



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

FOURTH SECTION

CASE OF GODENAU v. GERMANY

(Application no. 80450/17)

JUDGMENT

Art 10 • Freedom of expression • Applicant's inclusion on a regional internal list of teachers deemed unsuitable for appointment to public schools due to doubts as to her loyalty to the Constitution • Case distinguished from *Vogt v. Germany* • Decision based on relevant and sufficient reasons • Limited severity of the impugned measure not preventing applicant's recruitment as a teacher • No severe negative effect on applicant's reputation due to limited accessibility of the list • Sufficient procedural safeguards • Margin of appreciation not overstepped

STRASBOURG

29 November 2022

FINAL

28/02/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Godenau v. Germany,

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

Gabriele Kucsko-Stadlmayer, *President*,

Tim Eicke,

Faris Vehabović,

Jon Fridrik Kjølbro,

Branko Lubarda,

Armen Harutyunyan,

Anja Seibert-Fohr, *judges*,

and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the application (no. 80450/17) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Ms Ingeborg Godenau (“the applicant”), on 20 November 2017;

the decision to give notice to the German Government (“the Government”) of the above application;

the parties’ observations;

Having deliberated in private on 8 November 2022,

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

INTRODUCTION

1. The application concerns the refusal of the applicant’s request to have her name and information about her deleted from an internal list of teachers deemed unsuitable for reappointment to a teaching post at public schools in the *Land* of Hesse. The list was created and maintained by the Hesse authorities. The applicant was included and retained on that list because of statements she had made as well as her memberships in and political activities on behalf of right-wing parties and organisations, in view of which the authorities determined that there were doubts as to her loyalty to the Constitution. The applicant relied on Articles 10, 11 and 14 of the Convention.

THE FACTS

2. The applicant was born in 1954 and lives in Gilserberg. She was represented by Ms G. Pahl, a lawyer practising in Hamburg.

3. The Government were represented by one of their Agents, Ms N. Wenzel, of the Federal Ministry of Justice and Consumer Protection.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

A. The applicant's political activities

5. From 1993 until early 2006 the applicant was a member of the political party the Republicans (*Die Partei der Republikaner*). The party is generally considered to be right-wing and has been under scrutiny by the offices for the protection of the Constitution (*Verfassungsschutzämter*) in various German *Länder*; it has not, however, been declared unconstitutional by the Federal Constitutional Court under Article 21 § 2 of the German Basic Law (for earlier cases concerning members of that party, see *Otto v. Germany* (dec.), no. 27574/02, 24 November 2005, and *Erdel v. Germany* (dec.), no. 30067/04, 13 February 2007). The applicant sat on the Schwalm-Eder District Council (*Kreistag*) and stood for election to both the Federal Parliament (*Bundestag*) and to the parliament of the *Land* of Hesse (*Landtag*) on behalf of that party. In March 2006 the applicant was elected to the District Council on behalf of the Pro Schwalm-Eder Civic Alliance (*Bürgerbündnis Pro-Schwalm Eder*) and served in that role until her resignation in late 2008. The domestic courts established that several members of that alliance's board as composed at that time had links with organisations of the extreme right (see paragraphs 14 and 20 below). In addition to her membership in and activities on behalf of these parties and organisations, the applicant expressed herself publicly at political rallies and in lectures and interviews over the years.

B. The applicant's employment as a teacher

6. The applicant trained as a teacher for lower secondary schools, passing her first and second State exams in 1978 and 1981. She exercised this profession for limited periods and at irregular intervals. In the academic year 2004/05 she worked at a public secondary school in Eltville, in the *Land* of Hesse, on a fixed-term contract. She received a positive appraisal report for that academic year and in the academic year 2005/06 she again worked at the same school on a fixed-term contract.

7. In a letter of 30 March 2006, the competent authorities terminated the applicant's employment contract with immediate effect, citing doubts as to her loyalty to the Constitution (*Verfassungstreue*). In early April 2006 the Hesse Ministry of Culture notified all public education authorities in Hesse that the applicant's employment contract had been terminated on the grounds of significant doubts as to her loyalty to the Constitution and asked to be notified immediately if the applicant applied for another post.

8. The applicant brought an action against the termination of her employment contract before the Wiesbaden Labour Court. Those proceedings ended with a friendly settlement concluded on 19 May 2006, which read:

“The employment contract will be terminated upon expiry of the fixed term specified therein, that is, on 14 July 2006. The [applicant] will remain entitled to remuneration until the termination date but will be released from her work duties ... The parties hereby agree that an offer of employment issued in February 2006 will be deemed null and void. The *Land* against which the action was brought hereby undertakes to delete from the personnel files any mention of the [dismissal] ... The [applicant] will receive a favourable appraisal report which specifies the date of termination as 14 July 2006.”

That appraisal report was issued on 17 August 2006 and any mention of the dismissal was deleted from her personnel files.

C. The applicant’s inclusion on the authorities’ list

9. In an email of 30 May 2006, the Hesse Ministry of Culture asked the Darmstadt public education authority (*Schulamt*) to ensure, through the centralised office for the management of teaching personnel, that the applicant would not be included on any shortlists of potential teachers for public schools in Hesse. In late 2008, the Hesse Ministry of Culture, in cooperation with the decentralised Hesse public education authorities, decided to set up a list containing information regarding teachers deemed unsuitable for reappointment to a teaching post at a school (“the list”). The list was maintained by the centralised office for the management of teaching personnel in Hesse and access was restricted to ten individuals working at that office as well as to two individuals at each of the fifteen decentralised Hesse public education authorities, in the event that they received a job application. Education authorities in other German *Länder* and private schools in Hesse did not have the right to inspect the list, and it would have been unlawful to transmit any information in the list to them. According to the notification by the Hesse Ministry of Culture, the fact that the name of a job applicant appeared on the list did not obviate the need to examine his or her suitability in each individual case. Public education authorities in Hesse seeking to recruit thus retained the discretion to make their own decision as to the suitability of a job applicant included on the list.

