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. 56720/00
by Gabriele METZGER
against Germany

The European Court of Human Rights (Third Section), sitting on 17 November 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr L. CAFLISCH,
Mr C. BÎRSAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mrs R. JAEGER, *judges*,
and Mr M. VILLIGER, *Deputy Section Registrar*,

Having regard to the above application lodged on 2 December 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Gabriele Metzger, is a German national who was born in 1957 and lives in Elztal-Dallau. She was represented before the Court by Mr H.-J. Dohmeier, a lawyer practising in Ludwigshafen.

A. The circumstances of the case

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

1. Background to the case

The applicant, an employed bookseller, is a member of the Neckar-Odenwald County Council (*Kreistag*) sitting for the Green party.

On 24 April 1990 she attended as a listener a session of the Billigheim Municipal Council (*Gemeinderat*), which arranged a public discussion and subsequent vote on the question whether an old people's home in a residential area of the town should be converted into a foster home for mentally ill persons. A citizens' initiative with approximately thirty members had been formed by the neighbours of that home and further sympathizers to oppose this project. The members of the initiative argued, *inter alia*, that neighbours, notably children, would be endangered by the prospective patients, and expressed fear that their real property might lose part of its value. During the public discussion in the Municipal Council, a member of the citizens' initiative, Ms B., repeated these arguments. The applicant herself supported the conversion project.

Following the session, the applicant was accused in two letters to the editor published in a regional newspaper, the *Rhein-Neckar-Zeitung*, of having commented Ms B.'s statement by saying in a rather low voice to her neighbour: "*But these are Nazis, these are Nazi methods.*" Furthermore, she was accused of having said to a group of people belonging to the citizens' initiative, who were standing close to the town hall after the session: "*You Nazis.*"

The applicant subsequently instituted civil proceedings in the Mosbach Regional Court both against the four signatories of the letters to the editor and against the editor himself, in the course of which she confirmed in two affidavits that she had never made such statements. On 29 May 1990 the Regional Court granted the applicant an interim injunction prohibiting the defendants to impart the allegation that the applicant had made the impugned statements. On 10 October 1990 the Karlsruhe Court of Appeal quashed the judgment of the Regional Court concerning the editor and dismissed the applicant's motion for an interim injunction.

Furthermore, on 14 November 1990 the Heidelberg District Court conducted a hearing in proceedings brought by the applicant's lawyer against the *Rhein-Neckar-Zeitung* for damages caused by the press coverage concerning the applicant's alleged statements. In that hearing, the applicant, who testified as a witness, again denied having made the impugned remarks. The District Court subsequently partly allowed the action.

2. Proceedings in the national criminal courts

a. Intermediate proceedings (*Zwischenverfahren*)

On 2 October 1990 the Mosbach District Court refused to open criminal main proceedings against the applicant for libel. Having regard to the

evidence before it, it argued that it was not sufficiently likely that the applicant would be convicted.

Following the public prosecutor's appeal, the Mosbach Regional Court quashed the judgment of the District Court on 28 December 1990 and opened the main proceedings before the District Court. On 16 July 1991 it allowed the motion of 25 persons to join the proceedings as associated prosecutors (*Nebenkläger*).

b. Proceedings before the District Court

On 21 February 1992 the Mosbach District Court acquitted the applicant of two counts of libel to the detriment of 21 persons, of having made two wrong affidavits (*falsche Versicherung an Eides Statt*) and of having given false evidence in court (*falsche uneidliche Aussage*). After having heard twenty-three witnesses, the court came to the conclusion that the applicant had not made the impugned statements. The Public Prosecutor's Office and 21 associated prosecutors appealed against the judgment.

c. Proceedings before the Regional Court

On 16 June 1993 the Mosbach Regional Court, after having heard most of the witnesses called already by the District Court, quashed the judgment of that court. It convicted the applicant of two counts of libel, of having made two wrong affidavits and of having given false evidence in court and sentenced her to a fine of 4,800 Deutschmarks (DEM) (120 daily rates of DEM 40). She was further ordered to bear the costs of the proceedings. These included the expenses of some DEM 40,000 incurred by the associated prosecutors who had appealed against the District Court's judgment.

Having assessed the evidence before it, the Regional Court was convinced that the applicant had in fact made the impugned remarks. The court further found that the citizens' initiative comprised a small group of people whose members were determinable, so that each of these members was affected by the applicant's remarks.

