CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 43718/98
by Norbert WINGERTER
against Germany

The European Court of Human Rights (Third Section), sitting on 21 March 2002 as a Chamber composed of

Mr I. CABRAL BARRETO, *President*,
Mr G. RESS,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 14 September 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Norbert Wingerter, is a German national, who was born in 1938 and lives in Heilbronn. The respondent Government were represented by Mr Klaus Stoltenberg, *Ministerialdirigent*.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 27 September 1996 the Stuttgart District Disciplinary Court for Lawyers (*Anwaltsgericht*) issued a reprimand (*Warnung*) against the applicant for having violated professional rules (*anwaltliche Pflichtverletzung*).

In its reasoning, the Disciplinary Court noted that in 1994 the applicant had assisted Mr K., a foreigner, who had been accused in criminal proceedings in Mannheim, of having acted as an accessory to forgery, and that this trial had resulted in an acquittal for lack of jurisdiction of the German courts. In October 1994 the applicant had appealed against the bill of costs (*Kostenfestsetzungbeschluss*) as far as the fixing of his fees, to be borne by the Treasury, was concerned. In his appeal, the applicant, objecting to a refusal to reimburse his travelling expenses from Heilbronn to Mannheim, had argued that the intervention of a lawyer outside of Mannheim had been necessary. According to him,

> "the Mannheim judiciary had not been able to cope with the difficulty of the case. From the very beginning, it had been obvious that the accused had to be acquitted. Nevertheless, the public prosecutor had applied for a penal order and the court had issued one. The quality of the Mannheim lawyers is not superior to the quality of the judges and public prosecutors. ... It had been necessary to appoint a non-Mannheim lawyer to have justice done. Had the accused been assisted by a Mannheim lawyer, the penal order would have been undoubtedly been confirmed at the trial."

In March 1995, in the course of investigations brought against him, the applicant had submitted that this reasoning had been necessary to argue his appeal. He had added that his opinion on the quality of Mannheim judges, public prosecutors and lawyers was correct, as any first-semester law student would have known that the charge against his client was unfounded. Moreover, he had evoked the past of a Mannheim judge and two Mannheim lawyers under the Nazi regime. In particular, regarding judge W., he had referred to judgments rendered in 1944, convicting persons for having criticised the treatment of Jews or for failure to differentiate, in their charitable work, between their own people and Jews. Regarding lawyer B., he had mentioned a statement, to be found in Mr. B's doctoral thesis,

according to which a medical practitioner keeping friendship with a Jew violated the honour of the profession. According to him, their merits under the Nazi regime had contributed to their professional success after 1945.

The Disciplinary Court considered that the applicant had thereby violated his professional duties within the meaning of section 43 a (3) of the Federal Regulations for Lawyers (*Bundesrechtsanwaltsordnung*).

The Disciplinary Court examined the applicant's above-mentioned statements in the light of these principles and found that the course of the criminal proceedings against Mr. K. had not been correct and could have justified even harsh criticism of the officials concerned. However, the applicant's general attack charging the Mannheim judiciary of complete incompetence was unjustified and amounted to a deliberate disparagement of all members of the Mannheim judiciary on criminal matters. These considerations applied even more to his subsequent statements that in Mannheim anti-Semitic and Nazi judges had made a career because of their work or their attitude under the Nazi regime. Such statements had been all the more disproportionate as the claim for reimbursement had amounted to a mere 203 German marks (DEM).

On 15 March 1997 the Baden-Württemberg Disciplinary Court of Appeal (*Anwaltsgerichtshof*), following a hearing, dismissed the applicant's appeal and the Court ordered that the case should not be subject to an appeal on points of law.

In its decision, the Disciplinary Court of Appeal considered that the applicant had been entitled to argue that his assistance in the criminal proceedings at issue had been necessary and that his qualifications were superior to those of Mannheim lawyers.

Moreover, the allegation that 'the quality of Mannheim lawyers was not superior to the quality of Mannheim judges and public prosecutors' could have been read as applying only to those judges and prosecutors specifically involved in the procedure against Mr. K. The context in which the applicant made his statements shows, however, that that allegation was intended to characterise all Mannheim judges, public prosecutors and lawyers as incapable of recognising or remedying obvious legal errors. This assessment was confirmed in the applicant's further submissions of March 1995.

