approximately 22% of those dropped out for medical reasons, so about 58% of the eligible population completed the training.

42. In 2004 there were 27,766 conscripts, 17,445 (62.8%) of whom were found fit for service; in 2005 conscripts numbered 33,036, of whom 20,155 (61%) were found fit for service; and in 2006 24,134 out of 37,377 conscripts (64.6%) were found fit for service. In 2004, 4,457 people (that is to say 16% of the people actually conscripted that year and 10% of those found fit for military service) were released from the obligation to do military service while in training school for medical reasons (the corresponding figures for 2005 were 3,071 people or 9.3% and 5.7% respectively; and for 2006, 2,668 people or 9.3% and 6% respectively). According to statements made to the press on 6 January 2008 by Major General Lupi, Surgeon General of the Swiss Army, 34% of conscripts were declared unfit for military service during the 2007 recruitment campaign and another 6% would very probably be declared unfit for military service during or after training school (figures taken from the *Neue Zürcher Zeitung* of 7 January 2008, p. 8).

43. According to the Government, these figures show that in recent years between 52% and 58% of conscripts completed training school.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

A. Admissibility

44. The applicant claimed that he was the victim of discriminatory treatment because he was prevented from doing his military service although he was willing to serve and, instead, he was obliged to pay the exemption tax because his disability was considered a minor one by the competent authorities. This complaint must accordingly be examined under Article 14 of the Convention, which 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."

45. According to the Court's well-established case-law, Article 14 complements the other substantive provisions of the Convention and its 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 necessarily presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts in issue fall within the ambit of one of the latter provisions (see, for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 71, Series A no. 94).

46. The Court has said on many occasions that Article 14 comes into play whenever "the subject matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed" (see *National Union of Belgian Police v. Belgium*, 27 October 1975, § 45, Series A no. 19), or the measures complained of are "linked to the exercise of a right guaranteed" (see *Schmidt and Dahlström v. Sweden*, 6 February 1976, § 39, Series A no. 21).

47. In that connection, the Court is aware that the applicant, who was not represented by counsel before the domestic authorities, did not explicitly rely on any other substantive provision of the Convention or its Protocols.

48. However, since it is master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I), the Court considers it appropriate to examine whether the military-service exemption tax falls within the ambit of Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions on the admissibility of the case

49. The Government argued that the applicant suffered not from a disability but from an illness. His health was not seriously affected and his personal development and physical and mental integrity had not been impaired by the measure in issue, namely the payment of the exemption tax. The Government admitted, on the other hand, that his medical condition should not be underestimated and that it required permanent supervision and regular therapeutic measures, such as insulin injections several times a day. However, the purely financial disadvantage suffered, which in this case had

been tailored to his financial means, had not adversely affected the applicant's private life. In fact, there was no direct link between the measure concerned and the applicant's private life. The Government accordingly submitted that Article 8 was not applicable and that the application should be rejected as incompatible *ratione materiae* with the Convention, as Article 14 had no independent existence and could not be taken into account.

50. Furthermore, the Government considered that the applicant had not raised the question of health-based discrimination contrary to Article 14 taken in conjunction with Article 8 before the domestic courts, or even before the Court. In particular, he had not demonstrated to what extent his private life had been affected by the impugned decision. Nor had he shown how he had been discriminated against in his private life as a result of it. The Government accordingly considered that the applicant had not exhausted the domestic remedies in respect of his complaint under Article 14 of the Convention taken in conjunction with Article 8.

51. The applicant maintained that the Government themselves had admitted that his health was affected. He found it incomprehensible, even contradictory, that the Government should arrive at the conclusion that such an illness would have no impact on his personal development and physical integrity. However, in spite of his illness, which allegedly made him unfit for military or civilian service, the applicant had had to pay the military-service exemption tax. In this way Swiss law sought to benefit from a medical condition for which the applicant was not responsible. In his view such a measure clearly interfered with his private and family life. That being so, the applicant considered that Article 14 should be taken into account.

2. The Court's assessment

52. The Court reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition (see, for example, *Hadri-Vionnet v. Switzerland*, no. 55525/00, § 51, 14 February 2008, and *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). On several occasions the Court has admitted that private life covers the physical integrity of the person (see, among other authorities, *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 36, Series A no. 247-C, and *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91).

