

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

FIFTH SECTION

DECISION

Application no. 55558/10
Klaus Günter ANNEN
against Germany

The European Court of Human Rights (Fifth Section), sitting on 12 February 2013 as a Committee composed of:
Boštjan M. Zupančič, *President,*
Angelika Nußberger,
Helena Jäderblom, *judges,*
and Stephen Phillips, *Deputy Section Registrar,*
Having regard to the above application lodged on 24 September 2010,
Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Klaus Günter Annen, is a German national, who was born in 1951 and lives in Weinheim. He was represented before the Court by Mr L. Lennartz, a lawyer practising in Euskirchen.

A. The circumstances of the case

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

On 6 May 2003 the applicant, who militates against the right to abortion, walked up and down in front of the medical practices of the gynaecologist Dr M. He was carrying a cardboard poster containing the following text on the front (all quotes translated from German):

"Stop unlawful abortions [performed] by Dr M. [full address]."

On the back the poster contained the following text:

"Then Holocaust - today babycaust – stop the child murder"

The applicant also distributed four-page leaflets to passers-by, which contained, *inter alia*, the following statement in bold letters:

"Dr M. [full address] performs unlawful abortions, which are, however, allowed by the German legislator and are not subject to criminal liability. The attestation of counselling protects against criminal prosecution, but not against the responsibility before God."

Dr M. brought criminal charges for defamation against the applicant.

On 29 November 2004 the Munich District Court convicted the applicant of defamation (section 185 of the Criminal Code) and sentenced him to a fine of seventy daily rates of twenty euros each. The District Court noted that the applicant had availed himself of legal terminology (unlawful) in order to express his opinion in a situation of everyday life. It further noted that the cardboard poster – in contrast to the leaflet – did not contain any further explanation. The District Court concluded that both sides of the poster, taken together, seen from the point of view of an ordinary and unbiased passer-by, contained the incorrect statement that Dr M. did not abide by the law when performing abortions. Furthermore, the text on the back of the poster referred to the Holocaust and to the murder of children. This had to lead the unbiased observer to the conclusion that Dr M. did not abide by the law in his medical practice and that he acted in a particularly cruel and despicable way.

This was a deliberately incorrect statement of facts. In view of a former criminal conviction, the applicant must have been aware of the fact that the term "unlawful abortion" could only be seen in the specific context of the relevant case-law of the Federal Constitutional Court. This was illustrated by the fact that the applicant took his previous conviction into account by changing the text of his leaflets, which now clearly explained the term "unlawful". However, no such explanation was to be found in the text of the cardboard poster. The leaflet was not suitable to inform all passers-by in an appropriate way, as the majority of passers-by would have read the poster, but not the leaflet. The applicant had accepted that a great number of people would read the text on the poster without ever gaining knowledge of the explanatory content of the leaflet.

The District Court further considered that the text on the poster seriously interfered with Dr M.'s personal honour and his right freely to pursue his profession. These protected interests outweighed the applicant's right freely to express his opinion in the instant case. When weighing the conflicting interests, the District Court took into account that the applicant displayed his posters by walking up and down in the direct vicinity of Dr M.'s medical practice. On the other hand, Dr M. had not expressed his own opinion in a

comparable way, but had merely announced on the Internet that lawful abortions were performed in his medical practice. The court considered that the applicant was allowed to draw attention to his cause even by using particularly catchy phrases. However, Dr M. had not given him any reason to single him out.

The District Court finally considered that the applicant would have been free to label the applicant's actions as "reprehensible" or as "immoral". However, the applicant had chosen to use a legal term without providing the necessary explanation.

The District Court considered as mitigating factors that the applicant had accepted the facts as alleged and that he had actively taken part in the political discourse in Germany. On the other hand, it had to be taken into account that the applicant had already been convicted twice of similar offences and that he had expressed his intention not to change his course of action.

On 28 June 2005 the Munich Regional Court rejected the applicant's appeal. The Regional Court noted that Dr M. had ceased to perform abortions in 2001, but that this fact was unknown to the applicant. The Regional Court confirmed that the content of the cardboard poster implied that Dr M. performed illegal abortions in his practices. The explanations contained in the leaflet were not capable of rectifying this statement, as the applicant distributed them only to those passers-by who had been interested. Consequently, other passers-by, car-drivers or other persons who had seen the poster without reading the leaflet had not been able to take note of the applicant's explanations.

The Regional Court further considered that the applicant acted deliberately. Even though he might have erroneously assumed that Dr M. still performed abortions, this did not apply to the statement that these abortions were "unlawful". Relying on the Federal Court of Justice's reasoning in two decisions given on 1 April 2003 and 7 December 2004 (compare *Annen II v. Germany* (dec.), nos. 2373/07 and 2396/07, 30 March 2010), the Regional Court considered that Dr M.'s personality rights had been violated in such a serious way that the applicant's right to freedom of expression had to cede.

On 15 Feburary 2006 the Munich Court of Appeal rejected the applicant's appeal on points of law. It considered that the Regional Court had examined and assessed all relevant facts. The Court of Appeal observed, in particular, that the Regional Court had taken into account that the applicant made his statement within the context of a public political debate and that the right to freedom of expression demanded that the conflicting interests be weighed in a comprehensive way. It further considered that in all matters of public interest, and in particular, in a political debate, there was an assumption in favour of freedom of expression. The Court of Appeal observed that the Regional Court had

referred to the Federal Court of Justice's reasoning. According to this reasoning, the applicant had arbitrarily singled out the physician and had produced a "pillory effect". It followed that Dr M.'s personality rights had to prevail.