10. By a letter of 2 December 2009, the applicant was notified that her name had been included on the list. The list entry concerning the applicant read “non-inclusion in the shortlist (reasons attributable to the person)”.

II. THE PROCEEDINGS IN ISSUE

11. On 22 December 2009 the applicant requested that her name and information about her be deleted from the list. By a letter of 12 January 2010, the competent authorities rejected the applicant’s request.

12. The applicant brought an action, which, in a judgment of 24 August 2011, the Darmstadt Administrative Court dismissed as ill-founded, finding that the applicant was not entitled to have her name deleted from the list. Her inclusion and retention on the list, and the processing of the information

relating to her, had a legal basis in section 34(1) of the Hesse Data Protection Act in conjunction with sections 107d and 107g of the Hesse Civil Servants Act (see paragraphs 29-30 below), the provisions of the latter Act applying *mutatis mutandis* to State employees who were not civil servants. There was sufficient evidence, both at the time of her inclusion on the list and at the time of the Administrative Court's judgment, that the applicant was not committed to the free democratic constitutional order (*freiheitlich-demokratische Grundordnung*) in every aspect of her conduct, contrary to the requirements of section 3(1), second sentence, of the Collective Agreement for Public Service in Hesse (*Tarifvertrag für den öffentlichen Dienst des Landes Hessen*, see paragraph 27 below). The Administrative Court found that the respondent authority had acted within its margin of appreciation when it had concluded that there were serious doubts as to the applicant's loyalty to the Constitution and that she was unsuitable to work as a teacher at a public school in Hesse. Indeed, it could not be taken for granted that the applicant would uphold the free democratic constitutional order at all times or that she would convey the basic values and principles of the Constitution to her pupils in a credible manner.

13. Observing that political engagement for an organisation that was hostile to the Constitution could be a relevant factor, even if the organisation concerned had not been declared unconstitutional by the Federal Constitutional Court under Article 21 § 2 of the Basic Law, the Administrative Court considered that the applicant had been an active member of the Republicans from 1993 to early 2006 and had represented that party as a member of the Schwalm-Eder District Council and as a candidate in elections at both the federal and *Land* level. This membership and these activities in the Republicans, a party in respect of which there were manifold indications that it was not committed to protecting, in particular, the dignity of foreigners and asylum-seekers living in Germany, could serve as a first indication that there might be doubts as to the applicant's loyalty to the Constitution. Her letter of 23 January 2006 to the party's Hesse leadership in which she had declared that she was ending her party membership reinforced these doubts: her primary motivation for her withdrawal from the party had been that she did not share the concern expressed by the party leadership about cooperation with members of the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands*, "NPD") who had stood for election to the District Council as part of the Pro Schwalm-Eder Civic Alliance. In that letter, the applicant had displayed an attitude that was very critical of the German State, as evidenced by her statements that there was no risk of that alliance "abolishing the free democratic constitutional order, as such order had ceased to exist a long time ago" and that she would "make every effort to reinstate a free order", deliberately omitting the word "democratic".

14. Her activities on behalf of the Pro Schwalm-Eder Civic Alliance were an important element for assessing the question of doubts as to her loyalty to the Constitution. Several members of that alliance, and in particular the members of its board, including F.R., had links to extreme-right organisations, notably to the NPD and Neo-Nazi groups, and had become known for their extremist opinions. The applicant could not successfully claim that the opinions of the alliance's other members could not be attributed to her, given that she had chosen to run for the March 2006 elections to the District Council and to serve as a member of the District Council on behalf of that alliance until her resignation in late 2008.

15. Doubts as to the applicant's loyalty to the Constitution also followed from her appearance at political rallies of, *inter alia*, a youth organisation of the extreme right and her interviews with the NPD magazine, *Die Deutsche Stimme* (German Voice). She had engaged in such activities in 2006 but also as late as April 2009, when she had spoken at a rally of the Russian-German Conservatives, stating that "sixty years after the war [we] still bow to what the victors decreed and accept half-truths and lies about [our] own people". Her appearances at events of the Silesian Youth Thuringia or the Young Witikons groups were similarly characterised by aggressiveness towards State institutions. While she could legitimately object to kin liability in respect of the political views of her husband, who had been described as an American Neo-Nazi previously belonging to an important extreme-right organisation in the United States of America and who had served as the District Chairman of the NPD since 2010, the similarity in political views was evident from the fact that four members of the family, including the applicant, had run as candidates for the District Council elections in 2006 on behalf of the Pro Schwalm-Eder Civic Alliance.

16. The applicant had never distanced herself from her past political activities, but had merely declared that she did not intend to be politically active in the future. The Administrative Court considered that, at the time of its judgment, this was insufficient to dispel the doubts, for the purposes of a forward-looking assessment, as to her loyalty to the Constitution, which had justifiably arisen following years of political activities. She could legitimately be expected to explicitly express her commitment to the free democratic constitutional order and to declare that she did not support movements pursuing contrary aims, or in the alternative that she had turned away from such movements after having previously supported them. However, rather than doing so, the applicant had defended her activities and merely stated that she did not pursue aims that were hostile to the Constitution.

17. Observing that her retention on the list meant that the applicant, for the time being, *de facto* had no possibility of being hired as a teacher at a public school in Hesse, the Administrative Court considered that this did not constitute an unjustified interference with her freedom of profession (*Berufsfreiheit*) under Article 12 of the Basic Law. In view of the importance

of protecting the constitutional order and the risk that a teacher who opposed that order could abuse his or her role of educating the children entrusted to him or her, the authorities were allowed to question the teacher's loyalty to the Constitution even if there had not yet been any work-related reproaches. Applications by the applicant for a teaching post at private schools in Hesse or at schools in other German *Länder* were not futile, as access to the list was limited to the Hesse authorities and could not be transmitted to other authorities for reasons of data protection. Lastly, the applicant's inclusion on the list was not in conflict with the friendly settlement concluded in 2006 (see paragraph 8 above), as that did not prevent the authorities from continuing to doubt the applicant's loyalty to the Constitution and seeking to prevent her reappointment as a teacher at a public school in Hesse.

