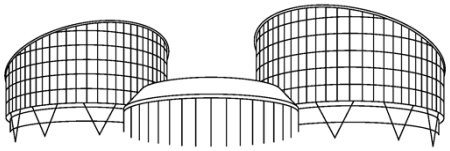

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ANNEN v. GERMANY (No. 6)

(Application no. 3779/11)

JUDGMENT

STRASBOURG

18 October 2018

FINAL

18/01/2019

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

In the case of Annen v. Germany (no. 6),

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

Yonko Grozev, *President,*
Angelika Nußberger,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 25 September 2018,

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

PROCEDURE

1. The case originated in an application (no. 3779/11) 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, Mr Klaus Günter Annen ("the applicant"), on 10 January 2011.

2. The applicant was represented by Mr L. Eck, a lawyer practising in Passau. The German Government ("the Government") were represented by their Agents, Mr H.-J. Behrens and Ms K. Behr, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged, in particular, that his criminal conviction for statements made in a press release had violated his right to freedom of expression.

4. On 20 June 2016 the complaint concerning Article 10 of the Convention was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Third party comments were received from Asociatia Medicilor Catolici din Bucaresti (AMCB), which had been given leave by the Vice-President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

6. The applicant was born in 1951 and lives in Weinheim. He is a campaigner against abortion and operates an anti-abortion website.

7. In December 2007 there was an on-going public debate on developments in human embryonic stem-cell research. As part of the debate the Catholic Bishop F. voiced criticism of human embryonic stem-cell research and a group of scientists at the University of Bonn responded to that criticism. On 13 December 2007 Bishop F. issued a press release repudiating allegations that his earlier comments had implied a degree of similarity between the scientists carrying out embryonic stem-cell research and the Nazis who had performed experiments on humans. He emphasised that he had had absolutely no intention of casting such defamatory aspersions upon the scientists, but reasserted his belief that there was an urgent need for such vitally important ethical issues to be debated critically. He claimed that he had never wished to imply that there had been any link between stem-cell research and the ideological and historical context of the crimes committed by the dehumanising Nazi system, which should not be relativised through comparison.

8. On 18 December 2007, the applicant issued a press release for his initiative Never Again! (*Nie Wieder! e.V*) with the title:

> "Dogs which have been hit bark! Stem-cell research in Germany" (*Getroffene Hunde bellen! Stammzellenforschung in Deutschland*)

The press release was published on the Internet and handed out as leaflets. It read:

> "The initiative Never Again! [*Nie Wieder! e.V.*] and the Austrian Christian Social Working Group [*Christlich Soziale Arbeitsgemeinschaft Österreichs*] wish to make known their opposition to the press release issued by the University of Bonn on 13 December 2007, which bears the signatures of eighteen well-known professors and in which the professors express their outrage at the comments made by Bishop F. [name abbreviated by the Court] comparing modern-day stem-cell research to the experiments on human beings carried out by the Nazis.
>
> The professors appear to have forgotten that these experiments were performed in Nazi times by willing doctors and scientists. These doctors and scientists, who were clearly in bondage to the rogue State and subservient to it, also carried out their research solely 'for the good of the people'.
>
> The research performed during the Nazi regime took place at a later stage of human life.
>
> The present-day research takes place at an earlier stage of human life.

Do the professors want to determine humans' right to life on the basis of how useful they are? The principle of human dignity does not apply only after a particular phase of growth has been completed, and people should not be allowed to experiment at will during this phase.

The professors can spin it any way they want. Aggravated murder [*Mord*] will always be aggravated murder, regardless of the stage of life at which the human being is destroyed. The fact that others were responsible for performing these contract killings does not provide moral justification for working with this 'human material'.

The comments made by Bishop F. [name abbreviated by the Court], which were presumably addressed directly to Prof. Dr B. [name abbreviated by the Court], were absolutely accurate.

Prof. Dr B uses embryos – people – for research purposes at the University of Bonn that were murdered in Israel and then sold to Germany for significant sums of money.

During Nazi times, German scientists performed research experiments on Jews and then murdered them.

Nowadays, the unborn children of people who follow the religion of Moses – the Jews – are murdered and sold to the 'Christian' country of Germany for research purposes, all with the blessing of both Israel and Germany!

The comparison drawn by Bishop F. was entirely justified!