According to the Disciplinary Court of Appeal, the wholesale allegation that the Mannheim judges, public prosecutor's and lawyers were incompetent in legal matters was disparaging and made without good cause. The applicant had no reason or justification to disparage the legal skills of all Mannheim judges, public prosecutors and lawyers. Even the obvious legal errors committed in the criminal proceedings against Mr K. could not justify disparaging whole groups of professionals. The insulting remarks made by the applicant had not been necessary to justify the need for having recourse to a non-local lawyer.

The applicant's submissions of March 1995 did not, in the Disciplinary Court of Appeal's view, constitute a further breach of professional duties. Rather, the applicant had acted for the protection of his interests in the disciplinary proceedings against him. Moreover, to the extent that he had referred to the Nazi past of certain Mannheim lawyers and of a judge, he had not, in the Court of Appeal's view, made a general statement.

On 26 January 1998 the Lawyers' Senate (*Senat für Anwaltssachen*) at the Federal Court of Justice dismissed the applicant's request for leave to appeal on points of law.

On 11 March 1998 the Federal Constitutional Court refused to entertain the applicant's constitutional complaint.

B. Relevant domestic law

According to section 43 of the Federal Regulations for Lawyers, a lawyer has to practise his profession conscientiously, and, whether in pursuit of his profession or otherwise, has to prove himself worthy of the respect and trust which his position requires.

As one of the basic duties, section 43a(3) provides that in his professional conduct, a lawyer has to respect the duty of objectivity (*Sachlichkeit*). Such conduct lacks objectivity if it involves a deliberate dissemination of untrue or otherwise disparaging statements which find no ground in the behaviour of other persons involved in the proceedings or in the course of the proceedings.

Section 113(1) of the Federal Regulations provides that disciplinary measures shall be taken against a lawyer who is liable of a breach of duties as defined by the Regulations or the rules on professional conduct (*Berufsordnung*).

According to section 114(1), the possible disciplinary measures are: (1) a warning; (2) a reprimand; (3) a fine not exceeding DEM 50,000; (4) a temporary prohibition on practising as counsel in certain legal fields; or (5) a permanent exclusion from the Bar. The disciplinary measures of reprimand and fine may be imposed simultaneously (section 114(2)).

COMPLAINT

The applicant complains under Article 10 of the Convention that his disciplinary punishment amounts to a violation of his right to freedom of expression.

THE LAW

The applicant complains that the disciplinary measure of reprimand is in breach of his right to freedom of expression under Article 10 of the Convention. This provision reads:

> "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."

The Court considers, and this is not disputed by the respondent Government, that the impugned measure constituted an "interference by [a] public authority" with the applicant's right to freedom of expression as guaranteed under Article 10 § 1. It must therefore be examined whether the interference was justified under the second paragraph of that provision.

This interference was "prescribed by law", namely sections 43a(3), 113 and 114 of the Federal Regulations for Lawyers, and pursued the legitimate aim of protecting "the reputation or rights of others" and the "authority of the judiciary".

The dispute in the present case relates to the question of whether the interference was "necessary in a democratic society".

The Government submit that the punishment had complied with an urgent social need to protect the good reputation of the judicial authorities and its members. According to them, the present case does not concern the suppression of public criticism of the judiciary. Rather, the German disciplinary courts had punished the applicant for the deliberate disparagement of the members of the judicial authorities in Mannheim, which went beyond legitimate criticism. Even though the criminal proceedings against the applicant's client had not been conducted properly by the public prosecutor and the judge involved, and even though they had - as claimed by the applicant - committed incomprehensible legal errors, the applicant had no cause to speak as he did in disparaging terms of Mannheim judges, public prosecutors and lawyers in general. Moreover, in the present case, there had not even been a strained procedural situation, as the

applicant's client had already been acquitted at the time when the statement was made.

In the Government's submission, the disparaging statement made by the applicant was not compatible with the function of a lawyer as an organ of the administration of justice. Furthermore, the most lenient disciplinary punishment had been imposed. That punishment had no further consequences but appeared appropriate for inducing the applicant to comply with his legal obligations.

The applicant argues that the impugned statement had been contained in appeal submissions in the context of criminal proceedings in the course of which the Mannheim judges and public prosecutors had acted in a deplorable manner. This statement had been necessary for the appeal to have a prospect of success. The applicant further considers that the disciplinary courts should not have had recourse to his subsequent submissions in the disciplinary proceedings as a means of interpretation.

