

APPLICATION N° 21128/93

Udo WALENDY v/GERMANY

DECISION of 11 January 1995 on the admissibility of the application

Article 10, paragraph 2 of the Convention .

- a) Search and seizure of unlawful publication (Germany) Since domestic law permits such a measure notwithstanding that at the time the appellate court rules on its legality, a substantive prosecution has become time-barred, the measure is "prescribed by law"*
- b) German courts finding that an article published by the applicant amounted to denial of the systematic annihilation of Jews under the Third Reich, hence could have led to conviction under provisions of criminal law intended to protect persons from insult Search and seizure of the material in question pursues a legitimate aim and, since the findings of the domestic courts are not arbitrary, may be considered necessary in a democratic society*

Article 17 of the Convention . *This provision covers essentially those rights which may facilitate an attempt to derive from them a right to engage in activities aimed at the destruction of the rights and freedoms set forth in the Convention. In particular, the right to freedom of expression may not be invoked in a sense contrary to Article 17. In the present case, reference to this Article to establish that an interference with the exercise of that right was necessary in a democratic society*

THE FACTS

The applicant is a German citizen, born in 1927 and living in Vlotho. He edits a periodical under the title "Historical Facts" ("Historische Tatsachen")

Edition No. 36 of this publication is entitled "A trial which makes history" ("Ein Prozeß, der Geschichte macht"). In an editorial written by the applicant himself, he explains that he was admitted as an expert to give evidence at the trial in question which took place in Toronto, Canada. The editorial states, *inter alia*, that the trial concerned Mr. E. Z., a person of German origin, accused of having published a reprint of an article entitled "Did six million really die?" ("Starben wirklich sechs Millionen?") and thereby disturbed the social peace among the different ethnic groups in Canada by disseminating wrong information, in violation of Section 177 of the Canadian Criminal Code.

On 26 April 1989, the Bielefeld Regional Court (Landgericht), granting an appeal of the Public Prosecutor, amended a search and seizure order issued against the applicant by the District Court (Amtsgericht). In consequence thereof, edition No. 36 of "Historical Facts" was seized. According to the Regional Court's order, the applicant was suspected of having made insulting remarks, in violation of Section 185 of the Criminal Code, in that he denied the fact of the systematic murder of Jewish people committed under the former Nazi régime.

The court referred, *inter alia*, to the following passages in the periodical

[Translation]

"Having examined the available literature, the sites at Auschwitz, Birkenau and Majdanek, the author finds in the light of his knowledge of the construction and the technique as well as the functioning of modern crematoriums, that there is no evidence that any of the installations alleged to have been gas chambers were ever used as such. ... Neither the construction of the installations nor their equipment allowed their use as gas chambers for the killing of people.

In addition, the crematorium installations prove convincingly that it would have been impossible to burn the alleged multitude of corpses during the alleged periods "

[German]

"Der Verfasser findet nach Studium der verfügbaren Literatur, der vorhandenen Stätten in Auschwitz, Birkenau und Majdanek, seiner Kenntnis der Konstruktionskriterien für den Betrieb von Gaskammern, Untersuchung der Krematoriumstechnik und Prüfung moderner Krematorien keinen Beweis dafür, daß irgendeine der Einrichtungen, von denen normalerweise behauptet wird, sie seien Gaskammern gewesen, jemals als solche benutzt worden sind. Diese Stätten [hatten] schon von ihrer Konstruktion und Ausstattung her nicht als Gaskammern für Menschentötung verwendet werden können.

