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

FIFTH SECTION

DECISION

Application no. 35285/16
Hans Burkhard NIX
against Germany

The European Court of Human Rights (Fifth Section), sitting on 13 March 2018 as a Chamber composed of:

Erik Møse, *President,*
Angelika Nußberger,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 14 June 2016,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Hans Burkhard Nix, is a German national who was born in 1954 and lives in Munich.

A. The circumstances of the case

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

1. Background to the case

3. The origin of the dispute lies in correspondence between a staff member of the local branch of the Federal Employment Agency (*Bundesagentur für Arbeit*, hereinafter the "employment office") and the

applicant concerning the applicant's daughter, who is of German-Nepalese origin. In early March 2014, the employment office sent a letter with the heading "Your professional development from September 2014 onwards" to the applicant's daughter. The employment office requested her, as an eighteen-year-old who was scheduled to complete her schooling in the summer of 2015 at the earliest, to complete a questionnaire to indicate whether she intended to continue schooling beyond September 2014, or to commence vocational training or tertiary studies. She was also asked to submit a copy of her latest school report. Moreover, the letter stated that, should the applicant's daughter intend to pursue vocational training, the staff member would ensure her registration at the employment office. In that case he asked her to contact him, as the registration was very important for the transmission of vacant positions for vocational training.

4. The applicant has a blog, on which he writes about certain matters concerning economics, politics and society. Between 20 March 2014 and 13 May 2014, he published six posts about the interaction between the employment office and his daughter.

5. In his first post on the matter, entitled "[Name of the staff member] of the employment office, expert in educational remote diagnosis" and published on 20 March 2014, the applicant reproduced an e-mail exchange he had with the staff member of the employment office on 18 March 2014. In that exchange, the applicant had inquired about the purpose of the employment office's request contained in the above-mentioned letter, to which the staff member had responded that he was, in line with pertinent legislation, the contact person for the applicant's daughter in relation to her transition from schooling to vocational training or tertiary studies. He further stated that, in order to provide customised counselling, he needed information about the current state of affairs, in particular whether she was on track to finish school that summer as intended or whether the employment office should finance remedial lessons. The applicant stated that he would provide his answers within a few days.

6. In his second post, published on 23 March 2014 at 1.52 am, the applicant addressed the staff member of the employment office and reiterated that he, as the father who had custody for his daughter, would never allow the employment office to intervene in the decision-making concerning her professional development. The background to the staff member's letter and email was that the employment office intended to push his daughter, in a racist and discriminatory manner, into becoming part of the cheap labour force ("*Das Jobcenter will in rassistischer und diskriminierender Weise meine Tochter in einen Billiglohnjob verfrachten*"). The applicant stated that he was going to address the matter in a number of blog posts. A long post would concern legal aspects and, *inter alia*, contain references to judgments and statements of the Federal Constitutional Court. He would also make the staff member of the

employment office and the employment office as a whole aware of the highly interesting statements contained in report CRI(2014)2 of the European Commission against Racism and Intolerance (ECRI) on Germany. ECRI's general policy recommendation no. 7 on national legislation to combat racism and racial discrimination adopted on 13 December 2002 should not be forgotten either. Furthermore, the applicant was going to contact different institutions, both domestic and international, with regard to this matter and publish everything on his blog. He stated that his next post would address the sentence "[F]or customised counselling I need information about the current state of affairs ([that is to say] a school report)" contained in the email of the staff member of the unemployment office.

7. At 7.16 am that same day, the applicant posted a statement, more than a page in length. Under the heading "[Name of the staff member] offers 'customised' integration into the low-wage [economy]" he placed a picture of the former SS chief Heinrich Himmler, showing him in SS uniform, with the badge of the Nazi party (including a swastika) on his front pocket, and wearing a swastika armband. The diameter of the swastika on the armband, as shown on the picture, was 0.7 centimetres. Next to the picture the applicant posted a quote of Himmler concerning the schooling of children in Eastern Europe during the occupation by Nazi Germany to the effect that parents who wanted to offer their children good education had to submit a request to the SS and the police leadership. The applicant indicated the sources for both the quotation and the picture.