18. On 30 September 2011 the applicant requested leave to appeal the Administrative Court's judgment, submitting that she was not "unsuitable" to work as a teacher and that the judgment had breached her freedom of opinion under Article 5 of the Basic Law and her freedom of profession under Article 12 of the Basic Law. She argued that not a single school in Germany would hire her as a result of her inclusion on the list, which had a stigmatising effect. She had always strictly separated her political activities and her work as a teacher and there had never been any detrimental effect on her work as a teacher, as also evidenced by the positive appraisal reports she had received. Her previous membership in and activities on behalf of the Republicans were not in themselves sufficient to question her loyalty to the Constitution. Nor did these activities or those on behalf of the Pro Schwalm-Eder Civic Alliance render her "unsuitable" to work as a teacher. Political views held by other members of that alliance could not be attributed to her. As a member of the District Council, from which she had resigned in late 2008, she had never made any statements that were hostile to the Constitution, xenophobic or extremist. She did not intend to pursue any political activity in the future. Neither the Russian-German Conservatives, nor the Silesian Youth Thuringia or the Young Witikons were deemed to be hostile to the Constitution or being monitored for that reason. References to her husband were inadmissible. She could not be required to distance herself from her prior political activities, also bearing in mind that she did not aim to become a civil servant and that a lesser degree of loyalty was required from public employees who were not civil servants. Lastly, her retention on the list was in breach of the friendly settlement reached in 2006, in which the authorities had undertaken to remove the dismissal notice from her personnel file; this also meant that doubts as to her loyalty to the Constitution could not be based on her past political activities.

19. By an order of 25 September 2012, the Hesse Administrative Court of Appeal dismissed the applicant's request for leave to appeal as ill-founded, finding that there were no serious doubts as to the correctness of the Administrative Court's judgment. As regards the compatibility of the

impugned measure with the applicant's freedom of profession under Article 12 of the Basic Law, the court considered that the applicant was unsuitable for a teaching post at a public school in Hesse and that the measure, which aimed to prevent her reappointment to such a post, was proportionate in view of the public interest at stake. It was true that not all employees working in public service (*Arbeitnehmer im öffentlichen Dienst*) were *per se* subject to an enhanced obligation of loyalty to the Constitution comparable to the one imposed on civil servants (*Beamte*). Rather, the extent of their obligation of loyalty depended on their position and the tasks they performed, which meant that teachers were subject to an enhanced duty of political loyalty which was equivalent or came close to the one placed on teachers who were civil servants. Teachers had to teach the children entrusted to them in a credible manner about the basic values of the Constitution. Children and adolescents in public schools should recognise that freedom, democracy and the rule of law were values worth upholding. A teacher who did not relate positively to the basic values and principles of the Constitution was unable to convince his or her pupils that democracy was worth defending. Moreover, there was a risk that such a teacher would sway his or her students against the basic values of the Constitution. Pupils were wholly at the mercy of the teachers' influence. The role played by teachers was therefore one of enormous significance from a public-policy perspective.

20. The Administrative Court of Appeal added that standards differed depending on whether the matter concerned the termination of an existing employment contract or, as in the present case, potential (re)appointment to a post. Whereas general doubts as to the individual's loyalty to the Constitution were not sufficient to justify the termination of an existing employment contract, such general doubts were sufficient to justify the decision not to recruit an individual, with the employer enjoying a margin of appreciation. In the applicant's case, there were sufficient general doubts as to her loyalty to the Constitution. The existence of work-related reproaches or detrimental effects on her work as a result of her political activities was therefore not required and the applicant's submissions as to her positive appraisal reports and her separation of professional and political activities were beside the point. In respect of the existence of such general doubts as to the applicant's loyalty to the Constitution and her challenges of that assessment, the Administrative Court of Appeal in essence repeated the grounds given by the Administrative Court (see paragraphs 13-16 above). The Administrative Court of Appeal added that the Pro Schwalm-Eder Civic Alliance had been deemed hostile to the Constitution and that the applicant had voluntarily chosen to run as the alliance's top candidate in the elections to the District Council; as such she could not legitimately avoid being identified with the political aims of the alliance's other members and candidates. It also reiterated that membership in and activities on behalf of parties and organisations that were hostile to the Constitution, such as the

ones with or on behalf of which the applicant had voluntarily and actively engaged, was a relevant aspect in the assessment of doubts as to loyalty to the Constitution in the context of the person's potential employment, even if the respective parties or organisations had not been declared unconstitutional by the Federal Constitutional Court under Article 21 § 2 of the Basic Law.

21. Having regard to the foregoing and to the margin of appreciation enjoyed by the *Land* in question in relation to applicants for employment, the Administrative Court of Appeal concluded that there were objective grounds for that *Land* to seek to prevent the applicant's employment as a teacher at a public school in Hesse. In these circumstances, including the applicant on the list was not disproportionate to the aim pursued. The applicant's inclusion on the list provided any of the decentralised public education authorities with an effective opportunity to examine existing reservations as to the applicant's appointment in a potential future recruitment procedure. No more lenient, equally suitable measure could be discerned.

