

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

FIFTH SECTION

CASE OF E.S. v. AUSTRIA

(Application no. 38450/12)

JUDGMENT

STRASBOURG

25 October 2018

FINAL

18/03/2019

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



In the case of E.S. v. Austria,

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

Angelika Nußberger, *President,*
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov,
Lado Chanturia, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 2 October 2018,

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

PROCEDURE

1. The case originated in an application (no. 38450/12) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national ("the applicant") on 6 June 2012. The President of the Section granted the applicant anonymity of her own motion (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented before the Court by Gheneff-Rami-Sommer, a law firm based in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

3. The applicant complained that her criminal conviction for disparaging religious doctrines (*Herabwürdigung religiöser Lehren*) had violated her right to freedom of expression under Article 10 of the Convention.

4. On 16 December 2015 the complaint concerning the alleged violation of 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 observations were received from the European Centre for Law and Justice, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1971 and lives in Vienna.

7. From January 2008 she held several seminars entitled "Basic Information on Islam" (*Grundlagen des Islams*) at the right-wing Freedom Party Education Institute (*Bildungsinstitut der Freiheitlichen Partei Österreichs*). The seminars were not only open to members of the Freedom Party or invited guests, but were also publicly advertised on its website. In addition, the head of the Freedom Party, H.-C.S., had distributed a leaflet specifically aimed at young voters, advertising them as "top seminars" in the framework of a "free education package". The applicant had not been involved in the selection of participants.

8. Two of the seminars were held on 15 October and 12 November 2009 respectively, with around thirty participants at each. One of the participants was an undercover journalist working for a weekly journal, N.

9. At the journal's request, a preliminary investigation was instituted against the applicant, and on 11 February 2010 she was questioned by the police concerning certain statements she had made during the seminars which had been directed against the doctrines of Islam.

10. On 12 August 2010 the Vienna public prosecutor's office (*Staatsanwaltschaft Wien* – "the public prosecutor") brought charges against the applicant, pursuant to Article 283 of the Criminal Code, for inciting to hatred (*Verhetzung)*. Hearings were held on 23 November 2010 and on 18 January and 15 February 2011.

11. At the hearing on 18 January 2011 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen Wien* – "the Regional Court") informed the applicant that the court might adopt a different legal classification in the matter from the one contained in the charge. The hearing was therefore postponed to give her time to properly prepare a defence.

12. At the end of the hearing on 15 February 2011 the Regional Court acquitted the applicant in relation to several of the statements originally included in the indictment under Article 283 of the Criminal Code. This was partly because the public prosecutor had withdrawn the indictment concerning certain statements and partly because it could not be established that the applicant had made some of the other statements exactly – or at least approximately – as they were worded in the indictment. She was however convicted of disparaging religious doctrines (*Herabwürdigung religiöser Lehren*), pursuant to Article 188 of the Criminal Code, concerning the three remaining statements. She was ordered to pay the costs of the proceedings and a day-fine of 4 euros (EUR) for a period of 120 days (amounting to EUR 480 in total), which would result in sixty days'

imprisonment in the event of default. The court considered the applicant's repeated infringements to be an aggravating factor and the fact that she did not have a previous criminal record to be a mitigating factor. The court found her guilty of publicly disparaging an object of veneration of a domestic church or religious society – namely Muhammad, the Prophet of Islam – in a manner capable of arousing justified indignation (*geeignet, berechtigtes Ärgernis zu erregen*).

13. The statements which the court found incriminating were the following:

English translation:

"I./ 1. One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. That means that the highest commandment for a male Muslim is to imitate Muhammad, to live his life. This does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. And according to our standards he was not a perfect human. We have huge problems with that today, that Muslims get into conflict with democracy and our value system ...

2. The most important of all Hadith collections recognised by all legal schools: The most important is the Sahih Al-Bukhari. If a Hadith was quoted after Bukhari, one can be sure that all Muslims would recognise it. And, unfortunately, in Al-Bukhari the thing with Aisha and child sex is written...

II./ I remember my sister, I have said this several times already, when [S.W.] made her famous statement in Graz, my sister called me and asked: "For God's sake. Did you tell [S.W.] that?" To which I answered: "No, it wasn't me, but you can look it up, it's not really a secret." And her: "You can't say it like that!" And me: "A 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?" Her: "Well, one has to paraphrase it, say it in a more diplomatic way." My sister is symptomatic. We have heard that so many times. "Those were different times" – it wasn't okay back then, and it's not okay today. Full stop. And it is still happening today. One can never approve of something like that. They all create their own reality, because the truth is so cruel ..."