The crimes against democracy being committed in the here and now must be denounced in the strongest possible terms and brought to people's attention.

The time has finally arrived to overcome the spirit of Auschwitz!!"

B. Criminal Proceedings

9. On 12 November 2008 the Weinheim District Court convicted the applicant of insult and sentenced him to a penalty of thirty daily fines of 15 euros (EUR) each. In its judgment the court acknowledged the applicant's right to freedom of expression and to impart to others his beliefs that the fusion of an egg and a sperm represented the beginning of human life and that research using imported stem cells from terminated embryos involved the destruction of human life. It also emphasised that the applicant had the fundamental liberty to exercise his freedom of expression by imparting his opinion strikingly and pointedly, including in the form of abusive criticism addressed at well-known researchers referred to by name. However, the court found that, when viewed in its entirety, the press release had exceeded the permissible bounds of abusive criticism. The court based this decision on the fact that the implication that the scientists had been guilty not just of committing murder but of doing so for deeply despicable motives had been a central theme running through the press release and had escalated in the phrase "The time has finally arrived to overcome the spirit of Auschwitz". It concluded that the applicant had intended to imply that the scientists carrying out stem-cell research had been prompted by the same criminal, sadistic and dehumanising motives as those responsible for

performing unimaginably cruel mass experiments on humans, such as Mengele in Auschwitz. Given Prof. Dr B.'s position as a doctor and scientist, this implication had been severely insulting.

10. On 26 March 2009 the Mannheim Regional Court rejected the applicant's appeal. Similarly to the District Court, the Regional Court acknowledged the applicant's right to freedom of expression and that his press release had contributed to a debate of great public interest. It further held that the majority of the statements in the press release had been value judgments and that therefore the press release had to be classified as a value judgment and not as a statement of fact. Nonetheless, the court stated that freedom of expression was not granted unconditionally and could be subject to restrictions with a view to protecting, *inter alia*, the right to personal honour. When examining contributions to a debate of public interest, however, there had to be a presumption in favour of freedom of speech. The Regional Court further found that the criterion for abusive criticism had not been met. Criticism which was excessive or even aggressive in nature was not necessarily abusive. The relevant criterion was whether the main purpose of the criticism had been to defame an individual rather than to debate the relevant issue. The court concluded that this was not applicable in the case at hand, since the applicant's past behaviour and the content of the press release showed that the focus had been on "the issue" rather than the individual doctor against whom allegations had been made. The court therefore found that the right to freedom of expression had to be balanced with the legally protected personality rights of Prof. Dr B. and emphasised that freedom of expression granted equal protection to all statements of opinion, regardless of whether they were useful, useless, correct, incorrect, emotional, rational or even polemical or insulting. The Regional Court took into account that the press release had represented the applicant's contribution to the formation of public opinion, but believed that referring to Prof. Dr B. by name had been equivalent to linking his professional conduct to the atrocities committed by the Nazis. It concluded that this had represented a serious infringement of his personality rights, which had also been unnecessary since the applicant could have contributed to the debate without referring to the professor by name.

11. On 15 February 2010 the Court of Appeal rejected an appeal on points of law by the applicant as unfounded and on 6 July 2010 the Federal Constitutional Court refused to admit a constitutional complaint lodged by the applicant without providing reasons (1 BvR 827/10).

II. RELEVANT DOMESTIC LAW

12. The relevant provision of the German Basic Law (*Grundgesetz*) reads, in so far as relevant, as follows:

Article 5

!(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. ...

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour."

13. The relevant provisions of the German Criminal Code (*Strafgesetzbuch*) read as follows:

Article 185
Insult

"Insult shall be punished with imprisonment for not more than one year or a fine and, if the insult is committed by means of violence, with imprisonment for not more than two years or a fine."

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

14. The applicant complained that his criminal conviction for insult had violated his right to freedom of expression as provided in Article 10 of the Convention, which reads, in so far as relevant, as follows:

"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 ... for the protection of the reputation or rights of others ..."

15. The Government contested that argument.

A. Admissibility

16. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

17. The applicant argued that his press release had contributed to a debate of great public importance and had not aimed at personally attacking Prof. Dr B. Even though the domestic courts had accepted that the applicant had focussed on "the issue" and had clarified that he had not used abusive criticism they, nonetheless, had, by misinterpreting the actual statements, construed an insult in respect of Prof. Dr B., which had exceeded the actual content of his press release. The applicant further submitted that the courts had insufficiently taken into account that Prof. Dr B. had been part of the public debate and had acted as an unofficial spokesperson of the scientists conducting stem-cell research in Germany. Consequently, sharper criticism and mentioning him by name had been justified.