53. The Court also reiterates that the Convention and its Protocols must be interpreted in the light of present-day conditions (see *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31, and many subsequent cases, such as *Vo v. France* [GC], no 53924/00, § 82, ECHR 2004-VIII, and *Emonet and Others v. Switzerland*, no. 39051/03, § 66, 13 December 2007). It notes that the present case concerns possible discrimination against a person with a physical disability, even though it is only considered a minor disability by the domestic authorities. It also considers that there is a European and

worldwide consensus on the need to protect people with disabilities from discriminatory treatment (see, for example, Recommendation 1592 (2003) towards full social inclusion of people with disabilities, adopted by the Parliamentary Assembly of the Council of Europe on 29 January 2003, or the United Nations Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008).

54. The Court considers that a tax collected by the State which has its origin, as in the present case, in unfitness to serve in the army for health reasons – that is, a factor outside the person's control – clearly falls within the scope of Article 8 of the Convention, even if the consequences of the measure are above all pecuniary (for cases concerning the "family" aspect of Article 8, see, for example, *mutatis mutandis*, *Marckx*, cited above, § 31; *Pla and Puncernau v. Andorra*, no. 69498/01, § 55, ECHR 2004-VIII; *Petrovic v. Austria*, 27 March 1998, § 29, *Reports* 1998-II; and *Merger and Cros v. France*, no. 68864/01, § 46, 22 December 2004; in this last case the Court declared that "family life" did not include only social, moral or cultural relations, but also comprised interests of a material kind).

55. In addition, the Court reiterated the principle that the complaint to be submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Ankerl v. Switzerland*, 23 October 1996, § 34, *Reports* 1996-V). In the instant case it considers that the applicant did raise the substance of the complaint of a violation of Article 14 taken in conjunction with Article 8 before the domestic authorities when he affirmed that he had been required to pay the exemption tax and prevented from doing his military service even though he had always maintained that he was willing to do it. He had thus exhausted the domestic remedies.

56. The Court notes that the complaint under Article 14 of the Convention taken in conjunction with Article 8 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

57. The Government pointed out that the competent authorities had considered that it would have been objectively dangerous and irresponsible to declare the applicant fit for military service. That decision had been reached based on his illness and the special constraints linked to military

service, including limited access to health care and medicines, strong physical exertion and considerable psychological pressure.

58. They also explained that the possibility of doing civilian service instead was restricted solely to those who objected to military service on grounds of conscience.

59. Furthermore, the Government were convinced that the Federal Military-Service Exemption Tax Act pursued a legitimate aim, which was to restore a degree of equality between those who actually did military or civilian service and those who, for whatever reason, were exempt. The tax was meant to make up for the efforts and obligations which those exempt from serving were spared.

60. In so far as the applicant argued that the distinction made between people with different degrees of disability was discriminatory, the Government pointed out that the legislation was framed so as to avoid exonerating everyone unfit for military service because of a disability from paying the tax, and to limit such exoneration to those persons mentioned in section 4 of the Federal Military-Service Exemption Tax Act. Paragraph 1 (a) of section 4 laid down three conditions for a person unfit for military service as a result of a disability to be exonerated from the tax: a "major" disability; income that did not exceed the minimum subsistence income; and a causal link between that income and the disability. The provision thus took into account the degree of physical or mental disability of the person concerned as well as their financial situation. A general exemption from the tax for all people with disabilities, of the type referred to by the applicant, would deny the very nature of the tax and would be incompatible with the principle of equal treatment.

61. With regard to physical disabilities, the Federal Court found, in keeping with legal opinion in Switzerland, that the prohibition of discrimination should be limited to people with disabilities of a certain gravity. The deciding factor was the risk of stigmatisation, denigration and social exclusion because of the disability. According to the Government the Federal Military-Service Exemption Tax Act made distinctions based on these principles. The obligation to pay the exemption tax did not apply to people with major disabilities, that is, precisely those people who ran a risk of stigmatisation. In the Government's opinion the applicant ran no such risk as he was only slightly inconvenienced in his everyday life. In the normal course of things his disability was not even noticeable and there was no reason why anyone but a limited circle of people should have known about it. The exemption tax did not change that, as no-one but the person concerned knew about it. For people with more severe disabilities, on the other hand, especially clearly visible disabilities, special arrangements were justified, and exonerating them from paying the tax was a means of not adding to the exclusion they suffered.

62. Accordingly, the distinction made between people unfit for military service whose disability had only limited repercussions on their working lives and those for whom it had more serious repercussions could not be said to be discriminatory. On the contrary, it was based on objective and reasonable considerations.