German original:

"I./1. Eines der großen Probleme, die wir heute haben, ist dass Mohammed als der ideale Mann, der perfekte Mensch, der perfekte Muslim gesehen wird. Das heißt, das oberste Gebot für einen männlichen Moslem ist es, Mohammed nachzumachen, sein Leben zu leben. Das läuft nicht nach unseren sozialen Standards und Gesetzen ab. Weil er war ein Kriegsherr, hatte einen relativ großen Frauenverschleiß, um das jetzt einmal so auszudrücken, hatte nun mal gerne mit Kindern ein bisschen was. Und er war nach unseren Begriffen kein perfekter Mensch. Damit haben wir heute riesige Probleme, weil Muslime mit der Demokratie und unserem Wertesystem in Konflikt geraten...

2. Die wichtigsten von allen Rechtsschulen anerkannten Hadith-Sammlungen: Die allerwichtigste ist die Sahih Al-Bukhari. Wenn eine Hadith nach Bukhari zitiert wurde, dann können Sie sicher sein, dass es alle Muslime anerkennen. Und in der Al-Bukhari ist auch blöderweise das geschrieben mit der Aisha und dem Kindersex...

II./ Ich erinnere mich an meine Schwester, das hab ich schon ein paar Mal erzählt, als [S.W.] in Graz ihren berühmten Sager gemacht hat, ruft mich meine Schwester an und sagt: "Um Gottes willen. Hast du ihr das gesagt?" Worauf ich gesagt habe: "Nein, ich war's nicht, aber es ist nachzulesen, es ist nicht wirklich ein Geheimnis. " Und sie: "Das kann man doch so nicht sagen." Und ich : "Ein 56-Jähriger und eine 6-Jährige ? Wie nennst du das? Gib mir ein Beispiel? Wie nennen wir das, wenn's nicht Pädophilie ist?" Sie: "Na ja, das muss man ein bisschen umschreiben, diplomatischer sagen." Meine Schwester ist symptomatisch. Das haben wir schon so oft gehört. "Das waren doch andere Zeiten" – das war damals nicht o.k., und es ist heute nicht o.k. Punkt. Und es passiert heute auch noch. So was ist nie gutzuheißen. Sie legen sich alle eine Wirklichkeit zurecht, weil die Wahrheit so grausam ist..."

14. The Regional Court found that the above statements essentially conveyed the message that Muhammad had had paedophilic tendencies. It stated that the applicant was referring to a marriage which Muhammad had concluded with Aisha, a six-year-old, and consummated when she had been nine. The court found that by making those statements the applicant had suggested that Muhammad was not a worthy subject of worship. However, it also found that it could not be established that the applicant had intended to decry all Muslims. She was not suggesting that all Muslims were paedophiles, but was criticising the unreflecting imitation of a role model. According to the court, the common definition of paedophilia was a primary sexual interest in children who had not yet reached puberty. Because paedophilia was behaviour which was ostracised by society and outlawed, it was evident that the applicant's statements were capable of causing indignation. The court concluded that the applicant had intended to wrongfully accuse Muhammad of having paedophilic tendencies. Even though criticising child marriages was justifiable, she had accused a subject of religious worship of having a primary sexual interest in children's bodies, which she had deduced from his marriage with a child, disregarding the point that the marriage had continued until the Prophet's death, when Aisha had already turned eighteen and had therefore passed the age of puberty. In addition, the court found that because of the public nature of the seminars, which had not been limited to members of the Freedom Party, it was conceivable that at least some of the participants might have been disturbed by the statements.

15. The Regional Court further stated that anyone who wished to exercise their rights under Article 10 of the Convention was subject to duties and responsibilities, such as refraining from making statements which hurt others without reason and therefore did not contribute to a debate of public interest. A balancing exercise between the rights under Article 9 on the one hand and those under Article 10 on the other needed to be carried out. The court considered that the applicant's statements were not statements of fact, but derogatory value judgments which exceeded the permissible limits. It held that the applicant had not intended to approach the topic in an objective manner, but had directly aimed to degrade

Muhammad. The court stated that child marriages were not the same as paedophilia, and were not only a phenomenon of Islam but also used to be widespread among the European ruling dynasties. Furthermore, the court reasoned that freedom of religion as protected by Article 9 of the Convention was one of the foundations of a democratic society. Those who invoked their freedom of religion could not expect to be exempt from criticism, and even had to accept the negation of their beliefs. However, the manner in which religious views were attacked could engage the State's responsibility in order to guarantee the peaceful exercise of the rights under Article 9. Presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society. The court concluded that the interference with the applicant's freedom of expression in the form of a criminal conviction had been justified as it had been based in law and had been necessary in a democratic society, namely in order to protect religious peace in Austria.