22. Access to the list was heavily restricted, which limited the severity of the interference with the applicant's rights. Access was restricted to ten individuals within the centralised office for the management of teaching personnel in the *Land* of Hesse, which administered the list, as well as to two individuals at each of the decentralised public education authorities in Hesse. The list was for internal use only and the information contained therein was not transmitted beyond the said authorities in Hesse; notably, neither private schools in Hesse nor authorities in other *Länder* had a right to inspect the list. The impact of the applicant's inclusion and retention on the list was therefore limited to making it more difficult, or preventing, her appointment at a public school in Hesse; it did not negatively affect the applicant's chances of employment at public schools in other *Länder* or at private schools in Hesse. There was no reason to believe that her job applications at a private school in Hesse and at a public school in another *Land* had been unsuccessful because of her inclusion on the list, contrary to what she had alleged, given that the relevant employers did not have access to it. It was much more likely that her applications had been unsuccessful for other reasons or that her political activities and public appearances had led to her being publicly known. In so far as the applicant had invoked the friendly settlement of 19 May 2006, that agreement did not feature any undertaking in respect of a future reappointment of the applicant at a public school in Hesse nor an undertaking that the circumstances which had led to the applicant's dismissal would not be considered in connection with her potential reappointment.

23. Lastly, even assuming that the impugned measure constituted an interference with the applicant's right to freedom of opinion under Article 5 of the Basic Law, such interference was not disproportionate in view of the enormous importance of and public interest in educating children in a credible manner about the basic values of the Constitution.

24. On 19 October 2012 the applicant lodged a constitutional complaint, which the Federal Constitutional Court decided not to accept for adjudication, without providing reasons (decision no. 1 BvR 2249/12 of 15 May 2017). The decision was served on the applicant on 27 June 2017.

III. THE APPLICANT'S POLITICAL ACTIVITIES AFTER 2008/09

25. In their observations, the Government submitted that the applicant had continued to engage in political activities for the extreme right, contrary to what she had submitted before the domestic courts. By way of example, they referred to a lecture given in Barcelona in 2015 entitled "Inge Godenau: la democràcia manipulada". During the talk, a flag of the NPD had been on display and a member of the audience had been wearing a T-shirt with a slightly modified swastika. The promotional materials for the event had described the applicant as belonging to a family of militant and founding members of the NPD. The Government pointed out that a simple Internet search of the applicant's name brought up a large number of online posts, letters and speeches expressing extremist opinions, some of which could engage criminal liability, with her contributions covering topics such as her non-recognition of Poland's national borders, her criticism of the presentation of historical events in school textbooks, and allegations that the press was lying. The Government submitted examples of the applicant's statements to the Court, including the following:

"I'd be remiss to end my post without referring to the 'brutal regime' which allegedly murdered millions of Jews and was responsible for millions more deaths during the Second World War. Researchers do not by any means share a single opinion as regards the former and as regards the latter it is now commonly accepted that Germany neither planned nor wanted to go to war. ..."

Another statement by the applicant was to the effect that Germany had no Constitution; since a portion of the population remained under Polish administration, the opinion of the entire German people on the matter had not been sought.

The applicant did not dispute that she had made those statements.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

26. The relevant provisions of the Basic Law (*Grundgesetz*) read as follows:

Article 5

"1. Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures ...

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2. These rights shall be subject to the limitations laid down by the provisions of the general laws and by statutory provisions aimed at protecting young people and to the obligation to respect personal honour.

...”

Article 12 § 1

“All Germans shall have the right to freely choose their profession, their place of work, and their place of training. The practice of a profession may be regulated by or pursuant to a law.”

Article 21 § 2

“Parties which, through their aims or the conduct of their members, seek to damage or to overthrow the free democratic constitutional system or to endanger the existence of the Federal Republic of Germany shall be held to be unconstitutional. The Federal Constitutional Court shall determine the question of unconstitutionality.”

Article 33

“...

(2) Every German shall be equally eligible for any public office according to his [or her] aptitude, qualifications and professional achievements.

...

(4) The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.

(5) The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service.”

27. Section 3(1) of the Collective Agreement for Public Service in Hesse (*Tarifvertrag öffentlicher Dienst des Landes Hessen*) provided, at the material time, as follows:

“The work required under the employment contract must be performed prudently and conscientiously. Every aspect of an employee’s conduct must reflect his or her commitment to the concept of a free democratic constitutional order within the meaning of the Basic Law.”

28. According to the well-established case-law of the domestic courts, the suitability for employment in public service within the meaning of Article 33(2) of the Basic Law entails a duty of loyalty to the Constitution (see, for example, Federal Labour Court, no. 2 AZR 479/09, judgment of 12 May 2011, at para. 23 - juris, with further references). State employees with civil servant status are subject to an enhanced duty of loyalty (*ibid.*, at para. 27, with further references). The extent of the duty of loyalty owed by State employees employed under private-law contracts depends on their position and the tasks they perform (*ibid.*, at para. 29, with further references).

29. Section 34(1) of the Hesse Data Protection Act, as in force at the material time, read as follows:

“An employer in the public or private sector may process employee data only in cases where said processing is necessary to establish, execute, terminate or wind up the employment relationship or to implement internal planning, organisational, welfare and personnel measures, or where said processing is provided for by a legislative provision, a collective agreement or a works agreement. The provisions of the Hesse Civil Servants Act which concern the right to maintain personnel records will apply *mutatis mutandis* to State employees (both salaried and those paid on an hourly basis) unless otherwise specified in a collective agreement.”

30. The relevant provisions of the Hesse Civil Servants Act, as in force at the material time, read as follows:

Section 107d(1)

“The personnel record may be presented without the civil servant’s consent, for personnel administration or human resources management purposes, to a higher-level authority within the civil service or an authority granted the right to issue instructions in connection with administrative oversight. The same applies to authorities within the same area of jurisdiction in so far as presentation of the data is necessary in order to prepare for or implement a personnel-related decision, and to State authorities in other areas of jurisdiction in so far as they are involved in the personnel-related decision. ...”

