



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

THIRD SECTION

CASE OF STAMBUK v. GERMANY

(Application no. 37928/97)

JUDGMENT

STRASBOURG

17 October 2002

FINAL

17/01/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Stambuk v. Germany,

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

Mr I. CABRAL BARRETO, *President*,

Mr G. RESS,

Mr L. CAFLISCH,

Mr P. KÜRIS,

Mr R. TÜRMELEN,

Mrs H.S. GREVE,

Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 22 November 2001 and on 26 September 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37928/97) against the Federal Republic of Germany lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr Miro Stambuk (“the applicant”) on 30 August 1997.

2. The German Government (“the Government”) were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*. The applicant was represented by Mr M. Kleine-Kosak, a lawyer practising in Freiburg.

3. The applicant alleged that the disciplinary punishment imposed on him for having participated in a press article on his work violated his right to freedom of expression guaranteed in Article 10 of the Convention

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court).

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

7. By a decision of 22 November 2001 the Court declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1943 and lives in Blaubeuren.

9. On 25 October 1995 the Tübingen District Disciplinary Court for Medical Practitioners (*Bezirksberufsgericht für Ärzte*) imposed a fine amounting to 2,000 German marks (“DEM”) upon the applicant, an ophthalmologist, for disregarding the ban on advertising under the relevant provisions of the Baden-Württemberg Rules of Professional Conduct of the Medical Practitioners’ Council (*Berufsordnung der Landesärztekammer*) and the Act on the Councils for the Medical Professions (*Heilberufe-Kammergesetz*).

10. In its reasoning, the Disciplinary Court found that the applicant performed medical operations with a laser technique. In the house where he had his consultation rooms, his wife ran an “excimer-laser-centre”. In May 1994 the journalist Ms K. of the newspaper *Schwäbische Zeitung* had visited the applicant, upon appointment, in his consultation rooms and discussed his new laser operation technique. Moreover, a photograph was taken of the applicant at his place of work. On 26 September 1994, there had appeared in the said newspaper an article signed by Ms K. and entitled “Cornea under fire – laser restores full vision. In Blaubeuren, the ‘photorefractive keratotomy’ has been applied since three years – operation risks are low - expenses are partly reimbursed by the insurances” (“*Die Hornhaut unter Beschuss – Laser gibt dem Auge die volle Sehkraft zurück. In Blaubeuren wird seit drei Jahren die ‘Photorefraktive Keratektomie’ angewandt – Operationsrisiken sind gering – Kosten werden teilweise von den Kassen übernommen.*”). In the article, it had been inter alia stated that, according to his indications, the applicant had treated more than 400 patients having defective vision with a laser technique and that in no case had any subsequent corrective measures been necessary and that accordingly he had a success rate of 100%. The article had also reported the applicant’s statement that the long-term success of an operation depended upon the experience of the medical practitioner and on the selection of the patients. The article had been illustrated by a photograph of 12x19 cm in size which showed the applicant at his computer pointing to the monitor. It had the caption: “On the occasion of the ‘mapping’ Dr Miro Stambuk sees on the monitor of his computer whether or not the patient can be treated with the laser technique” (“*Beim ‘mapping’ sieht Dr. Miro Stambuk auf dem*

Monitor seines Computers, ob ein Patient mit dem Laser behandelt werden kann.”).

11. The Disciplinary Court considered that the applicant had thereby disregarded sections 25(2) and 27 of the Rules of Professional Conduct of the Medical Practitioners’ Council (see below, Relevant domestic law, paragraph 20). Thus, according to section 25(2), a medical practitioner should not allow for picture-stories to be published in respect of his professional activities which had an advertising character, indicated the name and showed a photograph. According to section 27, the cooperation of a medical practitioner in informative publications in the press was only permissible if these publications were limited to objective information and if the person and the activities of the practitioner were not presented in the form of an advertisement. In press interviews, the medical practitioner was held to “responsible objectivity” (“*verantwortungsbewusste Objektivität*”).