16. The applicant appealed, arguing that the impugned statements were statements of fact, not value judgments. She referred to several of the documents which she had submitted as evidence which, in her view, clearly confirmed that when Muhammad had been fifty-six years old, he had had sexual intercourse with the nine-year-old Aisha. She stated that it was no more than reasonable to present those facts in the light of the values of today's society. It had not been her intention to disparage Muhammad. She had merely criticised the notion that an adult had had sexual intercourse with a nine-year-old child and raised the question whether this amounted to paedophilia. If one were to follow the arguments of the Regional Court, it would mean that someone who had married a child and managed to maintain the marriage until the child had come of age could not be described as a paedophile. She further contended that she had not used the term "paedophile" in the strict scientific sense, but in the way it was used in everyday language, referring to men who had sex with minors. She stated that she had never said that Muhammad had been a paedophile because he had married a child, but because he had had sexual intercourse with one. In any event, her statements were covered by her rights under Article 10 of the Convention, which included the right to impart opinions and ideas that offended, shocked or disturbed.

17. On 20 December 2011 the Vienna Court of Appeal (*Oberlandesgericht Wien* – hereinafter "the Court of Appeal") dismissed the applicant's appeal, confirming in essence the legal and factual findings of the lower court. The Regional Court had based its findings on the facts as submitted by the applicant, namely that Muhammad had married Aisha when she had been six years old and consummated the marriage when she had been nine. It had rightly made a distinction between child marriages and

paedophilia. It had not based its findings on an unpredictable definition of the term "paedophilia" but on a common definition which was comparable to that used by the World Health Organisation. As regards the alleged violation of Article 10 of the Convention, the Court of Appeal, referring to the Court's case-law (*İ.A. v. Turkey*, no. 42571/98, ECHR 2005-VIII, and *Aydın Tatlav v. Turkey*, no. 50692/99, 2 May 2006), found that it had to examine whether the comments at issue were merely provocative or had been intended as an abusive attack on the Prophet of Islam. It concluded that the latter was the case as Muslims would find the applicant's statements – "he liked to do it with children", "the thing with Aisha and child sex" and "a 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?" – wrong and offensive, even if Muhammad had married a six-year-old and had had intercourse with her when she had been nine.

18. The Court of Appeal stated that the reason for the applicant's conviction had not been that the events had purportedly taken place more than a thousand years ago and similar conduct would no longer be tolerable under today's criminal law and contemporary moral and value concepts, but because the applicant had accused Muhammad of paedophilia by using the plural form "children", "child sex", "what do we call it, if it is not paedophilia?" without providing evidence that his primary sexual interest in Aisha had been her not yet having reached puberty. Moreover, there were no reliable sources for that allegation, as no documentary evidence existed to suggest that his other wives or concubines had been similarly young. On the contrary, his first wife had been fifteen years older than him, as could be seen from the documents submitted by the applicant herself. Even if the applicant had had the right to criticise others' attempts to imitate Muhammad, her statements showed her intention to unnecessarily disparage and deride Muslims. Harsh criticism of churches or religious societies (*Religionsgesellschaften*) and religious traditions and practices was lawful. However, the permissible limits were exceeded where criticism ended and insults or mockery of a religious belief or person of worship (*Beschimpfung oder Verspottung einer Religion oder von ihr verehrten Personen*) began. The interference with the applicant's freedoms under Article 10 of the Convention had therefore been justified. As to the applicant's argument that those who had participated in the seminar knew of her critical approach and could not be offended, the Court of Appeal found that the public seminar had been offered for free to young voters by the Austrian Freedom Party Education Institute, and at least one participant had been offended, as her complaints had led to the applicant being charged.

19. On 16 April 2012 the applicant lodged a request for a renewal of the proceedings (*Antrag auf Erneuerung des Strafverfahrens*) with the Supreme Court (*Oberster Gerichtshof*), pursuant to Article 363a of the Code of

Criminal Procedure (*Strafprozessordnung*), and relying on Article 6 § 1, Article 7 § 1 and Article 10 of the Convention.

20. On 6 June 2012 the applicant lodged her application with the Court.

21. On 11 December 2013 the Supreme Court dismissed the request for a renewal of the proceedings. As regards the alleged violation of Article 10, it found that the applicant's conviction under Article 188 of the Criminal Code constituted an interference with the right to freedom of expression, which had however been justified under Article 10 § 2 of the Convention. Referring to the Court's case-law (*Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A no. 295-A; *İ.A.*, cited above; *Wingrove v. the United Kingdom*, 25 November 1996, *Reports of Judgments and Decisions* 1996-V; *Aydın Tatlav*, cited above; and *Giniewski v. France*, no. 64016/00, ECHR 2006-I), it held that the aim of the interference had been to protect religious peace and the religious feelings of others and was therefore legitimate. The Court had stated many times that in the context of religion member States had a duty to suppress certain forms of conduct or expression that were gratuitously offensive to others and profane. In cases where the impugned statements not only offended or shocked, or expressed a "provocative" opinion, but had also been considered an abusive attack on a religious group – for example an abusive attack on the Prophet of Islam, as in the applicant's case – a criminal conviction might be necessary to protect the freedom of religion of others. Where a conviction was based on Article 188 of the Criminal Code, the principles developed under Article 9 and 10 of the Convention had to be considered when examining whether a statement was capable of "arousing justified indignation". A statement could not be considered as arousing indignation if it was compatible with Articles 9 and 10 of the Convention. The courts therefore had to examine the meaning of the impugned statement, as well as the context in which it had been made and whether the statement was based on fact or was a value judgment. Only by considering all of those points could the question of the ability to arouse justified indignation be examined.