The court then examined the question whether the applicant's remark, having regard to her right to freedom of expression guaranteed by Article 5 of the Basic Law, had been justified. It stated that in discussions about vital issues of public interest, there was a presumption that a statement was permitted. Consequently, value judgments were protected under Article 5 even if they were harsh, polemic or exaggerated. However, Article 5 did not cover statements which were aimed at insulting a person in the first place, instead of contributing to the discussion on the subject-matter in dispute. The court found the applicant's remarks to be falling within that latter category of vituperation (*Schmähung*) of others. By comparing the members of the citizens' initiative to Nazis, who had sterilised and killed mentally ill people solely because of their illness, the applicant had severely insulted

these persons without having established a direct link to the subject in dispute.

d. Proceedings before the Court of Appeal

On 25 February 1994 the Karlsruhe Court of Appeal, without giving further reasons, dismissed the applicant's appeal on points of law against the judgment of the Regional Court as ill-founded.

e. Proceedings before the Federal Constitutional Court

On 5 August 1999 the Federal Constitutional Court refused to admit the applicant's constitutional complaint lodged on 5 April 1994. It found that the provision underlying the applicant's conviction, Section 185 of the Criminal Code, was formulated in a sufficiently precise way, even though not all questions concerning group libel (*Kollektivbeleidigung*) had already been settled.

The competent criminal courts had not violated the right to freedom of expression. It could be left open whether the impugned remarks had correctly been qualified as vituperation. Even assuming that this was not the case, there was nothing to suggest that, when balancing the competing fundamental rights involved, freedom of expression prevailed.

B. Relevant domestic law and practice

Pursuant to Section 185 of the Criminal Code, libel is punishable with imprisonment of up to one year or a fine and, if libel has been committed by an assault, with imprisonment of up to two years or a fine.

There is no specific provision in the Criminal Code governing group libel, that is, the defamation of individual members of a group by a statement that only refers to the group as such. Group libel falls to be examined under the general provision of Section 185 of the Criminal Code. According to the well-established case-law of the German courts, notably the Federal Constitutional Court (see, in particular, nos. 1 BvR 1476/91, 1 BvR 1980/91, 1 BvR 102/92 and 1 BvR 221/92, decision of 10 October 1995, Decisions of the Federal Constitutional Court (BVerfGE), vol. 93, pp. 266 *et seq.*, 299-303), it is possible to insult an individual member of a group by a collective term referring to the group as such (*Beleidigung unter einer Kollektivbezeichnung*), if the insult can be linked to that individual. However, the group must be clearly distinguishable by external signs from the general public, and the victims must be determinable. It is not necessary that the defendant knows every single victim of his defamation.

Pursuant to Section 395 § 1 of the Code of Criminal Procedure, a victim of libel is entitled to join the criminal proceedings against the defendant as an associated prosecutor. Section 472 § 1 of the Code of Criminal Procedure

provides that the defendant shall be charged the necessary expenses of an associate prosecutor, if he is convicted for an offence affecting the associate prosecutor. However, the court can wholly or partly abstain from ordering the defendant to pay these expenses, if such an order were inequitable.

COMPLAINTS

The applicant complained under Article 10 of the Convention that her criminal conviction for libel had violated her right to freedom of expression.

Invoking Article 7 of the Convention, the applicant argued that it had not been foreseeable that her remarks were punishable as group libel.

The applicant further complained that she had not had a fair trial as guaranteed by Article 6 of the Convention. She notably argued that due to the fact that the courts had allowed 25 persons to bring an associated prosecution, she had to bear additional costs of the proceedings of some DEM 40,000. Moreover, the courts had not properly established the facts and the files had been manipulated. The courts had also refused to call another witness for the defence and her defence counsel had not been allowed to inspect all documents relevant for the proceedings.

THE LAW

1. The applicant claimed that the decisions of the domestic courts convicting her of libel violated her right to freedom of expression guaranteed by Article 10 of the Convention, which provides:

> "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 applicant argued that the national courts had not duly weighed her interest in freely expressing herself against the interest in protecting the reputation of others as safeguarded by the provisions of criminal law. She stressed that a member of the citizens' initiative had argued that the value of

her house would be lowered if mentally ill persons moved to her neighbourhood. In these circumstances, she had been entitled to comment this statement by saying in a rather low voice to her neighbour that these were "Nazi-methods", given the killing of mentally ill persons solely because of their illness in the Third Reich. Furthermore, her conviction was contrary to the well-established case-law of the Federal Constitutional Court, which had previously considered similar statements not to constitute group libel and to be covered by the right to freedom of expression.

The Court finds that the applicant's conviction of libel amounted to an interference, for which the State had responsibility, with her right to freedom of expression.