12. According to the Court, the applicant had disregarded these rules in that he had, in the interview, stressed having treated more than 400 patients and had had a success rate of 100%. He had thereby mainly aimed at giving prominence to his own person. This was confirmed by his remark about his professional experience. Likewise, the large photograph, showing the applicant in his medical coat posing as lecturer in front of his computer, went beyond the permissible limits of objective information, as, together with the self-praise found in the text, the message was conveyed that the applicant was a particularly experienced medical practitioner. The applicant should have negotiated with the reporter the objective character of the publication and the size of the photograph in order to comply with the ban on advertising.

13. On 15 June 1996 the Stuttgart Disciplinary Appeals Court for Medical Practitioners (*Landesberufsgericht*) dismissed the applicant’s appeal. The Appeals Court confirmed the facts established by the District Court and its legal reasoning.

14. The Appeals Court considered in particular that in order to give effect to the ban on advertisement as laid down in section 25(1) of the Rules of Professional Conduct, cooperation with the press had to be prohibited to the extent that publications had an advertising character (section 25(2)). No less restrictive measure was available. The wording of a publication could disguise its advertising character and thus be a means to circumvent the ban on prohibition.

15. Having regard to the circumstances of the interview and the presentation of the article, the Appeals Court further considered that the applicant had not only tolerated that an article was published which would go beyond objective information on a particular operation technique, but had deliberately acted so as to give prominence to his own person. The Appeals Court also stated that, having regard to the interests of his colleagues, the ban on advertising outweighed the applicant’s freedom to exercise his profession .

16. On 7 May 1997 the Federal Constitutional Court refused to admit his constitutional complaint. The decision was served on 22 May 1997.

II. RELEVANT DOMESTIC LAW

17. In the Federal Republic of Germany, the medical profession is governed partly by Federal law and partly by the law of the *Länder*. The principal rules relevant for the present case are to be found in the Federal Medical Practitioners' Act (*Bundesärzteordnung*) of 1953 in the version of 16 April 1987 (amended in 1988, 1990, 1992 and 1993), the Baden-Württemberg Act on the Councils for the Medical Professions (*Gesetz über die öffentliche Berufsvertretung, die Berufspflichten, die Weiterbildung und die Berufsgerichtsbarkeit der Ärzte, Zahnärzte, Tierärzte, Apotheker und Dentisten – Heilberufe-Kammergesetz*) of 16 March 1995 (amended in 1999 and 2000), and the Baden-Württemberg Rules of Professional Conduct of the Medical Practitioners' Council in the version of 23 February 1994, as amended in September 1996 (in force at the material time – recent amendments in 1998, 2000 and 2001).

18. According to section 1 of the Federal Medical Practitioners' Act, the medical practitioner shall have the care of the health of each individual and of the community as a whole; he exercises a liberal profession and not a trade or business.

19. The medical practitioners practising in Baden-Württemberg constitute the Baden-Württemberg Medical Practitioners' Council, which is a public-law association (sections 1, 2 and 7 of the Baden-Württemberg Act on the Councils for the Medical Professions). The functions of the Medical Practitioners' Council include defending the interests of its members and ensuring that they meet their professional obligations (section 4 of the said Act). The Council adopts decrees concerning inter alia the Rules of Professional Conduct (section 9 of the said Act).

20. As regards professional communications, the Baden-Württemberg Rules of Professional Conduct of the Medical Practitioners' Council, as in force at the material time, provided as follows:

Section 25

“(1) A medical practitioner is not allowed to advertise his own services or those of other medical practitioners. He shall not instigate or tolerate such prohibited advertising by others. ...

(2) A medical practitioner shall not tolerate the publication of reports or picture-stories on his professional activity with an advertising character, stating his name, showing his photograph or indicating his address.”

Section 27

“Medical publications or the cooperation in informative publications in press, broadcasting or television are permissible if and to the extent that these publications or the medical practitioner’s cooperation are limited to objective information and neither the medical practitioner himself nor his activities are presented in the form of an advertisement. In such instances, the medical practitioner is held to ‘responsible objectivity’. The same shall apply to public lectures on medical issues.”