22. Applying the above considerations to the applicant's case, the Supreme Court held that she had not aimed to contribute to a serious debate about Islam or the phenomenon of child marriage, but merely to defame Muhammad by accusing him of a specific sexual preference, based on the assumption that he had had sexual intercourse with a prepubescent child, in order to show that he was not a worthy subject of worship. The court, whilst not misjudging the importance of the debate about sexual contact between adults and children, found that the applicant had not contributed to a debate of general interest because she had made her allegation primarily in order to defame Muhammad. On the basis of the Regional Court's findings that the applicant's statements qualified as value judgments, the Supreme Court held that they had not been a contribution to a serious debate. The case had to be distinguished from the case of *Aydın Tatlav* (cited above), in which a

scientific book, published in its fifth edition, had contained a passage of harsh criticism of religion, which had not been offensive. In the present case the criminal conviction constituted a measure necessary in a democratic society within the meaning of Article 10 of the Convention. Moreover, the measure taken by the Criminal Court had also been proportionate, as the applicant had only been ordered to pay a fine of EUR 480. The Supreme Court therefore dismissed the applicant's request for a renewal of the proceedings.

23. The Supreme Court's judgment was served on the applicant's counsel on 8 January 2014.

II. RELEVANT DOMESTIC LAW

24. Article 188 of the Criminal Code is part of section 8 of the Criminal Code, which, *inter alia*, lists criminally punishable offences against religious peace (*Strafbare Handlungen gegen den religiösen Frieden*). It reads as follows:

Article 188 - Disparagement of religious doctrines

> "Whoever, in circumstances where his or her behaviour is likely to arouse justified indignation, publicly disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to up to six months' imprisonment or a day-fine for a period of up to 360 days."

25. Article 283 of the Criminal Code, as in force at the relevant time, read as follows:

Article 283 – Incitement to hatred

> "1. Whoever, in a manner capable of endangering public order ... publicly incites to commit a hostile act against a church or religious community established within the country or against a group defined by its belonging to such a church or religious community, a race, a nation, a tribe or a State, shall be liable to up to two years' imprisonment.
>
> 2. Similarly, whoever publicly incites against a group defined in paragraph 1 or tries to insult or disparage it in a manner violating human dignity shall equally be held liable."

III. INTERNATIONAL MATERIAL

26. Article 20 § 2 of the 1966 United Nations International Covenant on Civil and Political Rights provides:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

27. The Council of Europe Parliamentary Assembly stated in its Recommendation 1805 (2007) on "Blasphemy, religious insults and hate speech against persons on grounds of their religion":

> "4. With regard to blasphemy, religious insults and hate speech against persons on the grounds of their religion, the state is responsible for determining what should count as criminal offences within the limits imposed by the case law of the European Court of Human Rights. In this connection, the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere. Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.
>
> ...
>
> 14. The Assembly notes that member states have the obligation under Article 9 of the Convention to protect freedom of religion including the freedom to manifest one's religion. This requires that member states protect such manifestations against disturbances by others. However, these rights may sometimes be subject to certain justified limitations. The challenge facing the authorities is how to strike a fair balance between the interests of individuals as members of a religious community in ensuring respect for their right to manifest their religion or their right to education, and the general public interest or the rights and interests of others.
>
> 15. The Assembly considers that, as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention, national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence. ..."

28. The European Commission for Democracy through Law ("the Venice Commission") stated in its "Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred" (CDL-AD(2008)026, §§ 89-92):

> "As concerns the question of whether or not there is a need for specific supplementary legislation in the area of blasphemy, religious insult and incitement to religious hatred, the Commission finds:
>
> a) That incitement to hatred, including religious hatred, should be the object of criminal sanctions as is the case in almost all European States ...
>
> b) That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component.
>
> c) That the offence of blasphemy should be abolished (which is already the case in most European States) and should not be reintroduced. ...
>
> As concerns the question of to what extent criminal legislation is adequate and/or effective for the purpose of bringing about the appropriate balance between the right to freedom of expression and the right to respect for one's beliefs, the Commission reiterates that, in its view, criminal sanctions are only appropriate in respect of incitement to hatred (unless public order offences are appropriate).