Section 107g

“(1) Personnel-record data may be processed and used in files only for personnel administration or human resources management purposes. They may be transmitted only in accordance with section 107d. ...

...

(5) When data are first stored, the data subject must be notified of the type of personal data stored in accordance with subsection 1; the data subject must also be notified of any significant modifications to the data. ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

31. The applicant complained about the refusal to delete her name from the “information list of teachers deemed unsuitable for reappointment to a teaching post” by the Hesse public education authorities. She relied on Article 10, which reads as follows:

Article 10

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. Admissibility

1. *Incompatibility ratione materiae*

32. The Government argued that the complaint was incompatible *ratione materiae* with Article 10 of the Convention, as it concerned, in essence, the right to recruitment to the civil service. According to the well-established case-law of the Court, the right to recruitment to civil service had deliberately been omitted from the Convention and as such the refusal to appoint a person as a civil servant could not provide the basis for a complaint under the Convention (they referred to, *inter alia*, *Glaser v. Germany*, 28 August 1986, § 48, Series A no. 104; *Wille v. Liechtenstein* [GC], no. 28396/95, § 41, ECHR 1999-VII; and *Otto v. Germany* (dec.), no. 27574/02, 24 November 2005). The circumstances of the present case were distinct from those in *Wille*: in that case, the President of the Liechtenstein Administrative Court had been reprimanded for opinions he had expressed in the course of the performance of his duties; the possibility of appointment to another office had not formed the subject of the dispute. By contrast, the actions taken by the authorities in the present case had not related to the ongoing employment of a civil servant. Instead, the proceedings had concerned a measure – the inclusion on a list of persons deemed unsuitable for appointment to a teaching post – which affected only individuals who had already left the public service and which would make their recruitment more difficult if they applied for positions at public schools in the future. The applicant’s earlier dismissal, in respect of which a friendly settlement had been reached in the proceedings before the Wiesbaden Labour Court, was not the subject matter of the present case, distinguishing it from that in *Vogt v. Germany* (26 September 1995, Series A no. 323).

33. The applicant submitted that the refusal to delete her name from the list in issue had constituted a disproportionate interference with her rights under Article 10 of the Convention.

34. The Court reiterates that the refusal to appoint a person as a public servant cannot, as such, provide the basis for a complaint under the Convention (see *Cimperšek v. Slovenia*, no. 58512/16, § 56, 30 June 2020, with further references). However, in a recent case the Court, putting the scope of the measure in the context of the facts of the case and the relevant legislation, held that the refusal to appoint an applicant who had succeeded in the relevant examination to a public service post because of statements he had

made, was a measure that essentially related to freedom of expression and not access to public service (*ibid.*, §§ 54-59).

35. While the applicant's inclusion and retention on the list in issue undoubtedly aimed to prevent her appointment to a teaching post at a public school in Hesse, the subject matter of the present case is not whether the applicant had a right to be recruited to public service and she did not complain about the authorities' refusal to appoint her as a teacher. Rather, the matter before the Court is the refusal to delete her name from the list of "teachers deemed unsuitable for reappointment to a teaching post" maintained by the Hesse authorities, which list pursued the purpose of providing information to any of the decentralised public education authorities in Hesse that may receive a job application by the applicant. However, any such authority retained a discretion whether to recruit the applicant or not (see paragraph 9 above). It is not disputed that the applicant was included on that list because of the opinions she had expressed and the political activities she had engaged in. The Court can accept that this measure essentially related to freedom of expression and that Article 10 of the Convention is applicable to the applicant's complaint (see, *mutatis mutandis*, *Cimperšek*, cited above, §§ 56 et seq.).

36. It follows that the Government's objection as to the applicability of Article 10 of the Convention must be dismissed. At the same time, the Court points out that it does not follow from the applicability *ratione materiae* of Article 10 of the Convention that the applicant had a right to be appointed to a teaching post at a public school in Hesse.

2. *Incompatibility ratione personae*

37. The Government maintained that the applicant could not claim to be a "victim" of a Convention violation for the purposes of Article 34 of the Convention. Her inclusion on the list, viewed in isolation, had not directly affected the applicant. She would only be directly affected by her inclusion in the list if she applied for a teaching post at a public school in Hesse and her application was rejected because of her inclusion on the list. The applicant had made a general statement that she had not been appointed to a teaching post by any public or private school in Hesse or other German *Länder* as a result of her inclusion on the list, but she had not submitted that any application she had made at a school in Hesse had been unsuccessful for that reason. While she had claimed that her application at a private school in North Rhine-Westphalia had been unsuccessful, it had been ruled out that the rejection of her application had been causally linked to her inclusion on the list, since a private school in another *Land* had no right to inspect that list. It was more likely that the private school concerned had learned about the applicant's political views from the Internet, where many statements by the applicant and information about her activities were available. As evidenced by the lecture she had organised in Barcelona in 2015, the inclusion on the

list in question had not deterred the applicant from continuing her political activities and expressing her views, which meant that the impugned measure had not had a chilling effect on her (they referred to *Petropavlovskis v. Latvia*, no. 44230/06, § 77, ECHR 2015).

38. The applicant did not specifically comment on this aspect.

39. The Court reiterates that in order to lodge an application in accordance with Article 34 of the Convention, an individual must be able to show that he or she was “directly affected” by the measure complained of (see *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, § 67, 15 October 2020, with further references). In the present case, the administrative courts did not declare the applicant’s action concerning the authority’s refusal to delete her name from the list inadmissible, it being noted that claiming to be directly affected in one’s rights by the administrative act or refusal is an admissibility requirement for actions before administrative courts under German law. What is more, the domestic courts considered that her inclusion and retention on that list had at least made her appointment at a public school in Hesse considerably more difficult (see paragraphs 17 and 22 above). In these circumstances and taking into account that the very purpose of the applicant’s inclusion and retention on the list was to prevent her reappointment to a teaching post at a public school in Hesse, it would be overly formalistic to require the applicant to apply for such a post first and be rejected, or to consider that she was not directly affected for the purposes of Article 34 of the Convention by the refusal to delete her name from the list. It follows that the Government’s objection must be dismissed.