According to the Court's well-established case-law, the test of "necessity in a democratic society" requires the Court to determine whether it was proportionate to the legitimate aim pursued and whether the reasons given 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).

It goes without saying that freedom of expression is secured to lawyers, too, who are certainly entitled to comment on the administration of justice, but their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession. Because of their direct and continuous contact with their members, the Bar authorities and a country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck. This is why they have a certain margin of appreciation in assessing the necessity of an interference in this area, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them (see the Schöpfer v. Switzerland judgment of 20 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1053/54, § 33 with further references).

The Court's task in exercising its supervisory function is not to take the place of the national authorities but to review, under Article 10, in the light of the case as a whole, the decisions those authorities have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

In the present case, the German disciplinary courts for lawyers found that one statement made by the applicant in written appeal submissions against a

bill of costs was, when read in its context, of a disparaging nature and therefore in breach of the professional duty of objectivity. The applicant's statement was deemed to mean that he regarded all Mannheim judges, public prosecutors and lawyers as incompetent in legal matters.

The Court finds that the reasons advanced by the German courts were relevant to the legitimate aim pursued, namely protecting the reputation of others.

As to the sufficiency of those reasons for the purposes of Article 10, the Court recalls that that Article 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 State or any sector of the population (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

With regard to the background of the case, the Court notes that no public interest aspect has to be taken into account (see the Sunday Times judgment cited above, § 65). The applicant had assisted a foreigner as defence counsel in criminal proceedings which resulted in the accused's acquittal. Following a bill of costs which did not include the reimbursement of the applicant's lawyer's travelling costs, the applicant lodged an appeal arguing that the intervention of a non-local lawyer had been necessary. The disciplinary courts accepted the applicant's argument that criminal proceedings against him had been far from exemplary and that there had been obvious legal errors. They also acknowledged the applicant's legitimate interest to justify his intervention as a non-local lawyer. It was the general disqualification of all Mannheim judges, public prosecutors and lawyers which triggered the disciplinary sanction.

In this connection, the Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. This position explains the usual restrictions on the conduct of members of the Bar (see the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A, p. 21, § 54; and the Schöpfer judgment cited above, § 29).

The Court further attaches importance to the fact that the statement made by the applicant was an attack on the reputation of three local professional groups as a whole (see, *a contrario*, the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 28, § 66; and the *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III, § 67 *in fine)*

The Court observes that the German disciplinary courts recognised that the applicant's legitimate interests in explaining the necessity of his involvement as defence counsel and in claiming the reimbursement of his travelling expenses had to be weighed against the reputation and rights of others. It cannot find that these courts failed properly to balance the various interests involved in the case.

In this respect, the Court observes that the present case bears similarities with Meister v. Germany, where counsel had made insulting statements about judges and other persons whom he regarded as having decided or acted incorrectly in the context of, or in relation to, court proceedings (no. 25197/95 and no. 30549/96, Commission decisions of 18 October 1995 and 10 April 1997, respectively, unreported), with W.R. v. Austria, where counsel had described the opinion of a judge as "ridiculous" (no. 26602/95, Commission decision of 30 June 1997, unreported) and Mahler v. Germany, where counsel had stated at the trial that the prosecutor had drafted the bill of indictment "in a state of complete intoxication" (no. 29045/95, Commission decision of 14 January 1998, unreported).

Taking into account the margin of appreciation left to the Contracting States in such circumstances, the Court considers that the disciplinary courts were, in the circumstances of the case, entitled to interfere with the exercise of the applicant's right under Article 10 of the Convention.

In assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see *Ceylan v. Turkey* [GC], no. 23556/94, § 49, ECHR 1999-IV). In this respect, the Court notes that the applicant was merely reprimanded.

Having regard to the foregoing, the Court considers that the reprimand issued against the applicant was not disproportionate to the legitimate aim pursued and that the reasons advanced by the domestic courts were sufficient and relevant to justify such interference. The latter could thus reasonably be considered necessary in a democratic society for the protection of the reputation or rights of others within the meaning of Article 10 § 2. In sum, there is no appearance of a breach of Article 10 of the Convention.

It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President