Notwithstanding the difficulties with enforcement of criminal legislation in this area, there is a high symbolic value in the pan-European introduction of criminal sanctions against incitement to hatred. It gives strong signals to all parts of society and to all societies that an effective democracy cannot bear behaviours and acts which undermine its core values: pluralism, tolerance, respect for human rights and non-discrimination. It is essential however that the application of legislation against incitement to hatred be done in a non-discriminatory manner.

In the Commission's view, instead, criminal sanctions are inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy."

29. The United Nations Human Rights Council stated in its Resolution 16/18 combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, adopted on 24 March 2011:

"2. *[the Human Rights Council] expresses its concern* that incidents of religious intolerance, discrimination and related violence, as well as of negative stereotyping of individuals on the basis of religion or belief, continue to rise around the world, and condemns, in this context, any advocacy of religious hatred against individuals that constitutes incitement to discrimination, hostility or violence, and urges States to take effective measures, as set forth in the present resolution, consistent with their obligations under international human rights law, to address and combat such incidents;

...

5. *Notes* the speech given by Secretary-General of the Organization of the Islamic Conference at the fifteenth session of the Human Rights Council, and draws on his call on States to take the following actions to foster a domestic environment of religious tolerance, peace and respect, by:

...

(*e*) Speaking out against intolerance, including advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence;

(*f*) Adopting measures to criminalize incitement to imminent violence based on religion or belief**;**

(*g*) Understanding the need to combat denigration and negative religious stereotyping of persons, as well as incitement to religious hatred, by strategizing and harmonizing actions at the local, national, regional and international levels through, inter alia, education and awareness-building;

(*h*) Recognizing that the open, constructive and respectful debate of ideas, as well as interfaith and intercultural dialogue at the local, national and international levels, can play a positive role in combating religious hatred, incitement and violence; ..."

30. The UN Human Rights Committee adopted at its 102nd session (11-29 July 2011) the General Comment No. 34 on freedom of opinion and freedom of expression:

"3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

...

47. Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party. States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. [...] Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

49. Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20. ...”

31. The European Parliament, in its resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)), held that:

“The European Parliament, ...

35. Recalls that national laws that criminalise blasphemy restrict freedom of expression concerning religious or other beliefs, that they are often applied to persecute, mistreat, or intimidate persons belonging to religious or other minorities, and that they can have a serious inhibiting effect on freedom of expression and on freedom of religion or belief; recommends that the Member States decriminalise such offences, ...”

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. The applicant alleged that her criminal conviction for disparaging religious doctrines had given rise to a violation of Article 10 of the Convention, which reads 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. 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. Admissibility

33. The Court notes that the application 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

34. The applicant considered that her conviction for the above-mentioned statements had amounted to an unlawful interference with her right to freedom of expression. Referring to the Court's case-law, she considered that the domestic courts had failed to address the substance of the impugned statements in the light of Article 10 of the Convention. If they had done so, they would not have qualified them as mere value judgments. Value judgments were only excessive if they were not linked to facts, whereas her incriminated statements had been based on facts. The applicant stressed that by stating that Muhammad had had sexual intercourse with a nine-year-old, she had quoted a historically proven fact and raised the question whether this could be regarded as paedophilia; thus, she had based her value judgment on facts, which was always permissible under Article 10 of the Convention. Furthermore, through the impugned statements she had expressed criticism concerning Islam and the unreflecting imitation of

Muhammad, in the framework of an objective and lively discussion, which the domestic courts had failed to take into account. Against that background, this had been an objective criticism of religion, had contributed to a public debate and had not been aimed at defaming the Prophet of Islam. Consequently, contrary to the domestic courts' reasoning, a sufficient factual basis had existed for her assessment that Muhammad's behaviour had amounted to paedophilia. She added that she had held a seminar extending over a number of days with an overall duration of twelve hours, and therefore a few "individual statements" had to be tolerated in order to allow for a lively discussion, which was a necessary part of such a seminar.

35. The applicant further submitted that religious groups had to be regarded as public institutions and therefore had to tolerate even severe criticism. Referring, *inter alia*, to the Court's judgments in *Aydın Tatlav*, *Giniewski* (both cited above) and *Gündüz v. Turkey* (no. 35071/97, ECHR 2003-XI), the applicant alleged that improper attacks on religious groups had to be tolerated even if they were based on untrue facts, as long as they did not incite to violence. Moreover, the rights guaranteed under Article 9 of the Convention did not imply a ban on the propagation by others of a doctrine which was hostile to other people's faiths. Only expressions that were gratuitously offensive to others and thus an infringement of their rights, and which therefore did not contribute to any form of public debate should be prohibited by law, whereas blasphemy laws providing for a criminal sanction should be avoided according to international law standards. She contrasted her case with the Court's judgment in *İ.A. v. Turkey* (cited above), as the impugned statement at issue in *İ.A.* had not been linked to facts.