Darüberhinaus beweisen die Krematoriumseinrichtungen schlussig, daß jene angebliche Vielzahl von Leichen in den behaupteten Zeiträumen nicht hatte verbrannt werden können

The court concluded that a global view of the contents of the periodical led to the understanding that the genocide was denied and that the applicant identified himself with the allegation made therein (Der Gesamtzusammenhang der Schrift lässt erkennen, dass der Beschuldigte sich die Aussage der wiedergegebenen Beiträge zu eigen macht)

On 29 November 1989, the Bielefeld Regional Court refused to open a trial against the applicant, and set aside the previous search and seizure order. The court considered

[Translation]

however incomprehensible, indeed outrageous, the statements quoted may appear to be, taken as a whole they cannot as such be seen to constitute an assault on the personality and human dignity of our Jewish fellow citizens forced to bear the burden of the persecution of the Jews by the National Socialists in the Third Reich. Rather, these statements, if one considers their wording and content objectively, merely involve a discussion of historically established facts and not discrimination against a group of human beings. Even if the attempt made here to correct the view of history may appear extremely reprehensible both morally and politically, in the court's view this is not a violation of the human dignity of our Jewish fellow citizens and therefore does not, from the point of view of the criminal law, constitute an insult within the meaning of s. 185 of the Criminal Law.

[German]

Die wiedergegebenen Aussagen, so wenig nachvollziehbar und sogar empörend sie auch erscheinen mögen, können insgesamt gesehen jedoch noch nicht als Angriff auf Persönlichkeit und Menschenwürde der durch die Verfolgung durch die Nationalsozialisten im Dritten Reich belasteten jüdischen Mitbürger angesehen werden, sondern haben [nach] ihrem Wortlaut und ihrem Sinngehalt bei objektiver Betrachtungsweise lediglich die Auseinandersetzung mit geschichtlich gesicherten Tatsachen zum Gegenstand und nicht die Diskriminierung einer Menschengruppe. Auch wenn der hier unternommene Versuch der Korrektur des Geschichtsbildes in moralischer und politischer Hinsicht in höchstem Maße mißbilligenswert erscheinen mag, ist nach Auffassung der Kammer somit eine Verletzung der Menschenwürde der jüdischen Mitbürger und damit in strafrechtlicher Hinsicht die Erfüllung des Tatbestandes der Beleidigung gem. § 185 StGB nicht gegeben."

On appeal by the Public Prosecutor, this decision was quashed by the Court of Appeal (Oberlandesgericht) in Hamm on 15 May 1990 in so far as the search and seizure was in question.

In respect of the criminal charges, no appeal had been lodged because prosecution had become time-barred

The search and seizure order issued by the Regional Court was, however, considered to have been lawful. The appellate court reached the conclusion:

[Translation]

"... the remarks in the periodical are more than a description of the contents and the course of the so-called Z. trial in Canada and also go beyond a presentation of a view of history that deviates from that established by historical research. On the surface, the periodical does, it is true, deal with the aforementioned trial. However, given its one-sided emphasis on, and evaluation of, the testimony of witnesses and experts ... it is also clear to the average person reading between the lines that the aim of the accused, as the publisher of the periodical, is in reality to deny the established historical fact of the mass murder of Jews ... Due to this inhuman treatment suffered by their people, the Jews living now have a special claim to the respect of their fellow citizens, which forms part of their human dignity. The denial of the systematic annihilation of Jews in the Third Reich violates the right to respect of their human dignity. It is thus at the same time an attack on each individual Jew's human dignity, especially as it must be seen to be a continuation of the earlier discrimination against the Jewish people."

[German]

"Die Ausführungen in der Druckschrift gehen über die Darstellung von Inhalt und Verlauf des sog. Z - Prozesses in Kanada wie auch über die Darlegung eines von der gesicherten historischen Forschung abweichenden Geschichtsbildes hinaus. Die Schrift befaßt sich zwar vordergründig mit dem vorgenannten Prozeß. Durch einseitige Gewichtung und Wertung der wiedergegebenen Zeugen- und Sachverständigenaussagen ... ist für den auch zwischen den Zeilen lesenden Durchschnittsleser ... ersichtlich, daß es dem Angeschuldigten als dem Herausgeber der Schrift in Wirklichkeit um die Leugnung der historisch gesicherten Tatsache des Judenmordes selbst geht ... Auch den jetzt lebenden Juden steht aufgrund dieses unmenschlichen Schicksals ihres Volkes ein besonderer Achtungsanspruch von seiten ihrer Mitbürger zu, der Teil ihrer Würde ist. Mit dem Leugnen der systematischen Judenvernichtung im 'Dritten Reich' wird dieser Achtungsanspruch verletzt. Damit erfolgt zugleich ein Angriff auf die Menschenwürde jedes einzelnen Juden, zumal darin auch eine Fortsetzung der früheren Diskriminierung des jüdischen Volkes zu sehen ist."