63. As regards the instant case, the Government pointed out that the applicant suffered from type 1 diabetes. The table used by the Swiss National Insurance Fund in the event of an accident did not settle the question of whether this disease should be considered as a major disability within the meaning of section 4(1)(a) of the Federal Military-Service Exemption Tax Act. Based on the medical certificate drawn up by a diabetes specialist from Zürich University Hospital on 14 May 2002, the federal tax authorities rated the applicant's disability at less than 40%. This meant that it could not be considered as a major disability for the purposes of the Act in question in so far as, although it made him unfit for military service, it did not prevent him from working in various other capacities.

64. In short, the Government considered that the Swiss legislation was designed to treat different situations differently. The distinctions made in the law were based on objective and reasonable considerations. In this particular case the Swiss authorities had correctly applied the law and could not, in the Government's submission, be considered to have violated Article 14 of the Convention. On the contrary, they argued, discrimination much more serious than that which the applicant complained of would have resulted had he been exempted from paying the tax. It was true that a possible discrimination between people based on the seriousness of their disability would be eliminated, but the result would be that whatever the reason for exempting people from military service, and in particular where they were found to be unfit, they would be under no obligation to pay the exemption tax. This in turn would amount to discrimination against all those people who did do their compulsory military service.

(b) The applicant

65. The applicant disagreed with the Government. He argued that a person with a slight disability could conceivably do civilian service instead, which was less physically and psychologically demanding than military service. It was discriminatory, he alleged, to allow conscientious objectors to do substitute service but not people declared unfit for military service because of a disability. In the circumstances, the applicant considered that he had in fact been penalised – as he had suffered a financial loss – when in fact he had been prevented against his will from doing his military service and had not been allowed to do civilian service instead. In his opinion there was no valid justification for such discrimination against people suffering from minor disabilities compared with people who were allowed to freely choose, such as conscientious objectors.

66. The applicant considered it unfair that people with disabilities should be treated differently depending on the level of disability, especially when the person concerned was willing to do substitute service, which would have entitled him to an allowance for loss of income. Furthermore, and contrary to what the Government had submitted, the army had not considered his disability to be a minor one, otherwise he would have been declared fit for service, with certain restrictions for example, or they would have assigned him to a unit less exposed to physical effort.

67. According to the applicant the Government had also failed to demonstrate that the 40% disability rate used to distinguish between people liable to pay the tax and those who were exempt was justified and not discriminatory. The applicant considered that neither the law nor the case-law provided clear guidance. The decision not to exonerate him from paying the exemption tax was based on the fact that his disability was less than 40%. That percentage was based on a single previous case concerning a person who had lost a leg – hardly a situation comparable to his own. It was therefore a discriminatory decision.

68. According to the applicant the discrimination against people with minor disabilities could not be justified: it was neither fair nor in the public interest. On the contrary, it was in the public interest for these people to be included as much as possible in normal life and not burdened with heavy, unfair financial charges.

69. The applicant added that the problems mentioned were further aggravated and appeared all the more disproportionate because people with disabilities did not usually have very high incomes and the exemption tax was not a progressive tax.

70. Lastly, he pointed out that over the previous fifteen years the Swiss army had considerably reduced its numbers, by more than 50% compared with 1989. A corollary of that decrease in numbers was that an increasing number of men were being declared unfit for service. It was all too tempting, he argued, to declare men with minor disabilities unfit for service and make them pay the exemption tax.

2. *The Court's assessment*

(a) Applicable principles

71. The Court reiterates that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, not every difference in treatment will amount to a violation of this Article. Instead, it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that this distinction is discriminatory (see, for example, *National & Provincial Building Society, Leeds Permanent Building Society and*

Yorkshire Building Society v. the United Kingdom, 23 October 1997, § 88, *Reports* 1997-VII, and *Zarb Adami v. Malta*, no. 17209/02, § 71, ECHR 2006-VIII).

72. According to the Court's case-law a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and the effects of the measure concerned and the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim: Article 14 will also be violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, for example, *Zarb Adami*, cited above, § 72; *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 51, ECHR 2006-VI; *Petrovic*, cited above, § 30; and *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 177, Series A no. 102).

73. In other words, the notion of discrimination includes, in general, cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali*, cited above, § 82). Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention (see, among other authorities, *G.M.B. and K.M. v. Switzerland* (dec.), no. 36797/97, 27 September 2001, and *Zarb Adami*, cited above, § 73).