18. The Government accepted that the criminal conviction had interfered with the applicant's freedom of expression. However, they submitted that this interference had had a legal basis in Article 185 of the Criminal Code, which had served to protect Prof. Dr B.'s personality rights and reputation and had been necessary in a democratic society. The domestic courts had, after analysing the text of the press release, reasonably interpreted the statements as an implication that the stem-cell research carried out by Prof. Dr B. had been equivalent to the human experiments performed by scientists during Nazi times. After weighing up the interests of the applicant against the rights of Prof. Dr B, the courts had ultimately found that priority should be given to protecting the personality rights of Prof. Dr B. In the undertaken balancing exercise the courts had taken into account that the applicant's press release had been protected by the right to freedom of expression, that he had had a right to express insulting criticism and that he had been contributing to a public debate. However, they had also considered the historical and social context of the comparison, the severity of the violation of Prof. Dr B.'s personality rights and the fact that the applicant could have made an equally important or noteworthy contribution to the debate without referring to the professor in question by name. The Government argued that the courts had therefore taken adequate account of the applicant's right and that the decision had not fallen outside the margin of appreciation as granted by the Court to domestic authorities.

2. The third-party's submissions

19. The third-party intervener AMCB submitted that the Convention granted particular protection to statements that contributed to a public debate. Moreover, since NGOs had a similar function to the press in a democratic society as public watchdogs, their statements required even further increased protection under Article 10 of the Convention. This held

true also for unofficial associations, which expressed unpopular or minority opinions. Article 10 also protected ideas that offend, shock or disturb and it was the right of the person who expressed her or his opinion to choose the most efficient way to do so. AMCB therefore argued that comparisons with the Holocaust could be considered legitimate expressions of opinion, even when taking the historical and social context into account.

3. The Court's assessment

20. At the outset, the Court considers – and this is not in dispute between the parties – that the criminal conviction interfered with the applicant's right to freedom of expression, that it was prescribed by law – namely Article 185 of the Criminal Code – and that it pursued the legitimate aim of protecting the reputation or rights of others. It therefore remains to be determined whether the interferences were "necessary in a democratic society".

21. The fundamental principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law and have recently been summarised as follows (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 131, 16 June 2015 with further references):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... 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 relied on an acceptable assessment of the relevant facts ..."

22. The Court further reiterates that the right to protection of reputation is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI; *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010). In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, no. 28070/06, § 64, 9 April 2009; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; and *Delfi AS*, cited above, § 137).

23. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; *Axel Springer AG*, cited above, § 84; and *Delfi AS*, cited above, § 138). In cases that require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention or under Article 10. Indeed, as a matter of principle these rights deserve equal respect (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012).

24. The Court has already found that, regardless of the forcefulness of political struggles, it is legitimate to try to ensure a minimum degree of moderation and propriety and that a clear distinction must be made between criticism and insult. If the sole intent of a particular form of expression is to insult a person, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention (see *Genner v. Austria*, no. 55495/08, § 36, 12 January 2016).

25. The Court has further differentiated between statements of fact and value judgments. The classification of a statement as fact or as a value-judgment is a matter which first and foremost falls within the margin of appreciation of the national authorities, in particular the domestic courts (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 36, Series A no. 313). While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. However, even where a statement amounts to a value judgment, there must be a sufficient factual

basis to support it, failing which it will be excessive (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II). In addition, when the Court examined cases concerning value judgments, which the domestic courts had found to be of a defamatory character, it assessed whether the language used had been of an excessive or dispassionate nature and whether an intention of defaming or stigmatising the opponent had been disclosed (see *Genner*, cited above, § 39).

26. Turning to the circumstances of the present case, the Court notes that the Mannheim Regional Court classified the press release, in its entirety, as a value judgment and will therefore proceed on the assumption that the statements are to be considered value judgments.