21. Sections 55 to 69 of the Baden-Württemberg Act on the Councils for the Medical Professions govern the disciplinary powers of the Councils. According to section 55(1) and (2), members of these Councils face disciplinary action for professional misconduct (*berufsunwürdige Handlungen*), i.e. conduct offending their professional duties as members of the Chamber concerned. Pursuant to section 58, the following disciplinary penalties may be imposed in disciplinary court proceedings: warning, reprimand, a fine of up to DEM 100,000, a loss of membership of the Council organs and of other representative bodies or committees of subordinate entities for a period not exceeding five years, loss of the right to vote and to stand for elections to such organs for a period not exceeding five years. Disciplinary proceedings are, at first instance, conducted before the district disciplinary courts (section 60); an appeal lies against the decision of the district disciplinary court and must be lodged with the disciplinary appeals court (section 61).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicant complains under Article 10 of the Convention that his disciplinary punishment by the Tübingen District Disciplinary Court for Medical Practitioners in 1995, as confirmed upon appeal, was in breach of his right to freedom of expression, as guaranteed in Article 10 of the Convention, which provides:

“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. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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. Existence of an interference

23. The participants in the proceedings agreed that the applicant’s disciplinary punishment amounted to an interference with the exercise of his right to freedom of expression. The Court sees no reason to conclude otherwise.

B. Justification of the interference

24. An interference contravenes Article 10 unless it is “prescribed by law”, pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is “necessary in a democratic society” for achieving such an aim or aims.

1. “Prescribed by law”

25. The Government submitted that the interference was prescribed by law, namely sections 25 and 27 of the Baden-Württemberg Rules of Professional Conduct of the Medical Practitioners’ Council and sections 55 and 58 of the Baden-Württemberg Act on the Councils for the Medical Professions (see paragraphs 20 and 21 above). The applicant did not comment on this point.

26. The Court notes that these legal provisions, which lay down rules for the professional conduct of medical practitioners and provide for disciplinary penalties for a breach of professional duties, were relied upon by the Tübingen District Disciplinary Court for Medical Practitioners and by the Stuttgart Disciplinary Appeals Court for Medical Practitioners. In short, the interference complained of was “prescribed by law”.

2. “Legitimate aim”

27. The applicant, while accepting that a ban on advertising might pursue the legitimate aim of protecting health, submitted that such prohibitions were not permissible if they merely served the purpose of protecting competitors.

28. The Government stated that the disciplinary measure imposed upon the applicant served to protect the health of the public and the rights of others. In their view, a medical practitioner was primarily responsible for the care of the health of individuals. His activity therefore could not be reconciled with advertising which was the typical instrument for profit-making. Commercialisation of the medical profession had to be avoided for the protection of patients and their health. The decisions in the instant case were based on these general considerations of medical policy. Protecting the

interests of competitors was only a supplementary element in the Appeals Court decision.

29. The Court notes that the disciplinary courts referred to the requirement of objectivity in informing the public about medical treatment and criticised the applicant for having given prominence to his own person. They thereby showed concern, as expressly stated by the Appeals Court, for the interests of the applicant's fellow medical practitioners, i.e. the rights of others which is a legitimate aim (cf. the *Barthold v. Germany* judgment of 25 March 1985, Series A no. 90, p. 23, § 51).

30. The Court further observes that, in the exercise of their liberal profession, medical practitioners have the care of the health of each individual and of the community as a whole (section 1(1) of the Federal Medical Practitioners Act – see paragraph 18 above). The relevant legislation of the *Länder*, in this case the Baden-Württemberg Act on the Medical Councils, and the Rules of Professional Conduct in laying down the specific features of the medical practitioners' position and professional conduct, were designed to protect "health". This consideration is therefore relevant to assessing the need for the disciplinary measure.

31. The Court is therefore satisfied that the interference in question pursued legitimate aims.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

32. The applicant maintained that the interference in question had not met the requirement of "necessity". In his view, the relevant provisions of the Rules of Professional Conduct had to be interpreted restrictively. Medical practitioners should not be prohibited from advertising in an informative manner on matters which were relevant for patients and contributed to the transparency of medical services. In case of new methods of medical treatment, informing the public was particularly important.