8. Below the picture and quotation, the applicant addressed the staff member of the employment office by name and stated that he would, in the blog post in question, proceed to discuss the following sentence from an email sent by the latter to the applicant: "[F]or customised counselling I need information about the current state of affairs – ([that is to say] a school report)". The applicant stated that the staff member had informed him that he was acting in line with his counselling mandate under the Social Security Code. To him, the staff member concerned and the employment office as a whole did not appear to attach much importance – if any – to the "counselling mandate". He stated that he had contacted the employment office in November 2013 and February 2014 to ask for the reimbursement of the costs in respect of his daughter commuting to school, without receiving a reply. Nobody from the employment office had ever taken an interest in his daughter, so the offer of "customised counselling" did not appear genuine. Prior to the entry into force of the latest educational policy, his daughter had been able to eat at school for free, but that support had been discontinued. The staff member of the employment office must have had telepathic skills if he was able to design "customised" advice for his daughter by looking at her school report without knowing anything about her interests, strengths and weaknesses. The employment office was making

every effort to make it difficult for adolescents to continue their education. The applicant ended by stating that he would deal in a future blog post with another sentence in the above-mentioned email from the employment office offering remedial lessons, "if required". Parts of the post were written in vulgar and offensive language.

9. On 25 March 2014 the applicant wrote another post entitled "Does [name of the staff member] offer personalised remedial lessons for my daughter?", in which he stated, *inter alia*, that he had the impression that the staff member of the employment office was acting on the basis of racial profiling and that a person's origin was associated with doubts as to his or her prospects of success, which he found shameful. He wrote two more posts on 27 March 2014 and on 13 May 2014, in the latter referring to the staff member as "slimy staff member" ("*schleimender Mitarbeiter*").

10. While all six posts have in common that they start with different pictures under the respective heading, only the third post featured Nazi symbols (see paragraph 7 above). None of the blog posts contained a clearly visible link to the other five posts. The applicant did not state in any of the six posts that his daughter was of German-Nepalese origin and that he was receiving social welfare benefits.

11. Shortly before the events in question, various German media reported on complaints made by parents who received social welfare benefits that their children were unduly pushed towards vocational training by the employment offices and that children with a migrant background were discriminated against in school and by employment offices.

12. In a letter of 17 December 2014 the Federal Commissioner for Data Protection and Freedom of Information informed the applicant's daughter that the employment office's request regarding the submission of her latest school report had been unlawful, given that her father had submitted to the employment office a certificate of her enrolment in the school, that the completion of her schooling was not imminent and that the employment office had not substantiated any suspicion that she would not complete her schooling.

2. The proceedings at issue

13. On 21 October 2014 the Munich prosecution authorities instituted criminal proceedings against the applicant, charging him with the offence of using symbols of unconstitutional organisations in his third blog post of 23 March 2014 (see paragraphs 7 and 8 above). The indictment also contained the information that the Munich District Court convicted the applicant, on 10 February 2014, of, *inter alia*, using symbols of unconstitutional organisations for having published a picture of Angela Merkel in Nazi uniform with a swastika armband and a painted Hitler-moustache. That conviction had not yet become final at the time of the indictment.

14. The prosecution authorities also charged the applicant with libel on account of his statement in his blog post of 13 May 2014 in which he had called the staff member of the employment office "slimy staff member" (see paragraph 9 above). The proceedings concerning the charge of libel were later discontinued by the Court of Appeal (see paragraph 25 below).

15. On 10 November 2014 the applicant published a blog post about the indictment, in which he reproduced a number of photographs showing, *inter alia*, Heinrich Himmler, Adolf Hitler and Hermann Göring in uniform as well as several flags showing the swastika. The Court does not have any information as to whether any criminal proceedings were instituted in relation to that blog post.

16. On 7 January 2015 the Munich District Court convicted the applicant of the offences of libel and using symbols of unconstitutional organisations (Article 86a § 1 no. 1 and Article 86 § 2 of the Criminal Code – see paragraph 29 below) because he had displayed, in his blog post of 23 March 2014, a picture of former SS chief Heinrich Himmler in SS uniform, with the badge of the Nazi party (including a swastika) on his front pocket, and wearing a swastika armband. It sentenced him to separate sentences (*Einzelstrafen*) of four months' imprisonment for using symbols for unconstitutional organisations and 70 day-fines of 15 euros (EUR) each for libel, resulting in a cumulative sentence (*Gesamtstrafe*) of five months' imprisonment. The sentence was suspended.