36. In relation to the question of the legitimate aim of the applicant's criminal conviction, the Government submitted that Article 188 of the Criminal Code did not prohibit critical or offensive statements about a church or religious community *per se*, but merely regulated the manner in which such statements could be made. As the explanatory notes on the Government bill (*Erläuternde Bemerkungen zur Regierungsvorlage*, RV 30 BlgNR XIII. GP, pg. 326 et seq.) stated, the primary purpose of that provision was to protect religious peace, which was an important element of general peace within a State. Religious peace was to be understood as the peaceful co-existence of the various churches and religious communities with each other, as well as with those who did not belong to a church or religious community. The Government concluded that the applicant's criminal conviction had pursued the legitimate aim of maintaining order (protecting religious peace) and protecting the rights of others (namely their religious feelings).

37. The Government argued that in their examination of the impugned statements the domestic courts had – in accordance with the Court's case law – balanced the right of the applicant to disclose her views to the general

public against the rights of others to respect for their religious freedom. They had comprehensively addressed the substance of the impugned statements and concluded that they had not been part of an objective discussion concerning Islam and child marriage, but had rather been aimed at defaming Muhammad, and therefore had been capable of arousing justified indignation. The Government reiterated that the Supreme Court had acknowledged that the issue of adults having sexual contact with minors gave rise to a public debate and the limits of acceptable criticism were therefore wider. However, the applicant's statements in substance accused Muhammad of paedophilia, and in that respect lacked a sufficient factual basis; they were disparaging towards Muhammad and therefore had not contributed to an objective public debate. Referring to the Court's case-law, the Government pointed out that critical statements regarded by believers as extremely insulting and provocative, as well as general vehement attacks on a religious or ethnic group, were incompatible with the values of tolerance, social peace and non-discrimination which underlay the Convention and therefore were not protected by the right to freedom of expression. Lastly, the imposed sanction had been a moderate day-fine of EUR 4 (the legal minimum) for a duration of 120 days, thus only a third of the possible maximum period of 360 days.

2. The third-party intervener

38. The European Centre for Law and Justice, as third-party intervener, submitted that statements which amounted to value judgments but were not devoid of any factual basis, contributed to a public debate and did not imminently incite to violence were permissible under Article 10 of the Convention. It observed that a criminal conviction which pursued the aim of protecting the belief itself rather than the believers' feelings was one of blasphemy – a criminal charge which, according to international law standards, should be abolished. It argued that Article 188 of the Criminal Code served as a deterrent ("chilling effect") obstructing free debate. Having recourse to a criminal sanction rather than a civil-law one to protect freedom of religion was not necessary in a democratic society.

3. The Court's assessment

39. The Court considers, and this was common ground between the parties, that the criminal conviction giving rise to the instant case amounted to an interference with the applicant's right to freedom of expression. Such interference constitutes a breach of Article 10 unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims in question.

(a) "Prescribed by law"

40. The Court notes that it was undisputed that the interference had been "prescribed by law", the applicant's conviction being based on Article 188 of the Criminal Code.

(b) "Legitimate aim"

41. While the applicant stressed that her statements had never been aimed at disparaging Muhammad, she did not dispute the legitimate purpose of criminal convictions under Article 188 of the Criminal Code, namely to protect religious peace. The Court endorses the Government's assessment that the impugned interference pursued the aim of preventing disorder by safeguarding religious peace, as well as protecting religious feelings, which corresponds to protecting the rights of others within the meaning of Article 10 § 2 of the Convention.

(c) "Necessary in a democratic society"

(i) General principles

42. The Court reiterates the fundamental principles underlying its judgments relating to Article 10 as set out, for example, in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), and in *Fressoz and Roire v. France* ([GC], no. 29183/95, § 45, ECHR 1999-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. The Court further notes that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Baka v. Hungary* [GC], no. 20261/12, § 159, ECHR 2016, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 167, ECHR 2017 (extracts)). Those who choose to exercise the freedom to manifest their religion under Article 9 of the Convention, irrespective of whether they do so as members of a religious majority or a minority, therefore cannot expect to be exempt from criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (see *Otto-Preminger-Institut*, § 47; *İ.A. v. Turkey*, § 28; and *Aydın Tatlav*, § 27, all cited above).