On 20 March 2006 the applicant lodged a constitutional complaint. Relying on his right to freedom of expression (Article 5 of the Basic Law) he complained, in particular, that the criminal courts had based their assessment of the facts exclusively on the text contained on the cardboard poster, but did not take into account the content of the leaflet. He submitted that, under the case-law of the Federal Constitutional Court, an expression of opinion had to be assessed within its general context. He further submitted that the statement on unlawful abortions had been correct and that the Regional Court had failed to consider that the applicant was militating for the rights of unborn children.

On 22 March 2010 the Federal Constitutional Court, relying on its Rules of Procedure, refused to accept the applicant's constitutional complaint for adjudication without giving further reasons.

B. Relevant domestic law and practice

The relevant domestic law and practice is summarised in the Court's judgment in the case of *Hoffer and Annen v. Germany*, nos. 397/07 and 2322/07, §§ 24-25, 13 January 2011 and in the decision on admissibility in the case of *Annen II* (cited above).

COMPLAINTS

The applicant complained under Article 10 of the Convention about his criminal conviction. He further complained under Article 6 § 1 of the Convention about the Federal Constitutional Court's failure to give reasons for its decision not to accept his constitutional complaint for adjudication.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

The applicant complained that his criminal conviction for defamation amounted to a violation of his right to freedom of expression as provided in Article 10 of the Convention, which, insofar as relevant, 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. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others, ..."

By way of reasoning, the applicant primarily referred to the arguments submitted in his constitutional complaint.

The Court observes, at the outset, that the provisions of the Basic Law relied on in the applicant's constitutional complaint are not completely identical with the relevant Articles of the Convention. Even assuming that the mere reference to the constitutional complaint represents sufficient substantiation of the applicant's complaint, the Court considers that the complaint is in any event inadmissible on the following grounds:

The Court considers that the applicant's criminal conviction amounted to an "interference" with his right to freedom of expression. Such interference will infringe the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

The Court notes that the applicants' conviction was based on section 185 of the Criminal Code. It follows that the interference complained of was "prescribed by law". The Court further observes that the applicant's conviction was designed to protect "the reputation or rights of others", namely Dr M.'s reputation and personality rights.

It remains to be determined whether the interferences were "necessary in a democratic society". This implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with supervision by the Court (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V).

The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). In this context, it has to be taken into account that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see, among other authorities, *Verein gegen Tierfabriken Schweiz (VgT)*

v. Switzerland (no. 2) [GC], no. 32772/02, § 92, ECHR 2009 and *Mouvement raëlien v. Switzerland* [GC], no. 16354/06, § 61, 13 July 2012).

Turning to the circumstances of the instant case the Court notes, at the outset, that the domestic courts and, in particular, the Munich Court of Appeal, expressly acknowledged that the applicant's statements addressed questions of public interest and that there was an assumption in favour of freedom of expression in cases of this kind. The criminal courts considered, however, that the statements made on the cardboard poster, according to which Dr M. performed "unlawful" abortions, had to be interpreted as implying that Dr M. was performing abortions outside the legal order. According to the criminal courts, this statement seriously violated the latter's right to personal honour and his professional reputation. They concluded that Dr M.'s interest in the protection of his rights outweighed the applicant's interest in expressing his opinion in the specific way he had chosen and that his action therefore amounted to defamation to the detriment of Dr M.

The Court further observes that the domestic courts thoroughly assessed the conflicting interests at three court instances. By doing so, they accepted that the applicant's statements could claim special protection under the right to freedom of expression as a contribution to a debate of public interest, while also taking into account that the physician had not taken part in the public debate and had not given the applicant any reason to single him out.

The Court notes that the applicant, in his constitutional complaint, complained about the fact that the domestic courts interpreted the text on the cardboard without taking into account the further legal explanations contained in the leaflets he had distributed to passers-by. The Court observes, however, that the domestic courts had explained that the leaflets were merely distributed to those passers-by who were interested in them and that a great number of persons could thus have been expected to have read the text on the poster without ever gaining knowledge of the content of the leaflet. The Court concludes that the domestic courts have given relevant reasons for assessing the cardboard poster's content on its own.

The Court recalls that the nature and severity of any sanction imposed are also factors to be taken into account when assessing the proportionality of the interference (see, among other authorities, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV and *Annen II*, cited above). Turning to the circumstances of the instant case, the Court observes that a relatively modest fine of seventy daily rates of twenty euros each was imposed on the applicant.

The Court reiterates that it accepted in its decision on another complaint lodged by the same applicant (see *Annen II*, cited above) that a similar statement made under comparable circumstances could be understood by a reasonable man with ordinary susceptibility as implying that the "unlawful" abortions were forbidden in a stricter sense and subject to criminal liability.

The Court further accepted in that case the domestic courts' assessment that the concerned physician's right to personal honour outweighed the applicant's freedom of expression.

In the instant case, the Court also considers that the domestic courts have duly balanced the applicants' right to freedom of expression against the physician's personality rights. It follows that the reasons relied on by the domestic courts were sufficient to show that the interference complained of was "necessary in a democratic society".

Having regard to all the foregoing factors, and, in particular, to the careful examination of the Article 10 issue by the domestic courts, the Court considers that the domestic courts struck a fair balance between the competing interests involved. There is, accordingly, no appearance of a violation of Article 10 of the Convention.

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

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

The applicant further complained that the Federal Constitutional Court's refusal to give reasons for its decision not to entertain the applicant's constitutional complaint violated his rights under Article 6 § 1 of the Convention, which, insofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The Court reiterates that is suffices for national superior courts to refuse to admit a complaint by simply referring to the legal provisions allowing for that procedure if the questions raised by the complaint are, as in the present case, not of fundamental importance (see *Teuschler v. Germany* (dec.), no. 47636/99, 4 October 2001). It follows that also this complaint 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.

Stephen Phillips	Boštjan M. Zupančič
Deputy Registrar	President