17. On 6 May 2015 the Munich Regional Court rejected an appeal lodged by the applicant against that judgment in so far as it related to his conviction of the offences of libel and – by displaying a picture of Himmler in SS uniform wearing a swastika armband in his blog post – of using symbols of unconstitutional organisations. However, it reduced the separate sentence for using symbols of unconstitutional organisations to 120 day-fines of EUR 10 each and that for libel to 40 day-fines of EUR 10 each, and the cumulative sentence to 140 day-fines of EUR 10 each. It considered that the applicant, who had relied on his right to freedom of expression and had claimed to have contributed to a debate of public interest, could not rely on Article 86 § 3 of the Criminal Code, as the publication (that is to say his blog post) had not served any of the purposes listed there (see paragraph 29 below). In the text of his blog post, which had started below the picture and quotation, he had neither dealt with Himmler nor with the quoted statement. Rather, the text had been addressed to the staff member of the employment office handling the file of the applicant's daughter and had concerned the dealings between that staff member and the daughter. The Regional Court saw no connection between the text written by the applicant on the one hand and Himmler, the Third Reich or its education policies on the other hand. The applicant had not explained any such parallel either. Nor had he distanced himself from the picture of Himmler with the swastika and from the quoted statement. It was not

obvious that the applicant rejected Nazism. The court concluded that the applicant had used the picture as an eye-catching device, which was exactly what the provision sanctioning the use of symbols of unconstitutional organisations was intended to prevent, as it was meant to pre-empt anyone becoming used to certain symbols by banning them from all means of communication (the so-called "communicative taboo" – see paragraph 31 below).

18. However, the Regional Court considered that an objective observer could not, without additional knowledge, have noticed that the symbol on the front pocket of Himmler's uniform was the badge of the Nazi party and featured a swastika. This display of the badge and swastika, therefore, did not give rise to criminal sanctions under Article 86a of the Criminal Code.

19. On 14 June 2015 the applicant, without being represented by a lawyer, lodged an appeal on points of law. He alleged that provisions relating to the proceedings and to substantive law had not been complied with. He did not elaborate on the former. With regard to the latter, he argued that Nazi symbols were widely shown all over the German media without any distancing from those symbols or Nazi ideology. In the light of that, it was unrealistic that sanctioning him for showing a picture of Himmler wearing an armband with a swastika could pre-empt anyone from becoming used to such images. Moreover, the finding that he had not clearly rejected Nazism was absurd: the blog post had to be examined in its entirety, taking into account its context and the circumstances in which it was written. The fact that the applicant rejected Nazi ideology was evident from the criticism contained in the text of the post, from the picture and quotation, and from the content of his blog as a whole, which featured many posts on economic and social matters (including the applicant's dealings with the employment office), and showed no affinity to Nazism. As a blogger, he was entitled to the same freedom of expression as a journalist, and his blog post had contributed to the discussion of a topic of general public interest that was widely debated in the media and mentioned by various stakeholders – that is to say the correlation between a migrant background and academic performance and institutional discrimination in Germany against children with a migrant background, not least in the light of Germany's economic interest in having a cheap labour force.

20. On 22 June 2015 the applicant gave an oral statement regarding the grounds for his appeal on points of law before the Regional Court's Registry in order that they would be formally recorded, in substance repeating his submission of 14 June 2015.

21. In their response of 8 July 2015, the prosecution authorities noted that the applicant had complied with the formal requirements for lodging his appeal on points of law in so far as he had sought to have the Regional Court's judgment quashed on account of a violation of a provision of substantive law, but that he had failed to comply with the formal

requirements in so far as the remainder of his submission was concerned (see paragraphs 34-36 below). While it was possible to provide the reasoning of an appeal on points of law by having it recorded at the court's registry, the judicial officer (*Rechtspfleger*) had the function of informing and examining the submission so as to avoid the Court of Appeal having to examine ill-founded or incomplete submissions (see paragraph 36 below). In the present case, the applicant's submission on 22 June 2015 was such that the judicial officer merely wrote it down, as evidenced by the judicial officer's note that it was not possible, in the light of the length of the submission (twenty-one pages), the many citations and the shortage of time available (two hours), to critically review the submission. The applicant's submission regarding the grounds for his appeal on points of law had thus not been made in compliance with the respective formal requirements (see paragraph 36 below).

