CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 34313/96
by Erwin IMMLER
against Germany

The European Court of Human Rights (Fourth Section) sitting on 2 March 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr G. Ress,
Mr I. Cabral Barreto,
Mr V. Butkevych,
Mrs N. Vajić,
Mr J. Hedigan,
Mrs S. Botoucharova, *Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 25 April 1996 by Erwin IMMLER against Germany and registered on 19 December 1996 under file no. 34313/96;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1932, is an Austrian national of German origin and resident in Lochau, Austria.

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

In 1993 criminal proceedings were instituted against the applicant on the suspicion of insult. In these proceedings defence counsel assisted him.

On 16 March 1994, following a hearing, the Lindau (Bodensee) District Court (*Amtsgericht*) convicted the applicant of insult and of having caused false suspicion, and imposed a fine of 80 daily rates of 80 German marks (DEM).

According to section 185 of the Penal Code (*Strafgesetzbuch*), insult (*Beleidigung*) is an offence punishable with a maximum of one year's imprisonment or a fine.

The District Court found that in the course of a dispute between the applicant and the foreign couple Mr and Mrs I. about their alleged unlawful parking, he had stated that "they came from the Balkan and did not know about German law", and he had called them "Kanaken", a term used in German language to disparage foreigners. Moreover, in the investigation proceedings instituted at Mr and Mrs I.'s request, he laid information against them pretending that they had insulted him in the course of the above dispute, that Mr I. had threatened him with force and that they had committed a parking offence. Subsequently, the applicant had also laid information against a witness of the above dispute, Mr S., pretending that this person had also insulted him. The District Court established these facts on the basis of the applicant's statements as well as on the evidence given by Mr and Mrs I., Mr S., Mrs H., the applicant's life companion, and Mr P., a customs officer having witnessed the dispute in the course of an observation of the place. It also had before it photographs of the place in question.

On 11 November 1994, following oral hearings, the Kempten Regional Court (*Landgericht*), upon the applicant's appeal, reduced the fine to 80 daily rates of DEM 40 and dismissed the remainder of the appeal. The Regional Court, on the basis of its own taking of evidence, confirmed in essence the establishment of facts by the District Court. Thus the applicant had started a dispute with Mr and Mrs I. about their allegedly wrong parking, stating that "they were not on the Balkan and had to comply with German traffic regulations" and, in his annoyance, he had called them "Kanaken". The court found that Mrs H.'s statements were refuted by the evidence given by Mr P., a neutral witness who had credibly explained that as a dog-fancier he would have seen Mrs H. and her dog. The Regional Court, having regard to the material before it, including a site plan and photographs, also considered that an inspection of the place of the events had not been necessary. Furthermore, the Regional Court rejected the applicant's arguments that the expression "Kanaken" was a neutral denomination of South Sea Islanders, considering that in German language this expression was unfortunately used, in a disparaging manner, in relation to foreigners.

On 28 March 1995 the Bavarian Court of Appeal (*Oberstes Landesgericht*) dismissed the applicant's appeal on points of law.

On 3 November 1995 the Federal Constitutional Court (*Bundesverfassungsgericht*) refused to entertain the applicant's constitutional appeal. The decision was served on 14 November 1995.

COMPLAINTS

1. The applicant complains that the criminal proceedings against him were unfair. According to him, the German courts failed to inspect the site and to take an expert opinion on the question whether the witness Mr P. was capable to hear the dispute in question. He invokes Article 6 of the Convention.

2. The applicant further complains under Article 10 of the Convention about his conviction of insult. In his submission, he had merely commented on Mr and Mrs I.'s alleged parking offence and, in any event, the expression "Kanaken" had no disparaging character.