74. 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. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background (see *Fretté v. France*, no. 36515/97, § 40, ECHR 2002-I; *Stec and Others*, cited above, § 52; *Rasmussen v. Denmark*, 28 November 1984, § 40, Series A no. 87; and *Inze v. Austria*, 28 October 1987, § 41, Series A no. 126).

75. Since the Convention is first and foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved. One of the relevant factors in determining the scope of the margin of appreciation left to the authorities may be the existence or non-existence of common ground between the laws of the Contracting States (see *Rasmussen*, cited above, § 40, and, *mutatis mutandis*, The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 59, Series A no. 30).

76. The Convention and its Protocols must be interpreted in the light of present-day conditions (see *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; and *Vo*, cited above, § 82). Lastly, the Court reiterates the principle, well established in its case-law, that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, for example, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37).

(b) Application of these principles to the present case

(i) Whether there was a difference of treatment between people in comparable situations

77. The applicant complained that, having been considered, under the legislation in force and the case-law of the Federal Court, as having a minor disability, he was obliged, unlike people with more serious disabilities, to pay the military-service exemption tax, even though he had always expressed his willingness to do military service.

78. He also felt that he had been treated in a discriminatory manner in so far as the substitute civilian service provided for under Swiss law, which would have exempted him from paying the tax, was open only to conscientious objectors.

79. The Court reiterates that the applicant did not do his military service because he was declared unfit by the competent military doctor. As a result, he was required to pay the exemption tax, like everyone else in the same situation, except for those with a major disability and those who did the substitute civilian service instead. However, only conscientious objectors could opt for civilian instead of military service. This is the situation the applicant complained of in the present application.

80. The Court considers that this case presents a dual example of differential treatment of people in comparable situations. As the list of grounds of distinction given in Article 14 is not exhaustive ("or other status"; see *Stec and Others*, cited above, § 50), there is no doubt that the scope of this provision includes discrimination based on disability. It remains to be seen whether the reasons for the difference of treatment were objective and reasonable.

(ii) Whether there was objective and reasonable justification

(α) Objective justification

81. According to the Government the distinction pursued a legitimate aim, which was to re-establish a sort of equality between people who actually did military or civilian service and those who were exempted from it. The tax in question was meant to replace the efforts and obligations from

which people exempted from serving were dispensed. The applicant disagreed.

82. The Court takes note of the aim of Swiss law to establish a form of equality between people who do their military or civilian service and those who are exempted from it. It must therefore consider whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. For this the Court must examine whether the Swiss authorities and courts struck a fair balance between the protection of the interests of the community and respect for the applicant's rights and freedoms safeguarded by the Convention.

(β) Reasonable justification

The margin of appreciation afforded to the authorities

83. The Court observes that Switzerland collects a tax from all male citizens who are unable, for any reason, to do their compulsory military service and do not do the substitute civilian service instead, with the exception of those with a severe disability. While aware that this fact alone is not decisive for its examination of the complaint under Article 14 of the Convention, the Court notes that this type of tax, imposed even on men unfit for military service because of a physical disability, does not seem to exist in other countries, at least in Europe (see paragraph 53 of the report of the United Nations High Commissioner for Human Rights, and the observations of the non-governmental organisation Conscience and Peace Tax International to the former Commission on Human Rights of the United Nations Economic and Social Council, paragraphs 38 and 39 above).

84. The Court also considers that obliging the applicant to pay the disputed tax after denying him the opportunity to do his military (or civilian) service might prove to be in contradiction with the need to prevent discrimination against people with disabilities and foster their full participation and integration in society. That being so, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced.

The interests in issue

The public interests of the respondent State

85. The Court then has to weigh up the interests in issue. First of all, as regards the legitimate interest of the Government in collecting an exemption tax, the Court notes at the outset that the only reason advanced by the Government for the legislation concerned is to maintain a certain equality between people who do their military or civilian service and those who are exempt. In the instant case, however, the person concerned was declared unfit for service by the authorities even though he had always expressed his

willingness to serve. In such a situation the Court is not convinced that it is in the interest of the community to oblige the man to pay a tax to compensate for not having done his military service. The Court does not consider that the financial contribution in question in this case serves any important compensatory purpose (see, *mutatis mutandis*, *Karlheinz Schmidt v. Germany*, 18 July 1994, § 28, Series A no. 291-B).