22. The prosecution authorities argued that the Regional Court's judgment had, in any event, not disclosed any errors. The blog post at issue could not be compared to media content, which was meant to serve a civil education purpose and reported on current or historical events or similar purposes, thus falling under Article 86 § 3 of the Criminal Code (see paragraph 29 below). The Regional Court had thoroughly and correctly reasoned why the applicant could not rely on that provision. They asked that the applicant's appeal on points of law be dismissed as ill-founded.

23. In his reply of 19 July 2015 the applicant submitted that he had, on 30 May 2015, requested that counsel be appointed to him for his appeal on points of law and that this request had been refused on 3 June 2015 because, *inter alia*, he had been able to lodge his appeal on points of law by making an oral statement before the Regional Court's Registry in order to have it recorded. In substance, he mainly repeated his earlier submissions.

24. On 28 July 2015 the prosecution authorities requested the Court of Appeal to discontinue the proceedings in so far as they related to libel because the sentence for that offence was insignificant compared to that for the use of symbols of unconstitutional organisations.

25. On 4 August 2015 the Munich Court of Appeal rejected the applicant's appeal on points of law in so far as it related to his conviction for using symbols of unconstitutional organisations and confirmed the separate sentence of 120 day-fines of EUR 10 each set by the Regional Court in this regard (see paragraph 17 above). Endorsing the reasoning of the Regional Court and referring to the submission of the prosecution authorities of 8 July 2015, it added that the applicability of Article 86a § 1 of the Criminal Code could only be restricted, beyond the scenarios covered by Article 86 § 3 of the Criminal Code, where it was obvious from the circumstances of the case taken as a whole that the person clearly distanced himself or herself from the objectives of Nazi ideology (see paragraph 32 below). The Regional Court had found that this was not the case in respect

of the applicant. At the same time, at the request of the prosecution authorities, the court discontinued the proceedings in so far as they related to libel (see paragraphs 9, 14 and 24 above).

26. On 2 September 2015 the applicant lodged a constitutional complaint, relying on his right to freedom of expression. He referred to the case of *Vajnai v. Hungary* (no. 33629/06, ECHR 2008), in which the Court had found that the applicant's criminal conviction for wearing a red star at a lawfully organised, peaceful demonstration by a registered political party, with no known intention of defying the rule of law, and without requiring any proof that the display of the red star amounted to totalitarian propaganda, constituted a violation of Article 10 of the Convention. The approach of the German courts fell short of the requirements provided by the Court's case-law. He also emphasised that it was not only journalists who enjoyed protection under that Article, but that there was a strong public interest in enabling small groups and individuals and groups outside the mainstream to contribute to public debate on matters of general public interest and that a certain degree of exaggeration had to be tolerated (see *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 89-90, ECHR 2005-II), in particular where the matter concerned racism (*Haguenauer v. France*, no. 34050/05, § 49, 22 April 2010), as was the case with his blog post.

27. The Regional Court and the Court of Appeal had not sufficiently taken all circumstances of the blog post into account. From the content of the blog post itself and from the overall context – which included several blog posts concerning the applicant's dealings with the employment office, the unlawfulness of the office's request that his daughter submit her most recent school report and his criticism of neo-liberal economics and institutional racism – it was evident that his intention had been to protest against the policies of the employment office and to contribute to a debate of public interest, and that he rejected Nazi ideology. The courts had failed to consider different interpretations of the blog post and had not examined his right to freedom of expression as protected by Article 5 of the Basic Law and Article 10 of the Convention.

28. On 12 December 2015 the Federal Constitutional Court refused to admit the constitutional complaint (no. 1 BvR 2141/15) for examination. It held that the complaint was inadmissible, but did not indicate the reason for this. The decision was served on the applicant on 20 January 2016.

B. Relevant domestic law and practice

1. The Criminal Code

29. The relevant provisions of the Criminal Code, in so far as relevant, provide as follows:

Article 86 [Dissemination of propaganda material of unconstitutional organisations]

"(1) Whosoever within Germany disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination within Germany or abroad, propaganda material

1. of a political party which has been declared unconstitutional by the Federal Constitutional Court or a political party or organisation which has been held by a final decision to be a surrogate organisation of such a party;

2. of an organisation which has been banned by a final decision because it is directed against the constitutional order or against the idea of the comity of nations or which has been held by a final decision to be a surrogate organisation of such a banned organisation;

3. of a government, organisation or institution outside the Federal Republic of Germany active in pursuing the objectives of one of the parties or organisations indicated in Nos 1 and 2 above; or

4. the contents of which are intended to further the aims of a former National Socialist organisation;

shall be liable to imprisonment not exceeding three years or a fine. ...