THE LAW

1. The applicant complains about the alleged unfairness of the criminal proceedings against him, in particular about the taking of evidence. He relies on Article 6 of the Convention, which, as far as relevant, reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] … tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> ...
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> …"

The applicant's complaints relate in particular to the taking of evidence by the Lindau District Court and the Kempten Regional Court. It seems appropriate to look at these issues from the points of view of paragraphs 1 and 3 of Article 6 taken together, especially as the guarantees in paragraph 3 represent aspects of the concept of a fair trial contained in paragraph 1 (see the Unterpertinger v. Austria judgment of 24 November 1986, Series A no. 110, p. 14, § 29).

The applicant considers that the courts failed to inspect the place of the offence and to take expert evidence.

As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the defendants seek to adduce (see the Vidal v. Belgium judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33).

In the present case, the Lindau District Court, as confirmed by the Kempten Regional Court, convicted the applicant after having heard, apart from himself, the victims of the offence and a number of other persons, including eye-witnesses, and photographs of the

place. The applicant's submissions do not disclose any circumstance according to which the failure to inspect the place of the dispute and to take expert advice regarding the phonetic conditions concerned could be reasonably regarded as incompatible with Article 6. Considering the criminal proceedings as a whole, there is no indication that the applicant, assisted by defence counsel, could not exercise his defence rights in a fair manner.

His submissions do not, therefore, disclose any appearance of a violation of his rights under Article 6 §§ 1 and 3 (d) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 2.

2. The applicant also complains under Article 10 of the Convention about his conviction of insult.

Article 10 of the Convention, as far as relevant, provides:

> "1. Everyone has the right to freedom of expression. This shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 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 ..."

The Court notes that on 16 March 1994 the Lindau District Court, as confirmed by the Kempten Regional Court and the Bavarian Court of Appeal, convicted the applicant of insult on the ground that he had called Mr and Mrs I. "Kanaken". The Court finds that this measure constituted an interference with the exercise of the applicant's freedom of expression. Such interference is in breach of Article 10, unless it is justified under paragraph 2 of Article 10,

The legal basis of the interference under consideration was S. 185 of the Penal Code. The German Courts found that the applicant's conduct constituted the offence of insult within the meaning of this provision. The interference complained of was, therefore, prescribed by law, for the purposes of Article 10 § 2.

Moreover, the decisions complained of aimed to protect "the reputation or rights of others", namely Mr and Mrs I., which is a legitimate aim under Article 10 § 2.

As regards the remaining question of whether the interference complained of was "necessary in a democratic society" and proportionate to the legitimate aim pursued, the Court recalls that the notion of necessity implies a pressing social need. The Contracting States enjoy a margin of appreciation in this respect, but this goes hand in hand with a European supervision which is more or less extensive depending on the circumstances. In reviewing under Article 10 the decisions taken by the national authorities pursuant to their power of appreciation, the Court has to determine, in the light of the case as a whole, whether the reasons adduced by them to justify the interference are "relevant and sufficient" (see the Sunday Times (no. 2) v. United Kingdom judgment of 26 November 1991, Series A no. 217, pp. 28-29, § 50; Worm v. Austria judgment of 29 August 1997, *Reports of Judgments and*

Decisions 1997-V, no. 45, § 47; see also the Commission's decision of 17 November 1998 on the admissibility of application no. 34328/96, Peree v. the Netherlands).

In the present case, the applicant's conviction of insult related to the use of the term "Kanaken" in the course of a dispute with a foreign couple previously unknown to him. In the applicant's view, Mr I. had committed a parking offence, and he stated that "they were not on the Balkan and had to comply with German traffic regulations". The Lindau District Court and the Kempten Regional Court considered that the term "Kanaken" was used in German language to disparage foreigners in general. The Bavarian Court of Appeal regarded the applicant's appeal on points of law as unfounded and the Federal Constitutional Court saw no reasons to admit the applicant's appeal.

In this light and having regard to the duties and responsibilities inherent in the right of freedom of expression guaranteed by Article 10 of the Convention, the Court considers that the interference at issue was justifiable and proportionate to the legitimate aim pursued.

The interference complained of can, therefore, reasonably be regarded as "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

It follows that this part of the application is likewise manifestly ill-founded within the meaning of Article 27 § 2 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

Matti Pellonpää
President