Such an interference contravenes Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10 and is "necessary in a democratic society" for achieving such an aim or aims.

The Court reiterates that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, for example, *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 31, § 49; *Tammer v. Estonia*, no. 41205/98, § 37, ECHR 2001-I).

The Court notes that Section 185 of the Criminal Code is worded in rather general terms and does not itself define in which cases a statement referring to a group of people is punishable as group libel. It further observes that the Federal Constitutional Court itself has found in the applicant's case that certain questions concerning the scope of Section 185 of the Criminal Code in cases of group libel remained to date unsettled. However, the Court finds that the general conditions under which a statement was to be considered as group libel had been well-established by the domestic courts at the relevant time. The existence of certain unsettled issues, which is immanent in the development of law on a case-by-case basis, does not prejudice this finding. The principles governing group libel have been formulated with sufficient precision to enable the applicant to foresee, to a degree that was reasonable in the circumstances, that she risked being found guilty of group libel for her statements. Group libel requires that the defamation refers to individual, identifiable members of the group.

The German courts have convincingly found that this condition had been complied with. Therefore, the Court is satisfied that in the circumstances of the present case, the interference with the applicant's right to freedom of expression was "prescribed by law".

The Court considers that the applicant's conviction of libel pursued a legitimate aim within the meaning of paragraph 2 of Article 10, namely "the protection of the reputation or rights of others".

It remains to be determined whether the interference with the applicant's right to freedom of expression was "necessary in a democratic society" to protect the reputation or rights of the members of the citizens' initiative.

The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and 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. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". This freedom is subject to the exceptions set out in Article 10 paragraph 2, which must, however, be construed strictly (see, *inter alia*, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2329, § 46; *Tammer*, cited above, § 59; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-...).

In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. 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 (see, for example, *Unabhängige Initiative Informationsvielfalt v. Austria*, no. 28525/95, §§ 39-40, ECHR 2002-I; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 76, ECHR 2004-XI).

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 margin of appreciation, the Convention organs must determine, in the light of the case as a whole, whether the interference at issue was "proportionate" to the legitimate aim pursued and whether the reasons adduced by them to justify the interference are "relevant and sufficient" (see, for instance, *Hertel*, cited above, pp. 2329 *et seq.*, § 46; *Pedersen and Baadsgaard*, cited above, §§ 68-70; *Steel and Morris*, cited above, § 87).

Turning to the facts of the present case, the Court must weigh a number of factors when reviewing the proportionality of the measure complained of. It observes that the applicant's impugned remarks, which have to be qualified as value judgments, were made in the course of a debate which was of public interest, albeit at local level. While the applicant had been active in politics at a regional level, the members of the citizens' initiative had also contributed to public debate in an organized way, thereby subjecting themselves to a certain public scrutiny. Despite this, the latter cannot be considered as public figures like politicians who knowingly lay themselves open to close scrutiny of their words and deeds and must display a greater degree of tolerance (see in this respect *Wabl v. Austria*, no. 24773/94, § 42, 21 March 2000; *Jerusalem v. Austria*, no. 26958/95, § 38, ECHR 2001-II; *Scharsach and News Verlagsgesellschaft mbH v. Austria*, no. 39394/98, § 30, ECHR 2003-XI; *Pedersen and Baadsgaard*, cited above, § 80).

The Court observes that notably the Regional Court argued that the applicant's statements had been made in a discussion about vital issues of public interest and that, therefore, there had been a presumption that these statements had been permitted. However, the Regional Court had convincingly shown that the applicant's remarks had been particularly offensive in the course of a discussion about the creation of a foster home for mentally ill persons, given that the Nazis had sterilised and killed mentally ill people only because of their illness. It is true that the applicant's first value judgment "*But these are Nazis, these are Nazi methods*" was an immediate reaction to the concern expressed by a member of the citizens' initiative about the loss of value of her property if mentally ill persons were allowed to move into the foster home. The latter statement must be considered as expressing at least serious reservations *vis-à-vis* mentally ill persons. However, there is a special stigma which attaches to Nazism and activities inspired by National Socialist ideas. The national courts, which duly weighed the applicant's interest in expressing her opinion against the necessity to protect the reputation of the members of the citizens' initiative, could, therefore, reasonably find that the applicant had exceeded the limits of acceptable criticism.

In reviewing the proportionality of the impugned measure, the Court also needs to consider the severity of the punishment, that is, the amount of money payable by the applicant following her conviction. It recalls that under the Convention, a criminal sentence or an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered (see, *inter alia*, *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B, p. 75, § 49; *Krutil v. Germany*, no. 71750/01, 20 March 2003; *Steel and Morris*, cited above, § 96; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, no. 55120/00, § 110, 16 June 2005).