(3) Paragraph 1 above shall not apply if the propaganda material or the act [in question] is meant to serve civil education, to [combat] unconstitutional movements, to promote art ..., science, research or teaching, to report on current or historical events, or [to serve] similar purposes.

(4) If the guilt is of a minor nature, the court may order a discharge under this provision."

Article 86a [Using symbols of unconstitutional organisations]

"(1) Whosoever

1. domestically distributes or publicly uses, in a meeting or in written materials (section 11(3)) disseminated by him, symbols of one of the parties or organisations indicated in Nos 1, 2 and 4 of Article 86 § 1; or

2. produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use in Germany or abroad in a manner indicated in No 1,

shall be liable to imprisonment not exceeding three years or a fine.

(2) Symbols within the meaning of paragraph 1 above [means] in particular flags, insignia, uniforms and parts thereof, slogans, and forms of greeting. Symbols which are so similar as to be mistaken for those named in the first sentence shall be [deemed to be] equivalent to them.

(3) Article 86 §§ 3 and 4 shall apply *mutatis mutandis*."

30. In its judgment of 18 October 1972, no. 3 StR 1/71 I, the Federal Court of Justice clarified the substance of Article 86a of the Criminal Code. Its purpose is to prevent the revival of prohibited organisations or the unconstitutional ideas pursued by them. The provision also serves to maintain political peace by avoiding any appearance of such a revival, as well as any perception on the part of domestic or foreign observers of

German political affairs that domestic politics have developed in a manner contrary to the rule of law by tolerating anti-constitutional efforts of the tendency embodied by the respective symbol. Such a perception and ensuing reactions could significantly impair political peace. Article 86a of the Criminal Code furthermore seeks to prevent the use of the symbols of prohibited anti-constitutional organisations – irrespective of the intentions of such use – becoming common again so that the objective of banning such symbols from German political life is not achieved, resulting in a situation in which those in favour of the political goals for which those symbols stand could use such symbols without danger.

31. Still according to the 1972 judgment, it is not necessary, given the purpose of Article 86a of the Criminal Code, for the use of a symbol to fall within the provision's scope, that there be proof that the symbol was used to support anti-constitutional objectives, that the use has to be understood as supporting the objectives of the prohibited organisation, or that the use constituted a concrete threat to constitutional democracy. The provision bans such symbols, as a rule, from German political life and establishes a "communicative taboo" (*kommunikatives Tabu*) (see Federal Constitutional Court, no. 1 BvR 150/03, decision of 1 June 2006).

32. In the light of this broad scope of Article 86a of the Criminal Code, domestic courts have, in addition to the scenarios covered by Article 86 § 3 of the Code, restricted its scope and exempted uses which do not contravene the provision's purpose or are even supposed to reinforce its purpose (see Federal Court of Justice, no. 3 StR 486/06, judgment of 15 March 2007). It follows from that judgment that the use of a symbol of an unconstitutional organisation thus does not fall within the scope of Article 86a of the Code, where the opposition to the unconstitutional organisation and its ideology is obvious and clear and can immediately be recognised by an observer. In such cases, imposing criminal liability would be difficult to reconcile with the right to freedom of expression of persons who want to protest against the revival of Nazi ideas by striking at the symbols embodying them. However, where the display has multiple meanings or where the rejection of Nazi ideas cannot be clearly recognised, such a display contravenes the provision's purpose and is not exempted from its scope. Moreover, in the light of the provision's "taboo function", it is not sufficient that a certain conduct pursued the aim of criticising in order for it to be exempted from the provision's scope (see Federal Constitutional Court, no. 1 BvR 204/03, decision of 23 March 2006). For an assessment of whether or not a certain use of a symbol of an unconstitutional organisation is to be exempted from the scope of Article 86a of the Criminal Code, all circumstances of the case have to be taken into account (see Federal Court of Justice, no. 3 StR 164/08, decision of 1 October 2008).

33. In the light of Himmler's function as the sole leader of the SS, an unconstitutional organisation, publicly showing a picture of him in SS

uniform has been found to amount, in itself, to the use of symbols of unconstitutional organisations within the meaning of Article 86a of the Code (see Munich Court of Appeal, no. 5 OLG 13 Ss 137/15, judgment of 7 May 2015).