86. In view, *inter alia*, of the staff reductions in the Swiss army in recent years (see paragraph 40 above; see also, for example, the Federal Council's report of 7 June 1999 to the Federal Assembly on Switzerland's security policy, pp. 58 and 70), the Court also considers that the tax has no major deterrent role to play either. Clearly it does not serve to ensure that a sufficient number of people do their military service, as at the material time there were plenty of people ready and able to do military service. The Court also observes the recent tendency for European States to do away with conscription altogether in favour of regular armies (for example, Spain (2002), Portugal (2004), Hungary and the Czech Republic (2005), Bosnia and Herzegovina and Slovakia (2006), and Romania, Italy and Latvia (2007)). The need to guarantee the country's defence and security by means of the tax is therefore not really established.

87. On the other hand, in the light of the figures supplied by the parties (see paragraphs 41-43 above), it appears that over 40% of all men were eventually declared unfit for military service in recent years. According to the information in the Court's possession, the percentage of people receiving disability benefits was small at the relevant time and a large majority of those persons declared unfit for service were obliged to pay the exemption tax. The Court accordingly considers it likely that the revenue generated by the exemption tax is not negligible.

The applicant's personal interest

88. The Government suggested that the tax did not place a substantial financial burden on people with less than 40% disability.

89. The Court observes that the exemption tax the applicant was required to pay for the year 2000 amounted to CHF 716 (approximately EUR 477). While it is true that this sum represents only 2% of the applicant's salary, it cannot be said to be insignificant considering the relatively modest level of his taxable income. Furthermore, it must be borne in mind that the tax in question is levied every year, for as long as the military obligations last, that is to say, from the person's 20th to the end of their 30th or even their 34th year (see paragraphs 28 and 31 above). That being so, the Court cannot consider the financial incidence of the tax on the applicant to be merely symbolic.

How the authorities assessed the applicant's disability level and the amount of the exemption tax

90. The other factor to be taken into account is the applicant's disability, which led the competent authorities to declare him unfit for military service. In calculating the tax to be paid, Swiss law takes into account the degree of disability, exempting those persons who suffer from major disabilities. The Federal Court has defined the meaning of a "major" disability. In a 1998 judgment it ruled that it should be understood in the medical sense, not the disability insurance sense. It held that the disability caused by amputation of the leg at the knee was a "major" disability, corresponding to 40% on the disability scale (see paragraph 33 above). In a judgment of 2000, the Federal Court decided that what should be taken into consideration were the tables used by the Swiss National Insurance Fund, in the event of an accident, to calculate compensation for bodily harm in accordance with the federal law on accident insurance. According to the Government, the intention behind section 4(1)(a) of the Federal Military-Service Exemption Tax Act was apparently not to generally exempt people with minor disabilities – and therefore capable of working and earning a normal salary – from the obligation to pay the tax.

91. The Court is well aware that it is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law (see *Winterwerp v. the Netherlands*, 24 October 1979, § 46, Series A no. 33). It nevertheless considers that the manner in which the relevant domestic authorities proceeded in the present case was questionable. First of all they simply compared the applicant's illness – which did not prevent him from working – with the case of a person whose leg had been amputated following an accident, and concluded that his disability was a minor one because it did not attain the 40% threshold. In the Court's opinion, in taking only one criterion into consideration, based on a precedent which scarcely bore comparison, the Swiss authorities failed to give sufficient consideration to the applicant's individual situation.

92. The second, subsidiary, criterion in section 4(1)(a) of the Federal Military-Service Exemption Tax Act is the applicant's income. Once his disability had been declared to be a minor disability, the applicant had no possibility of challenging the presumption – based on that provision and on the above-mentioned case-law of the Federal Court – that a person with only a minor disability was not placed at a disadvantage in the working world. In other words, the applicant could not claim that his income was relatively modest and that, accordingly, the obligation to pay the exemption tax was disproportionate in his case.

93. Lastly, the Court notes the lack of any possibility of exemption from the tax in issue for those whose disability was considered to be less than 40% but who, like the applicant, had a relatively modest salary. On the contrary, the law fixed a minimum payment of CHF 200 per year (see

paragraph 32 above). As a result, even people whose annual income was not high enough for them to pay income tax were not exempted from paying the tax in issue here.