The Court notes that the fine the applicant had been sentenced to pay, amounting to DEM 4,800 (120 daily rates of DEM 40), cannot be considered as disproportionate, given the charges she had been convicted of.

In addition to that, the applicant had also been charged the necessary expenses of the associated prosecutors, amounting to some DEM 40,000. The Court finds that the amount of these expenses is substantial, given the applicant's estimated daily income of DEM 40. In the Court's view, the order to pay necessary expenses, albeit a high amount, cannot be equalled to the order to pay a fine. The amount of expenses is merely calculated on the basis of what has been necessarily incurred in the proceedings and does not depend on the Court's margin of appreciation in assessing the applicant's guilt. However, the possible "chilling" effect on the applicant and others in freely expressing their opinion will depend on the overall consequences of having made certain statements, including the financial losses as such, irrespective of whether they result from fines or other court-related costs and expenses. Therefore, the Court cannot completely disregard the costs and expenses payable by a defendant in reviewing the proportionality of an impugned measure.

In the present case, the Court observes that the proceedings in the criminal courts against the applicant have been preceded by three sets of proceedings in the civil courts. These proceedings have been brought by the applicant or her lawyer and were grounded on the allegation that the applicant had not made the impugned remarks, which turned out to be false. The members of the citizens' initiative can therefore be considered as having reacted to that allegation by joining the criminal proceedings against the applicant as associated prosecutors. Under these circumstances, the substantial costs for the associated prosecution do not render the measure disproportionate.

Consequently, the Court is satisfied that the interference at issue was proportionate to the legitimate aim pursued and that the reasons adduced by the national courts to justify the interference were relevant and sufficient.

This part of the application is therefore manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

2. The applicant submitted that the national courts' interpretation of Section 185 of the Criminal Code as prohibiting her statements concerning the citizens' initiative had been unforeseeable and arbitrary. She claimed that her criminal conviction therefore amounted to a breach of Article 7 of the Convention, which, in so far as relevant, reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

The applicant argued that it had been contrary to the case-law of the German courts to qualify her statement as group libel. Her purported remarks had referred to a group of people which was not clearly distinguishable by external signs from the general public.

The Court recalls that, when speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, *inter alia*, *S.W. v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335, pp. 41-42, §§ 34-35; *Streletz, Kessler and Krenz v. Germany* [GC], no. 34044/96, 35532/97, 44801/98, § 50, ECHR 2001-II). Having found above that the applicant's conviction of group libel had been foreseeable and therefore "prescribed by law" within the meaning of Article 10 § 2, the Court concludes that no separate issue arises under Article 7 of the Convention.

3. The applicant further complained that the conduct of the criminal proceedings against her had been unfair, because she had to bear excessive court costs, and there had been irregularities in the content of and access to the case-files. The national courts also had not properly established the facts and had refused to call one additional witness on her behalf. She relied on Article 6 of the Convention, which, in so far as relevant, provides:

> "1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
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> ...
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
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> (b) to have adequate time and facilities for the preparation of his defence;
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> ...
>
> (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;"

(a) The applicant submitted in particular that, having been convicted after numerous hearings, she had to bear the costs of the proceedings. These comprised the costs of 25 associated prosecutors and their counsel and amounted to some DEM 40,000. Given the rather petty nature of her purported offence and the fine of merely DEM 4,800 she had been ordered to pay, the duty to account for these expenses rendered her trial unfair.

She further argued that there were numerous indications, notably inconsistent page numbers and stamps in the case-file, which proved that these files had been manipulated. Her defence counsel had not been granted access to certain confidential files of the Public Prosecutor's Office

containing submissions of the counsel of the associated prosecutor and further investigation proceedings against her. The courts had not properly established who had been a member of the citizens' initiative in Billigheim and therefore could be concerned by her purported statements. The Regional Court had also refused to call E., the judge of the Heidelberg District Court who had held the hearing on 14 November 1990, as a witness on her behalf.

As to the applicant's complaint concerning her duty to bear the court costs, the Court refers to its reasoning with respect to Article 10, and finds that – assuming the applicability of Article 6 § 1 – no separate issue arises under that Article.

(b) The Court has further examined the remainder of the applicant's complaints under Article 6 as submitted by her. However, having regard to all material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Mark VILLIGER
Deputy Registrar

Boštjan M. ZUPANČIČ
President