27. The Court observes that the domestic courts understood the text of the press release as implying that the conduct of the scientists carrying out stem-cell research, and in particular of Prof. B., was seen as equivalent to the atrocities committed by the Nazis. The applicant challenged this understanding of his press release. The Court notes, however, that the applicant's press release contained a series of comparisons between modern-day stem-cell research and experiments carried out on humans during the Nazi regime, which culminated in the sentence "The time has finally arrived to overcome the spirit of Auschwitz!!". Given these statements, the Court sees no reason to call into question the domestic courts' conclusion that the applicant did indeed directly link the work of the scientists – and in particular of Prof. Dr B. – to the atrocities during Nazi times. The Court further notes that the allegations made by the applicant were particularly serious. Even if, as in the instant case, regarded as value judgment, such serious and particularly offensive comparisons demand a particularly solid factual basis (compare *Genner*, cited above, § 46). While the Court accepts that the moral responsibility of scientists was the issue discussed, this alone does not provide a solid factual basis for targeting personally Prof. B.'s scientific work, this all the more so as the comparison used was not only shocking and disturbing but went beyond the limits of any acceptable criticism.

28. The Court also notes that the domestic courts concluded that the focus of the press release had been on "the issue" and had sought to contribute to a public debate, rather than defaming the individual doctor. It accepts this finding but would add that the applicant nonetheless made allegations against the scientists and doctors conducting stem-cell research, and in particular against Prof. Dr B. The Court therefore finds that even though the intention behind the applicant's press release was not mainly to defame the scientists, by naming Prof. Dr B. it still had a stigmatising and defaming effect.

29. In regard to the seriousness of the personal attack on the scientists and Prof. Dr B., the Court reiterates that the impact an expression of opinion has on another person's personality rights cannot be detached from the

historical and social context in which the statement was made (see *Annen v. Germany*, no. 3690/10, § 63, 26 November 2015, and *Hoffer and Annen v.* Germany, nos. 397/07 and 2322/07, § 48, 13 January 2011). The comparison of modern-day stem-cell research to experiments carried out on humans in concentration camps must therefore be seen in the specific context of German history. The Court has previously accepted that in the light of their historical role and experience, States which have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 243, ECHR 2015 (extracts), and *Nix v. Germany* (dec.), no. 35285/16, 13 March 2018). The Court therefore concludes that the attack on Prof. Dr B.'s reputation was serious and that the historical context is a weighty factor to be taken into account when assessing whether there existed a pressing social need for interfering with the applicant's right to freedom of expression (compare *Nix*, cited above, § 56).

30. The Court also observes that Prof. Dr B. and the other scientists had – by responding to the criticism voiced by Bishop F. – entered the public debate concerning stem-cell research before the publication of the applicant's press release and therefore finds that they could not claim the same particular protection as individuals completely unknown to the public.

31. Notwithstanding the facts that the applicant's statements sought to contribute to a public debate and that Prof. Dr B. had entered the public stage to a certain degree, the Court concludes that the domestic courts provided relevant and sufficient reasons for the criminal conviction of the applicant. The Court recalls that where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Delfi AS*, cited above, § 139, with further references). It finds that the decisions by the domestic courts were based on a reasonable assessment of the statements in question, the rights of Prof. Dr B. and of the circumstances of the present case.

32. Lastly, the Court observes that the sanction was criminal in nature, which is - in view of the existence of other means of intervention and rebuttal, particularly through civil remedies - one of the most serious forms of interference with the right to freedom of expression (see *Perinçek*, cited above, § 273; and *Frisk and Jensen v. Denmark*, no. 19657/12, § 77, 5 December 2017). While the use of criminal-law sanctions in defamation cases is not in itself disproportionate, the nature and severity of the penalties imposed are factors to be taken into account, because they must not be such as to dissuade the press or others who engage in public debate from taking part in the discussion of matters of legitimate public concern (*Ziembiński v. Poland* (no. 2), no. 1799/07, § 46, 5 July 2016, with further references). In that regard, it notes that the applicant was sentenced to a penalty of

30 daily fines of EUR 15 each and thereby to a sentence at the lower end of the possible criminal sanctions for insult. Having regard to the seriousness of the violations of Prof. Dr B.'s personality rights and the nature of the personalized attacks, when seen in the historical context (see paragraph 29 above), the Court finds that the penalty appears moderate and did not fall outside of the domestic courts' margin of appreciation.

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 10 of the Convention admissible;

2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 18 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Yonko Grozev
President