3. Conclusion

40. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

(a) The applicant

41. The applicant, relying on *Vogt* (cited above), submitted that her inclusion on and refusal to delete her information from the list, a measure which had been based on the opinions she had expressed as well as her membership in and activities on behalf of certain political parties and associations, had breached her rights under Article 10 of the Convention. While she had been critical of certain aspects of the political situation in Germany, such as the significant power of the media and the government’s asylum policy, the authorities’ conclusion that she had been hostile to the Constitution was untenable. It had to be possible to express legitimate

criticism and she had no reason to distance herself from the opinions she had expressed. No specific evidence of her alleged hostility to the Constitution had ever been presented. The allegations against her had been unsubstantiated, based on wrongful assumptions and mostly referred to the associations she had been part of. While it was true that certain members of the Republicans were considered as being hostile to the Constitution, the party had not been banned and, moreover, the applicant had left the party. As a member of the District Council, she had never made any statements that were hostile to the Constitution, extremist or xenophobic, nor had she acted in such a manner. It was true that she had been politically active, but being politically active was a protected fundamental right. It was unjust that citizens were invited to engage politically, but had their livelihoods destroyed if their political engagement did not take the desired form. During her studies she had never been told that working as a teacher would entail a restriction of her fundamental rights. The applicant submitted that it was incorrect that F.R., an individual who had become known for his extremist opinions, was a member of the Pro-Schwalm Eder Civic Alliance. In any event, she had resigned as a member of the District Council in 2008 and had not been politically active since.

42. In response to the Government's observations in which they referred to her activities after 2008, the applicant acknowledged that she had attended a conference in Barcelona in 2015 but disputed that she had organised it. She had no knowledge of the picture of that conference on the Internet. It was also untrue that she gave regular interviews to *Die Deutsche Stimme*; she had given only one interview after being asked to do so following her dismissal.

43. Similarly, the authorities' conclusion that she was unsuitable for a teaching post was untenable. The school where she had worked from 2004 to 2006 was located some 170 kilometres away from the Schwalm-Eder District and at that school it had not been known that she had been a member of the District Council in the latter location. As a teacher she had always paid attention to expressing herself in a neutral and matter-of-fact manner; she had never expressed her opinion on politics. There had never been any reproaches of her professional conduct or performance. Indeed, she had received very positive appraisal reports and the management of the school had offered her a permanent position. Her dismissal had been unjustified and had been withdrawn following the friendly settlement before the Labour Court, and was thus null and void. She had had no choice but to agree to that friendly settlement, as she had found herself in a financially precarious situation. In sum, none of the requirements for inclusion in the list – either to have been dismissed from a teaching post with immediate effect or professional deficiencies – applied to her.

44. The retention of her name on the list made it impossible for her to work as a teacher. No school was going to hire her. Ever since her inclusion on the list, all her applications for teaching posts had been unsuccessful,

including at private schools or at public schools in other German *Länder*. She had been unemployed and living off welfare benefits ever since.

(b) The Government

45. Even assuming that there had been an interference with the applicant's Article 10 rights, the Government maintained that it had been justified. States enjoyed a very broad margin of appreciation in respect of civil service. In Germany political activity was allowed up to the limit of conduct engaging criminal liability, but civil servants and State employees had a duty of loyalty to the Constitution, the degree of which depended on their particular function. School attendance was compulsory in Germany and teachers thus had a vital role to play; by teaching their pupils about the foundations of Germany's democratic system and the basic values of the Constitution, they stood as guarantors for living together in a free and democratic State. The duty of loyalty imposed upon teachers – which entailed restrictions of their freedom of expression, a fact which individuals were aware of when choosing the profession – constituted a central pillar of Germany's defensive democracy and was of vital importance from a public-policy perspective. Teachers who had reservations about or openly opposed the democratic system would be constrained in their ability to teach pupils that freedom, democracy and the rule of law were values worth defending. Reiterating the essence of the domestic courts' assessments as to the existence of doubts as to the applicant's loyalty to the Constitution, notably her political activities and statements in their entirety, the Government explained that the threshold for declaring a political party unconstitutional under Article 21 § 2 of the Basic Law was high and that a party that was hostile to the Constitution would therefore not necessarily be declared unconstitutional by the Federal Constitutional Court. In the light of the reaffirmation of the applicant's views and ideas in her observations in the proceedings before the Court, it was inconceivable that she would successfully be able to convey the basic values of the German Constitution to pupils.

46. The Government emphasised that the applicant appeared to have acknowledged that her initial claim that she had not been politically active since 2008 had been incorrect. In so far as there was a dispute as to the facts relating to activities on behalf of certain organisations and groups, the Government noted that in its judgment the Administrative Court had established that F.R., an individual who had become known for his extremist opinions, had been a member of the Pro-Schwalm Eder Civic Alliance, as it had done in respect of the applicant's appearances at political rallies and her role as an interviewee. As regards her participation in the conference in Barcelona, the Government pointed out that its advertisement had borne her name in the title and that any potential lack of knowledge as to any documentation of her lecture or pictures taken did not take away from the fact that she had participated in it; she had also not distanced herself from that fact

or the views she had expressed there. She had described herself as a victim of the system because her employment contract had been terminated and stated that Germany's democratic system was riddled with hypocrisy and that the country was in the process of de-Germanisation. If anything, the views she expressed had over time become more radical, rather than more moderate.