33. The applicant questioned the necessity of disciplinary punishment for having cooperated in, or tolerated, a publication by the press. A medical practitioner had no opportunity to influence the contents of press articles and he could not be expected to reserve a right to verify publications.

34. Moreover, as regards the contents of the impugned publication, the applicant asserted that the advertising effect had been of a secondary nature. The indication of the success rate could not be criticised as it had not been misleading. Furthermore, he could not be reproached for the publication of a photograph showing him wearing his medical coat.

(ii) The Government

35. The Government maintained that the disciplinary courts, having examined the particular circumstances of the applicant's case, had correctly concluded that he had disregarded the ban on advertising. The applicant had not been barred from making public statements on the issue of photorefractive keratotomy. The disciplinary punishment had not been imposed with regard to the article as a whole, but in respect of specific elements of an excessively advertising character. By giving himself prominence in the article, the applicant had overstepped the limits of permissible objective information. The photograph, especially of that size, did not convey to the reader any additional factual information. It had rather been meant to serve as an eye-catcher, showing the applicant in his medical coat and thereby suggesting that the treatment described in the article was advisable for the reader. Furthermore, stating a success rate was no objective information, as the success of medical treatment depended upon individual diagnosis and cooperation with the patient concerned. At the relevant time, the method of photorefractive keratotomy had not yet been generally recognised.

36. According to the Government, the ban on advertising could only operate effectively, if the medical practitioner was also prohibited from permitting publications, by other persons, advertising his services. In the circumstances of the present case, the applicant could have been reasonably expected to reserve the right to verify the text and presentation of the publication at issue.

37. Finally, the Government considered that, having regard to the rather low amount of the fine imposed upon the applicant, the penalty could not be regarded as disproportionate.

(b) The Court's assessment

(i) General principles

38. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the publication held against the applicant and the general context of the publication. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the *Sunday Times* (no. 1) v. the United Kingdom judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

39. The Court recalls that, for the citizen, advertising is a means of discovering the characteristics of services and goods offered to him.

Nevertheless, it may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions. Any such restrictions must, however, be closely scrutinised by the Court, which must weigh the requirements of those particular features against the advertising in question; to this end, the Court must look at the impugned penalty in the light of the case as a whole (see the *Casado Coca v. Spain* judgment of 24 February 1994, Series A no. 285-A, p. 20, § 51).

40. In the case of lawyers, the Court has held that their central position in the administration of justice as intermediaries between the public and the courts explains the usual restrictions on the conduct of members of the Bar (see the (see the *Schöpfer v. Switzerland* judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1052, § 29, with reference to the above-mentioned *Casado Coca v. Spain* judgment, p. 21, § 54; and, as a recent authority, *Nikula v. Finland*, no. 31611/96, § 45, 22 March 2002). Considering the wide range of regulations and the changes occurring in the Council of Europe's Member States, the bar authorities and the domestic courts, because of their direct, continuous contact, are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved (see the *Casado Coca* judgment cited above, p. 21, §§ 54-55). However, in the field under consideration, there are no particular circumstances – such as a clear lack of common ground among Member States regarding the principles at issue or a need to make allowance for the diversity of moral conceptions (see *Nikula v. Finland*, cited above, § 10) – which would justify granting the national authorities a comparable wide margin of appreciation.

41. In respect of medical practitioners, their general professional obligation of “care of the health of each individual and of the community as a whole” may explain similar restrictions on their conduct, including rules on their public communications or participation in public communications on professional issues. These rules of conduct in relation to the press is to be balanced against the legitimate interest of the public in information and are limited to preserve the well-functioning of the profession as a whole. They should not be interpreted as putting an excessive burden on medical practitioners to control the content of press publications.

42. One factor of importance for the Court's assessment in this regard is the essential function fulfilled by the press in a democratic society. Its duty is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see the *Jersild v. Denmark* judgment of 23 September 1994, Series A no. 298, p. 23, § 31; the *De Haes and Gijssels v. Belgium* judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 233-34, § 37; and the *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III).