43. As paragraph 2 of Article 10 recognises, however, the exercise of the freedom of expression carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an

expression that is, in regard to objects of veneration, gratuitously offensive to others and profane (see *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, § 74, 30 January 2018, with further references). Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a State may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures (see for example, *mutatis mutandis*, *Otto-Preminger-Institut,* § 47, and *İ.A. v. Turkey*, § 29, both cited above). In addition, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention (see, *mutatis mutandis, Gündüz*, cited above, § 51).

44. In examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society", the Court has frequently held that the Contracting States enjoy a certain margin of appreciation (see, for example, *Wingrove*, cited above, §§ 53 and 58, and *Murphy v. Ireland*, no. 44179/98, § 67, ECHR 2003-IX (extracts)). The absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend personal convictions within the sphere of morals or religion (see *Otto-Preminger-Institut*, § 50; *Wingrove*, § 58, *İ.A.*, § 25; *Giniewski*, § 44; and *Aydın Tatlav*, § 24, all cited above). Not only do they enjoy a wide margin of appreciation in that respect, they also have the positive obligation under Article 9 of the Convention of ensuring the peaceful co-existence of all religions and those not belonging to a religious group by ensuring mutual tolerance (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, §§ 107-08, ECHR 2005-XI, and *S.A.S. v. France* [GC], no. 43835/11, § 123-28, ECHR 2014 (extracts)).

45. A State may therefore legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas judged incompatible with respect for the freedom of thought, conscience and religion of others (see, in the context of Article 9, *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A; see also *Otto-Preminger-Institut*, § 47, and *Aydın Tatlav,* § 25, both cited above). It is, however, for the Court to give a final ruling on the restriction's compatibility with the Convention and it will do so by assessing it in the circumstances of a particular case.

46. The issue before the Court therefore involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public her views on religious

doctrine on the one hand, and the right of others to respect for their freedom of thought, conscience and religion on the other (see *Otto-Preminger-Institut*, § 55, and *Aydın Tatlav,* § 26, both cited above).

47. In its case-law the Court has distinguished 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). However, the Court can change this classification when exercising its supervisory function (see *Kharmalov v Russia*, no. 27447/07, § 31, 8 October 2015, and *Pinto Pinheiro Marques v. Portugal*, no. 26671/09, § 43, 22 January 2015).

48. In previous cases the Court has emphasised that the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive. As the Court has noted in previous cases, the difference lies in the degree of factual proof which has to be established (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II; *Feldek v. Slovakia*, no. 29032/95, §§ 73-76, ECHR 2001 VIII; and *Genner v. Austria*, no. 55495/08, § 38, 12 January 2016).

49. In exercising its supervisory function it is not the Court's task to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation, particularly whether they based their decisions on an acceptable assessment of the relevant facts (see *Vogt v. Germany*, 26 September 1995, § 52, Series A no. 323, and *Jerusalem,* cited above, § 33, with further references), and whether the interference corresponded to a "pressing social need" and was "proportionate to the legitimate aim pursued" (see *İ.A.*, cited above, § 26, with further references). In order to determine its proportionality, the Court must consider the impugned interference not only in the light of the content of the statements at issue, but also the context in which they were made. Furthermore, the nature and severity of the penalty imposed are also factors to be taken into account (see, for example, *Gündüz*, cited above, § 42). 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 *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, 7 February 2012).

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

50. The Court notes at the outset that the subject matter of the instant case is of a particularly sensitive nature, and that the (potential) effects of the impugned statements depend, to a certain degree, on the situation in the country where the statements were made at the time and the context in which they were made. Accordingly, and notwithstanding some of the domestic courts' considerations such as the duration of the marriage in question, the Court therefore considers that the domestic authorities had a wide margin of appreciation in the instant case, as they were in a better position to evaluate which statements were likely to disturb the religious peace in their country.

51. The Court notes that the domestic courts considered the applicant's statements as having been made in "public" (see paragraph 14 *in fine* above). Indeed, the seminars were widely advertised to the public on the Internet and via leaflets. The latter were sent out by the head of the right-wing Freedom Party, addressing them especially to young voters and praising them as "top seminars" in the framework of a "free education package". The applicant's intervention was entitled "Basic information on Islam" and was meant to be a critical analysis of Islamic doctrine, allowing for a discussion with the participants of the seminars. The title gave the – in hindsight misleading – impression that the seminars would include objective information on Islam. It appears that anyone interested was able to enrol; there was no requirement to be a member of the Freedom Party. The applicant therefore could not assume that there would only be like-minded people in the room who would share her very critical views of Islam, but had to expect that there could also be people among the audience who might be offended by her statements. It is of little relevance that only thirty people attended on average. The applicant's statements were in fact recorded by a journalist, who had participated in the seminar, and whose employer subsequently reported them to the public prosecutor (see paragraph 9 above).