In view of these considerations, the appellate court concluded that it was likely that the applicant would have been convicted of having made insulting remarks. The seizure therefore had to be maintained as there were strong reasons to expect that further proceedings would lead to the confiscation of the periodical (*Nach allem liegen Gründe für die Annahme vor, dass die sichergestellten Druckschriften im objektiven Verfahren der Einziehung unterliegen werden.*)

In accordance with Section 76 (a) of the Criminal Code and Section 440 of the Code on Criminal Procedure, confiscation can be ordered even where prosecution has become time-barred.

The applicant then lodged a constitutional complaint, which was rejected on 9 June 1992 by a group of three judges of the Federal Constitutional Court (*Bundesverfassungsgericht*) as offering no sufficient prospects of success. Stressing that freedom of knowledge (*Wissenschaftsfreiheit*) and freedom of expression (*Meinungsausserungsfreiheit*) were protected by the German Constitution (*Grundgesetz*), the court considered that the applicant could not invoke these rights, as his editorial was a denial of the historical fact of the genocide of Jews under the Nazi régime. Such untrue, factual allegation was not protected by the constitutional rights in question. Furthermore, the appellate court's finding that the applicant's statements could have led to a conviction for having made insulting remarks if prosecution had not become time-barred was unobjectionable from a constitutional point of view.

COMPLAINTS

The applicant complains that the above seizure order and the decisions confirming its lawfulness violate his rights under Article 10 of the Convention

THE LAW

The applicant argues that the seizure of No. 36 of his periodical violates his right to freedom of expression as guaranteed by Article 10 of the Convention

Article 10 para. 1 provides:

"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."

However, interferences with this right are compatible with the Convention when they fulfil the requirements of paragraph 2 of Article 10, which provides:

"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 Commission considers that the seizure complained of constitutes an interference with the right guaranteed under Article 10 para. 1 of the Convention. It therefore has to be examined whether or not it is justified under para. 2.

As to the requirements set out in paragraph 2, it has first to be noted that the measure in question was carried out on the ground that the applicant was suspected of having, by way of the publication in question, violated criminal law. The measure was consequently based on provisions of the Codes on Criminal Law and Procedure designed to protect others from being insulted. This applied regardless of the fact that prosecution had become time-barred. Thus the measure was lawful and pursued a legitimate aim.

It remains to be ascertained whether the measure in question was necessary in a democratic society and proportionate to the aims pursued (Eur. Court H.R., *Schwabe* judgment of 28 August 1992, Series A no. 242-B, p. 32, para. 29 with further references).

In this respect the Commission refers to Article 17 of the Convention. This provision states:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 17 covers essentially those rights which will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention. In particular, the Commission has repeatedly found that freedom of expression, as expressed in Article 10 of the Convention, may not be invoked in a sense contrary to Article 17 (cf. No. 12194/86, Dec. 12.5.88, *Kuhnen v. the Federal Republic of Germany*, D.R. 56 p. 205 and No. 19459/92, Dec. 29.3.93 unpublished).

As regards the circumstances of the present case, the Commission notes that the publication in question did, according to the German appellate court, deny historical facts about the mass murder committed by the totalitarian Nazi régime and therefore constituted an insult to the Jewish people and at the same time a continuation of the former discrimination against the Jewish people.

These findings, which were confirmed by the Federal Constitutional Court, do not disclose any arbitrariness. The Commission therefore concludes that the

interference at issue can be considered as "necessary in a democratic society" within the meaning of Article 10 para. 2 of the Convention.

It follows that the application has to be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.