(ii) Application of the above principles to the instant case

43. The Court notes that in the disciplinary proceedings at issue, a fine amounting to DEM 2,000 was imposed upon the applicant, an ophthalmologist, for having given an interview on his laser operation technique, which was subsequently repeated in an article published in the local press together with a photograph showing him in his consultation room. The disciplinary courts considered that the publication went beyond the limits of objective information and therefore constituted advertising prohibited under the Baden-Württemberg Rules of Professional Conduct of the Medical Practitioners' Council.

44. The German disciplinary courts in fact reproached the applicant with having transgressed the limits of objective information. They reasoned that, considering certain formulations in his interview, especially the reference to a success rate of 100%, and the manner of presenting him on the large photograph, he had aimed to give prominence to his person.

45. The Court considers that these reasons, in and of themselves, are relevant. It remains to be established whether they were sufficient to justify the applicant's disciplinary punishment.

46. The Court observes that the publication concerned a new laser operation technique to correct the defective vision of patients and was thus informing the public on a matter of general medical interest. Following an interview with the applicant, which had taken place on the initiative of the journalist, the latter published this article in a local newspaper in a language and manner of presentation destined to inform a general public.

47. The impugned article presented on the whole a balanced explanation of the specific operation technique which necessarily included indications as to the risk involved and the success rate. The German courts did not find that the applicant's statements in this respect, as reproduced in the article, were incorrect or genuinely misleading the reader as to the necessity or advisability of such intervention. The statement on the success rate clearly referred to the applicant's own experience in the past which is an important element in the presentation of a new operation technique. Moreover, this information was complemented by the indication, in the title, that the operation risks were low.

48. Moreover, in the Court's view, the illustration of an article in the general press with a photograph, showing the applicant in his professional context, cannot be regarded as amounting to prohibited and non-objective information or misleading advertising. Indeed, the photograph was closely related to the contents of the article and cannot be reduced to mere publicity.

49. In the Court's opinion, it is not possible to isolate the passage of the article concerning the applicant's past success rate in applying this operation technique and the appearance of the accompanying photograph from the article as a whole in order to argue the necessity to take disciplinary action for a breach of professional duties. The article may well have had the effect of giving publicity to the applicant and his practice, but, having regard to

the principal content of the article, this effect proved to be of a secondary nature (see the *Barthold v. Germany* judgment cited above, p. 26, § 58).

50. In the circumstances of this case, the German disciplinary courts' strict interpretation of the ban on advertising in the medical profession and the requisite objectivity of information so as to prohibit statements and related illustrations on account of their possible side effect of giving publicity to the medical practitioner concerned is not consonant with freedom of expression. This being so, it is not necessary to examine the Government's contention that the applicant should have, as a matter of principle, reserved a right to verify the article prior to its publication.

51. The Court would add that, in the context of a liberal profession and having regard to the range of possible penalties, imposing a fine, even if at the lower end of the scale of fines, is not a negligible disciplinary punishment.

52. The Court therefore finds that the interference complained of did not achieve a fair balance between the interests at stake, namely the protection of health and the interests of other medical practitioners and the applicant's right to freedom of expression and the vital role of the press.

53. In these circumstances, the interference complained of was not proportionate to the legitimate aims and, accordingly, was not "necessary in a democratic society" for the "protection of health" and the "protection of the rights of others".

54. In sum, that there has been a breach of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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."

56. The applicant's counsel claimed reimbursement of the applicant's legal expenses incurred in the domestic court proceedings.

57. The Court recalls that claims for just satisfaction must, in general, be supported by independent evidence. Thus, Rule 60 § 2 of the Rules of Court provides that:

"Itemised particulars of all claims made, together with the relevant supporting documents or vouchers, shall be submitted, failing which the Chamber may reject the claim in whole or in part".

58. In the present case, the applicant's claim is phrased in general terms, it was not particularised and not accompanied by relevant documentation.

59. The Court sees no ground for examining the question of awarding just satisfaction of its own motion (see, *mutatis mutandis*, the *Nasri v. France* judgment of 13 July 1995, Series A no. 320-B, p. 26, § 49).

60. The Court therefore rejects the claim for compensation.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;
2. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 October 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President