2. The Code of Criminal Procedure

34. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 344 [Reasoning of an appeal on points of law]

"(1) The appellant shall make a statement on the extent to which he contests the judgment and applies for it to be quashed (notices of appeal on points of law) and shall give reasons for his application.

(2) The reasoning must show whether the judgment is contested because of a violation of the law of procedure or because of a violation of a different legal provision. In the former case the facts which constitute the defect have to be set out."

Article 345 [Time-limit for reasoning the appeal on points of law]

"...

(2) The defendant may only [submit notices of appeal and the grounds therefore] in the form of observations signed by defence counsel or a lawyer, or orally, to be recorded by the court's registry."

35. Whereas appeals on points of law alleging a violation of a provision relating to proceedings must set out the facts which constitute the defect within the meaning of Article 344 § 2, second sentence, of the Code of Criminal Procedure, it suffices for an appeal on points of law alleging a violation of a provision of substantive law if the appellant states that he or she alleges such a violation; it is not required that he or she elaborate the grounds for such an appeal. Where the appellant does not provide specific grounds for an appeal alleging a violation of a provision of substantive law, or does not make a valid submission in that regard, the Court of Appeal is required to examine *ex officio* whether the appealed judgment violated a provision of substantive law.

36. Where the reasoning of an appeal on points of law is not submitted in the form of observations signed by a lawyer, but orally (to be recorded by the court's registry), Article 345 § 2 of the Code of Criminal Procedure requires, in accordance with the consistent case-law of the domestic courts, that the judicial officer (*Rechtspfleger*) advise on making pertinent submissions in line with the formal requirements so as to secure the interests of the appellant and to avoid the Court of Appeal having to examine ill-founded or incomprehensible submissions (see, for example, Federal Court of Justice, no. 3 StR 88/96, decision of 21 June 1996). Therefore, submissions regarding the grounds for an appeal on points of law are, as a rule, inadmissible where the judicial officer merely writes down

what the appellant dictates, or copies observations written by the appellant (ibid.).

COMPLAINT

37. The applicant complained under Article 10 of the Convention about his criminal conviction for the offence of using the symbols of unconstitutional organisations – in this instance, the picture of Himmler in SS uniform wearing a swastika armband – in a post on his blog on 23 March 2014.

THE LAW

38. The Court notes that the Federal Constitutional Court found the applicant's constitutional complaint to be inadmissible without, however, indicating with which admissibility requirement the applicant had failed to comply (see paragraph 28 above). It observes that the inadmissibility of the constitutional complaint is not evident from the case-file (compare and contrast *Colak and Others v. Germany* (dec.), nos. 77144/01 and 35493/05, 11 December 2007; and *Karabulut v. Germany* (dec.), no. 59546/12, § 40, 21 November 2017). In particular, it is not obvious that the applicant failed to comply with a particular formal requirement for lodging his constitutional complaint, as he lodged that complaint within the one-month time-limit under domestic law after service of the Court of Appeal's decision (see paragraphs 25 and 26 above) and the Court of Appeal had entered into an assessment of the merits of his appeal on points of law (see paragraph 25 above and *Gäfgen v. Germany* [GC], no. 22978/05, § 143, ECHR 2010). The Court is not in a position to establish the reason why the applicant's constitutional complaint was considered inadmissible (see *Annen v. Germany*, no. 3690/10, § 39, 26 November 2015). It can, however, leave open whether the applicant exhausted domestic remedies as required by Article 35 § 1 of the Convention, because the present application is, in any event, inadmissible because it is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention for the reasons set out below.

39. The applicant argued that Article 86a § 1 of the Criminal Code (as interpreted by the domestic courts) requiring that a person using a symbol of an unconstitutional organisation clearly distance himself or herself from Nazi ideology in order to avoid criminal liability constituted an interference with freedom of expression that was not necessary in a democratic society. A milder but similarly effective measure would be to sanction only such use

that constituted propaganda for the respective organisations or their ideology. In *Vajnai v. Hungary* (no. 33629/06, ECHR 2008) the Court considered that it could not be imputed that the fact that a person used a symbol that could stand for totalitarian notions but also for other meanings indicated that he or she used the symbol to identify with totalitarian ideas. Rather, the context was to guide the assessment.