The lack of alternatives to the tax

94. The Court considers that in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned. In this regard the Court notes that the applicant always expressed his willingness to do his military service but that he was declared unfit for service by the military doctor. According to the Government, that finding was based on the fact that he had to give himself an insulin injection four times a day. The Court is fully aware that where the organisation and operational effectiveness of the armed forces are concerned the States enjoy a certain margin of appreciation (see, *mutatis mutandis*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 89, ECHR 1999-VI). It nevertheless wonders what prevented the authorities from setting in place special forms of service for people in a situation comparable to that of the applicant. For example, activities which, although carried out within the armed forces, required less physical effort and could therefore be performed by people like the applicant. In certain States the law provides for alternative forms of military service, in the armed forces, for people with partial disabilities. In practice these people are recruited to posts suited to their degree of disability and their occupational skills.

95. It is not in dispute that the applicant was also willing to do the substitute civilian service instead of military service. Under Swiss law, however, that option is open only to conscientious objectors, based on the idea that civilian service requires the same physical and mental qualities as military service. The Court cannot accept that argument. It is true that in a large majority of the States substitute service is open only to conscientious objectors, as it is in Switzerland (for the Swedish approach, which appears to be an exception, see paragraph 34 of the report by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe entitled “Exercise of the right of conscientious objection to military service in Council of Europe member States”, 4 May 2001, Doc. 8809 revised, available on the Internet). The Court is convinced, however, that special forms of civilian service tailored to the needs of people in the applicant’s situation are perfectly envisageable (for the wide range of substitute services outside the armed forces open to conscientious objectors, see, *mutatis mutandis*, paragraph 35 of the above-mentioned Parliamentary Assembly report, and paragraphs 43-46 of the report of the Office of the United Nations High Commissioner for Human Rights, mentioned in paragraph 38 above).

Conclusion

96. In conclusion, the Court considers that in the present case the domestic authorities failed to strike a fair balance between the protection of the interests of the community and respect for the Convention rights and freedoms of the applicant, who was not allowed to do his military service, or civilian service instead, but was nevertheless required to pay the exemption tax. It takes into account the particular circumstances of the case, including: the amount payable – which was not a negligible sum for the applicant – and the number of years over which it was charged; the fact that the applicant was willing to do military or civilian service; the lack of provision under Swiss law for forms of service suitable for people in the applicant's situation, and the minor role the tax plays nowadays in terms of preventing or compensating for the avoidance of compulsory national service.

97. In the light of the aim and the effects of the tax in question, the objective reasons given to justify the distinction made by the domestic authorities, notably between people declared unfit for service and exonerated from paying the tax and those declared unfit for service but nevertheless obliged to pay it, do not appear reasonable in relation to the principles which normally prevail in democratic societies.

98. That being so, the applicant has been the victim of discriminatory treatment and there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

99. Relying on Article 7 of the Convention, the applicant alleged that that the decision of the Swiss authorities to set the degree of disability required for exoneration from the military-service exemption tax at 40% had no basis in law.

100. The Court considers that the impugned decision does not fall within the scope of that provision *ratione materiae*, in so far as no "penalty" within the meaning of Article 7 § 1 of the Convention was imposed on the applicant (see, for example, *Welch v. the United Kingdom*, 9 February 1995, §§ 26-36, Series A no. 307-A, and *Jamil v. France*, 8 June 1995, §§ 26-33, Series A no. 317-B).

101. It follows that this complaint must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. 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

103. The Court notes that the applicant submitted no claim in respect of pecuniary or non-pecuniary damage.

B. Costs and expenses

104. The applicant's counsel claimed a total of 12,256.70 Swiss francs (CHF) (approximately 8,171 euros (EUR)) for the costs and expenses incurred before the Court.

105. The Government pointed out that the applicant had been represented by counsel only at an advanced stage of the proceedings, and that the proceedings had raised no particularly complex legal issues. They accordingly considered that an award of CHF 2,000 (approximately EUR 1,333) for costs and expenses would be fair.

106. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,500 for the proceedings before the Court.

107. Consequently, after deduction of the sum of EUR 850 which he has already received in legal aid for the proceedings before it, the Court awards the applicant the sum of EUR 3,650 for costs and expenses, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

108. The Court considers it appropriate that the default interest rate 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. *Declares* the complaint concerning Article 14 of the Convention taken in conjunction with Article 8 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

3. *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, EUR 3,650 (three thousand six hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 30 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach	Nina Vajić
Deputy Registrar	President