47. Importantly, the applicant's political views and her work as a teacher were linked, contrary to what she had submitted. By way of example, the Government referred to the speech she had given at the rally held by the Russian-German Conservatives in April 2009, which had focused on a description of historical events in a school textbook. As well as the part of her speech cited by the domestic courts (see paragraph 15 above), the applicant had also stated:

“And so today we are demonstrating not only against the lies in that school textbook, but also and in particular against the undemocratic rabble-rousing of the media. There are three things you need to know about the press, radio and television today: the first is that they lie, the second is that they lie, and the third is that, if they do tell the truth, they tell only half the truth. The last is the worst of all three, because a complete lie is easier to detect than a half-truth.”

At an earlier rally of the Russian-German Conservatives in April 2008 she had stated:

“Our history textbooks are written from the perspective of the winners, and that's why one of them contains statements about the Russian Germans which are untrue, and that's why we're protesting here today. We must not stand by and watch the victims of Bolshevik violence be turned into perpetrators. Those of us gathered here today believe in the truth! We are calling for lies about historical facts to be removed from school textbooks. Our children must not be told lies about their grandfathers and great-grandfathers. The time has come to put an end to the self-debasement of our people. We are calling for GENUINE freedom of opinion, and not simply the acceptance of only one monolithic and politically correct opinion.”

48. In most German *Länder*, there were central recruitment agencies which were able to consult the personnel records of individuals applying to work as a teacher and to find out whether any of their previous contracts of employment had been terminated on grounds of unsuitability. In Hesse teachers at public schools were, at least in some cases, appointed on a decentralised basis by the relevant public education authorities. The list in issue pursued the aim of avoiding that individuals whose prior employment as a teacher had been terminated because they had been found unsuitable, such as the applicant, be recruited by a decentralised public education authority which was unaware of those facts. Indeed, the applicant's political activities had not been known at the time of her recruitment to the post from which she had subsequently been dismissed; as soon as they had become known, she had been dismissed. In the friendly settlement concluded in 2006, the authorities had not undertaken to refrain from including the applicant's name on an information list or from taking into account the facts that had led

to her dismissal when deciding whether to appoint her to another teaching post.

49. Inclusion and retention on the list did not constitute a severe interference. Access to the list was heavily restricted among Hesse public education authorities and neither public schools in other German *Länder* nor private schools in Hesse had access to the list or to the information contained therein. Inclusion on the list did not entail a ban on working as a teacher. In the event of the applicant applying for a teaching post at a public school in Hesse, an assessment of her suitability would have to be carried out and the school concerned remained free to recruit the applicant, regardless of her inclusion on the list. Moreover, deletion from the list could be requested on the basis of a change in the relevant circumstances. The applicant had simply not submitted any evidence concerning a change in such circumstances. Lastly, as the applicant was a French language teacher and had also worked as an English language teacher, her qualifications would allow her to work at language schools.

2. The Court's assessment

50. Having regard to its considerations in respect of the applicability of Article 10 of the Convention (see paragraph 35 above), the Court finds that the refusal to delete the applicant's name from the list interfered with her rights under Article 10 § 1 of the Convention. It follows that the Court needs to examine whether the interference was justified in accordance with Article 10 § 2 of the Convention, that is, whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

51. The inclusion and retention of the applicant's name on the list was based on section 34(1) of the Hesse Data Protection Act in conjunction with sections 107d and 107g of the Hesse Civil Servants Act (see paragraphs 29-30 above) and served to inform future decisions by the relevant Hesse public education authority, should the applicant apply for a job at a public school in Hesse. The performance of such checks concerning the suitability for employment in public service was based on Article 33 § 2 of the Basic Law and section 3 of the Collective Agreement for Public Service in Hesse (see paragraphs 26-27 above). Noting that, in accordance with the case-law of the domestic courts, such suitability entailed a duty of loyalty to the Constitution (see paragraph 28 above) and that the applicant's name was retained on the list in question precisely because of doubts as to such loyalty on her part, and that she had been informed about her inclusion on the list without delay, the Court considers that the impugned measure was prescribed by law.

52. The Court has already recognised in earlier cases that the duty of loyalty to the Constitution imposed on civil servants and public employees under German law was an expression of a "democracy capable of defending

itself” and that restrictions on the freedom of expression of teachers deriving from that duty of loyalty pursued legitimate aims under Article 10 § 2 of the Convention, notably the prevention of disorder and the protection of the rights of others (see *Vogt*, cited above, § 51, and *Volkmer v. Germany* (dec.), no. 39799/98, 22 November 2001). It considers that this applies to the applicant’s inclusion and retention on the list, which pursued the purpose of serving as a basis for a decision on her potential applications for a job at public schools in Hesse, it being noted that teachers at public schools may be appointed by any of the decentralised Hesse public education authorities.

53. Concerning a teacher who was a civil servant under German law, the Court considered that, when determining whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate aim of a democratic State in ensuring that its civil service properly furthered the purposes enumerated in Article 10 § 2 of the Convention, whenever civil servants’ right to freedom of expression was in issue the “duties and responsibilities” referred to in Article 10 § 2 of the Convention assumed a special significance, which justified leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference was proportionate to the above aim (see *Vogt*, cited above, § 53). In subsequent cases concerning teachers, the Court did not delve into the question whether their status under the relevant domestic law was that of civil servants or other public employees and instead focused on their role as teachers, being a symbol of authority for their pupils in the field of education, and reiterated that the particular duties and responsibilities incumbent on them also applied to a certain extent to their activities outside school (see *Mahi v. Belgium* (dec.), no. 57462/19, § 32, 7 July 2020, with further references).

54. The Court sees no reason to depart from this approach in the present case and dismisses as irrelevant the applicant’s submission that she was not, and did not aspire to become, a civil servant within the meaning of domestic law. It notes the approach taken by the domestic courts, according to which, as far as public employees were concerned, the decisive element for the duty of loyalty to the Constitution, and the degree of loyalty owed, was the role and function exercised by the individual, and that a high degree of such loyalty was owed by teachers, which was equivalent or came close to that owed by civil servants. In this connection, the Court emphasises the enormous importance, from a public-policy perspective, of teaching and educating children, in a credible manner, about freedom, democracy, human rights and the rule of law.