40. In that regard, he submitted that the domestic courts had not taken all the circumstances of the case into account and had thus failed to consider that his blog post had constituted a protest against discrimination against children with a migrant background and the working methods of the employment office, which he considered to resemble those employed by the Nazis. Notably, the domestic courts had not taken into account the fact that he had posted in a critical manner about capitalism and about the dealings between the employment office and his daughter several times, but had looked at the post of 23 March 2014 in isolation. Nor had they taken into account the fact that the authorities had admitted that there was no legal basis for the employment office to demand a copy of his daughter's latest school report and that there had been various reports in the media indicating that children of persons receiving social welfare payments and children with a migrant background were discriminated against in schools and by employment offices. His blog post had been intended to contribute to a debate of public interest about such discrimination and institutional racism.

41. Furthermore, it had to be taken into account that he had not used the swastika as such, but had rather used a historic picture of Himmler. Had he used a picture of Himmler that had not shown him wearing a swastika, this would not have been criminally sanctioned. Likewise, it was not understandable why the domestic courts had made reference to him not having distanced himself from the quoted statement given the fact that reproducing the statement as such had not been prohibited. In any event, the domestic courts had been wrong to consider that he had not addressed the statement in his blog post. He had contrasted Himmler's statement with that of the staff member of the employment office to illustrate the fact that professional success could nowadays be achieved only if children and young adults – especially those with foreign roots – cooperated with the employment offices, just as they had been required to cooperate with the SS during the Nazi era.

42. Article 10 of the Convention, in so far 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, 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."

43. The Court reiterates that Article 10 of the Convention applies to the Internet as a means of communication and that the publication of photographs on an Internet site falls under the right to freedom of expression (see *Ashby Donald and Others v. France*, no. 36769/08, § 34, 10 January 2013). It considers that the applicant's conviction for having displayed a picture of Himmler in SS uniform with a swastika armband in his blog post of 23 March 2014 amounted to an interference with his right to freedom of expression, as guaranteed by Article 10 of the Convention. Such interference will infringe the Convention if it does not meet the requirements of Article 10 § 2. 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.

44. The Court is satisfied that the applicant's conviction was prescribed by Article 86a of the Criminal Code. It notes that the purpose of that provision is to prevent the revival of prohibited organisations or the unconstitutional ideas pursued by them, to maintain political peace, and to ban symbols of unconstitutional organisations in German political life (see paragraph 30 above). The Court therefore considers that the interference in question was in accordance with the law and pursued the legitimate aim of the prevention of disorder.

45. The fundamental principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law and have recently been summarised as follows (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 196, ECHR 2015 (extracts)):

> "(i) Freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10 § 2, it applies 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'. As set forth in Article 10, this freedom is subject to exceptions, but these must be construed strictly, and the need for any restrictions must be established convincingly.
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> (ii) The adjective 'necessary' in Article 10 § 2 implies the existence of a pressing social need. The High Contracting Parties have a margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the law and the decisions that apply it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a 'restriction' can be reconciled with freedom of expression.
>
> (iii) The Court's task is not to take the place of the competent national authorities but to review the decisions that they made under Article 10. This does not mean that the Court's supervision is limited to ascertaining whether these authorities exercised

> their discretion reasonably, carefully and in good faith. The Court must rather examine the interference in the light of the case as a whole and determine whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it were relevant and sufficient. In doing so, the Court has to satisfy itself that these authorities applied standards which were in conformity with the principles embodied in Article 10 and relied on an acceptable assessment of the relevant facts."

46. Another principle that has been consistently emphasised in the Court's case-law is that there is little scope under Article 10 § 2 of the Convention for restrictions on political expression or on debate on questions of public interest (ibid., § 197, with further references). At the same time, the Court has always been sensitive to the historical context of the High Contracting Party concerned when reviewing whether there exists a pressing social need for interference with rights under the Convention (ibid., § 242).

47. In the light of their historical role and experience, States which have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis (ibid., § 243, with further references). The Court considers that the legislature's choice to criminally sanction the use of Nazi symbols, to ban the use of such symbols from German political life, to maintain political peace (also taking into account the perception of foreign observers), and to prevent the revival of Nazism (see paragraph 30 above) must be seen against this background.