52. The Court reiterates that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance. Article 188 of the Criminal Code (see paragraph 24 above) does not in fact incriminate all behaviour that is likely to hurt religious feelings or amounts to blasphemy, but additionally requires that the circumstances of such behaviour were capable of arousing justified indignation, and thus aims at the protection of religious peace and tolerance. The Court notes that the domestic courts explained extensively why they considered that the applicant's statements had been capable of arousing justified indignation, on the grounds that they had not been made in an objective manner aimed at contributing to a debate of public interest, but could only be understood as having been aimed at demonstrating that

Muhammad was not a worthy subject of worship (see paragraph 22 above). The Court endorses this assessment.

53. When saying "What do we call it, if it is not paedophilia?" the applicant, according to her own statements, was quoting a conversation she had had with her sister, who was of the opinion that "one [had] to paraphrase [the accusation that Muhammad was a paedophile], say it in a more diplomatic way". The Court notes that the applicant described herself as an expert in the field of Islamic doctrine, already having held seminars of that kind for a while. Her argument that the impugned statements had been made in the context of a lively discussion, in which they could not be revoked (see paragraph 34 above), is therefore not convincing (contrast *Gündüz*, cited above). The Court therefore agrees with the domestic courts that the applicant must have been aware that her statements were partly based on untrue facts and liable to arouse (justified) indignation in others. In that context the Court reiterates that the Convention States are required, in accordance with their positive obligations under Article 9 of the Convention, to ensure the peaceful co-existence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance (see paragraph 44 above). The Court endorses the Regional Court's statement in its judgment of 15 February 2011 that presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society (see paragraph 15 *in fine* above).

54. The Court notes that the domestic courts qualified the impugned statements as value judgments, based on a detailed analysis of the wording of the statements made (see, in particular, paragraph 18 above). They found that the applicant had subjectively labelled Muhammad with a general sexual preference for paedophilia and had failed to neutrally inform her audience of the historical background, which consequently had not allowed for a serious debate on that issue (see paragraphs 14-15 and 17-18 above). The Court therefore agrees with the domestic courts that the impugned statements can be classified as value judgments not having a sufficient factual basis. Even if they were to be classified as factual statements, as the applicant insisted, she failed to adduce any evidence to that end, both during the domestic proceedings and before the Court.

55. As to the applicant's argument that a few individual statements had to be tolerated during a lively discussion, the Court considers that it is not compatible with Article 10 of the Convention to package incriminating statements in the wrapping of an otherwise acceptable expression of opinion and deduce that this renders statements exceeding the permissible limits of freedom of expression passable. Moreover, the applicant was wrong to assume that improper attacks on religious groups had to be tolerated even if they were based on untrue facts (see paragraph 35 above). On the contrary,

the Court has held that statements which are based on (manifestly) untrue facts do not enjoy the protection of Article 10 (see, *mutatis mutandis*, *Giniewski*, § 52, cited above, and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no 17224/11, § 117, ECHR 2017).

56. Lastly, the Court reiterates that the applicant was ordered to pay a moderate fine of only EUR 480 in total for the three statements made, although the Criminal Code alternatively provided for up to six months' imprisonment. Furthermore, the fine imposed was at the lower end of the statutory scale of punishment of up to 360 day-fines, namely only 120 day-fines, and the domestic courts applied only the minimum daily amount of EUR 4. Although the applicant had no previous criminal record and this was taken into account as a mitigating factor, her repeated infringements had to be considered as an aggravating factor. Under the circumstances, the Court does not consider the criminal sanction to be disproportionate.

57. In conclusion the Court finds that in the instant case the domestic courts comprehensively assessed the wider context of the applicant's statements, and carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected and to have religious peace preserved in Austrian society. They discussed the permissible limits of criticism of religious doctrines versus their disparagement, and found that the applicant's statements had been likely to arouse justified indignation in Muslims. In addition, the Court considers that the impugned statements were not phrased in a neutral manner aimed at making an objective contribution to a public debate concerning child marriages (contrast *Aydın Tatlav* and *Giniewski*, both cited above), but amounted to a generalisation without a factual basis. Thus, by considering them as going beyond the permissible limits of an objective debate and classifying them as an abusive attack on the Prophet of Islam, which was capable of stirring up prejudice and putting religious peace at risk, the domestic courts came to the conclusion that the facts at issue contained elements of incitement to religious intolerance. The Court accepts that they thereby put forward relevant and sufficient reasons and finds that the interference with the applicant's rights under Article 10 did indeed correspond to a pressing social need and was proportionate to the legitimate aim pursued.

58. Therefore, the Court considers that the domestic courts did not overstep their – wide – margin of appreciation in the instant case when convicting the applicant of disparaging religious doctrines. Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

Done in English, and notified in writing on 25 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President