55. As in *Vogt* (cited above, § 60), it is undisputed that the applicant’s work as a teacher had been wholly satisfactory and there were no indications that she had sought to take advantage of her position to indoctrinate or exert improper influence on her pupils during lessons.

56. However, in *Vogt*, there was no evidence that the applicant had actually made statements that were hostile to the Constitution or had personally adopted such a stance. The only criticisms retained against her had concerned her active membership of and the posts held in a political party and her candidature in the elections for a *Land* parliament (cited above, § 60). By contrast, in the present case the domestic authorities did not merely rely on the applicant's active membership in the Republicans from 1993 to 2006 and the fact that she had sat on the District Council and stood as a candidate in several elections for that party. Rather, they relied heavily on the applicant's additional activities and statements to conclude that there were doubts as to her loyalty to the Constitution. They took into consideration, *inter alia*, the reasons the applicant had given for leaving the Republicans, that is, that she did not share the concern expressed by the party leadership about a cooperation with members of the NPD who were part of the Pro-Schwalm Eder Civic Alliance, and her statement that there was no risk of that alliance "abolishing the free democratic constitutional order, as such order had ceased to exist a long time ago" and that she would "make every effort to reinstate a free order", deliberately omitting the word "democratic" (see paragraphs 13 and 20 above). The domestic courts also took into consideration the applicant's subsequent membership of and active engagement on behalf of that alliance, which had been deemed to be hostile to the Constitution (see paragraphs 14 and 20 above), as well as statements she had made at political rallies (see paragraphs 15 and 20 above) and the fact that she had not distanced herself from her activities (see paragraphs 16 and 20 above). The Court is therefore satisfied that the domestic courts based their conclusion that there were doubts as to the applicant's loyalty to the Constitution on a well-reasoned assessment of the relevant facts. It notes that the additional submissions made by the Government in their observations, both about the link between the applicant's statements and her work as a teacher (see paragraph 47 above) and her continued public statements in the years after her resignation from the District Council in late 2008 (see paragraph 25 above), in so far as they are uncontested (see paragraphs 25, 42 and 46 above), reinforce the conclusion reached by the domestic courts.

57. Another significant difference between the present case and that in *Vogt* are the nature and consequences of the impugned measure. The applicant in *Vogt* had been dismissed from her post, which the Court considered as a very severe measure, *inter alia*, because of the effect it had on her reputation (cited above, § 60). What is in issue in the present case, by contrast, is not the applicant's dismissal, but rather her inclusion and retention on an internal list of teachers deemed unsuitable for future reappointment to a teaching post which was maintained by the authorities. A very limited number of public officials in Hesse had access to this list and her inclusion and retention on it, which was not known or visible to the public, cannot be said to have had a severe negative effect on her reputation.

58. What is more, the applicant's dismissal in *Vogt*, which terminated, with immediate effect, her existing employment as a civil servant (which was of an indefinite duration under the relevant domestic law) constituted a severe interference with her existing rights. In the present case, by contrast, the applicant was not employed at the time her name was included on the list and none of her existing positions or rights were interfered with. Rather, her inclusion and retention on the list pursued the aim of preventing her future appointment to a teaching post at a public school in Hesse. In this respect, it constitutes an important element of proportionality that the relevant decentralised public education authorities in Hesse were not prevented from recruiting the applicant to a teaching post and were obliged to examine her suitability in the event of receiving a job application by the applicant (see paragraphs 9 and 49 above). Moreover, neither public schools in any of the other German *Länder* nor private schools in Hesse had access to the list or the information contained therein and, consequently, the applicant's inclusion and retention on the list could not possibly prevent her appointment to, or negatively affect her application for, a teaching post at a public school in another *Land* or at a private school in Hesse, as established by the domestic courts (see paragraphs 17 and 22 above).

59. Lastly, even though the domestic courts dismissed the applicant's request to have her name deleted from the list, finding that there continued to be grounds for doubting her loyalty to the Constitution and for retaining her name on the list, the possibility for the applicant to request such deletion, at any point in time, and to obtain a comprehensive judicial review as to the existence, at the time of the domestic courts' assessment, of doubts concerning her political loyalty constitutes an important procedural safeguard which is a factor to be taken into account in the proportionality assessment (see *Baka v. Hungary* [GC], no. 20261/12, § 161, 23 June 2016).

60. Having regard to the foregoing considerations the Court concludes that the domestic authorities adduced relevant and sufficient reasons and did not overstep their margin of appreciation. The interference with the applicant's freedom of expression was therefore proportionate to the legitimate aims pursued and was thus "necessary in a democratic society".

61. There has accordingly been no violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 11 AND 14 OF THE CONVENTION

62. The applicant also relied on Articles 11 and 14 of the Convention to complain about the same measure, alleging that she had been discriminated against because of her political views and that a double standard was applied, depending on which end of the political spectrum teachers belonged to. Having regard to the facts of the case and the parties' submissions, which

essentially referred to the arguments they had made in respect of Article 10, its findings under that latter provision and the parallels it has drawn in its assessments under Articles 10 and 11 in earlier cases concerning the dismissal of teachers (see, for example, *Volkmer*, cited above), the Court considers that it has examined the main legal questions raised in the present application, and that there is thus no need to give a separate ruling on the remaining complaints (see, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 10 of the Convention admissible;
2. *Holds* that there has been no violation of Article 10 of the Convention;
3. *Holds* that there is no need to examine separately the admissibility and merits of the applicant's complaint under Articles 11 and 14 of the Convention.

Done in English, and notified in writing on 29 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Deputy Registrar

Gabriele Kucsko-Stadlmayer
President