48. The Court observes that, in accordance with Article 86 § 3 of the Criminal Code, to which Article 86a § 3 of the Criminal Code refers, no criminal liability arises where the use of such symbols is meant to serve civil education, to combat unconstitutional movements, to promote art or science, research or teaching, to report on current or historical events, or serve similar purposes (see paragraph 29 above). In addition, the domestic courts have restricted the scope of Article 86a of the Criminal Code and exempted uses of the respective symbols which do not contravene the provision's purpose, including where the opposition to the ideology embodied by the symbol used is obvious and clear, not least in order to sufficiently respect the right to freedom of expression in protesting against the revival of Nazi ideas (see paragraph 32 above). While the critical use of the respective symbols does not suffice to give rise to the possibility of exemption from criminal liability under domestic law, in line with one of the provision's purposes (that of banning the respective symbols from German political life altogether), the Court considers that exemption from criminal liability where opposition to the ideology embodied by the used symbols is "obvious and clear" (see paragraph 32 above) constitutes an important safeguard for the right to freedom of expression.

49. Turning to the circumstances of the applicant's conviction, the Court observes that the symbol used by the applicant – a picture of Heinrich Himmler in SS uniform with a swastika armband – cannot be considered to

have any other meaning than that of Nazi ideology (compare and contrast the cases of *Vajnai v. Hungary*, no. 33629/06, §§ 52 et seq., ECHR 2008, and *Fratanoló v. Hungary*, no. 29459/10, § 25, 3 November 2011, concerning the use of the red star). It takes note of the fact that domestic courts have, on another occasion, held that showing a picture of Himmler in SS uniform in itself constituted the use of symbols of unconstitutional organisations within the meaning of Article 86a of the Criminal Code (see paragraph 33 above).

50. The applicant must have been aware of the pertinent provision and case-law of the domestic courts, not least because he had been convicted of the same offence for having published a picture of Angela Merkel in Nazi uniform with a swastika armband and a painted Hitler-moustache some six weeks before he published the blog post at issue in the present case (see paragraph 13 above).

51. The Court accepts that the applicant, by displaying the picture of Himmler in SS uniform with a swastika armband in his blog post, did not intend to spread totalitarian propaganda, to incite violence, or to utter hate speech, and that his expression had not resulted in intimidation. It acknowledges that there have been various press reports detailing complaints that children of persons receiving social welfare and children with a migrant background are discriminated against in school and by employment offices (see paragraph 11 above). The applicant, through his series of six blog posts (see paragraphs 4-10 above), may have intended to contribute to a debate of public interest.

52. Thus, the question arises whether the domestic courts would have been required to examine the blog post of 23 March 2014, which led to the applicant's conviction, together with his other blog posts concerning the interaction between the employment office and his daughter. The Court observes that the post in question, which was the third on that matter, did not contain any reference or visible link to the applicant's earlier posts (see paragraphs 4-8 and 10 above). It was not immediately understandable for a reader of the post that it was part, or meant to be part, of a series of posts that may have been intended to contribute to a public debate. The domestic courts cannot be faulted for having considered only the specific utterance that was evident to the reader, that is the picture of Himmler in SS uniform with a swastika armband, the quoted statement, and the text written underneath, when assessing the applicant's criminal liability.

53. In the text of the blog post, which was addressed to the staff member of the employment office handling the file of the applicant's daughter, the applicant criticised the fact that various queries he had made to the employment office had remained unanswered and that the authorities were not providing free meals to his daughter and were not paying for her commuting to school (see paragraph 8 above). Moreover, he criticised the employment office for not knowing the needs of children and thus hindering

rather than promoting them. At no point is it mentioned that the applicant's daughter is of foreign origin and discriminated against and that the applicant was receiving social welfare benefits (see paragraphs 7, 8 and 10 above). Nor was there any parallel drawn or explanation given why the request by the staff member of the employment office (see paragraph 3 above) could be compared to what had happened during the Nazi regime. Not a single phrase of the text referred to racism or discrimination. The Court thus considers that the domestic courts can neither be reproached for finding that there was no connection between the text and the policies which the Nazi symbols stood for, nor for concluding that the applicant had used the picture as an "eye-catching device" (see paragraphs 17 and 25 above).

54. The Court notes that this gratuitous use of symbols was exactly what the provision sanctioning the use of symbols of unconstitutional organisations was intended to prevent, as it was meant to pre-empt anyone becoming used to certain symbols by banning them from all means of communication (the so-called "communicative taboo" – see paragraph 31 above). The case-law of the domestic court is clear in so far as the critical use of Nazi symbols is not sufficient to exempt a person from criminal liability for such use (see paragraph 32 above). Rather, a clear and obvious opposition to Nazi ideology is required (ibid.). Having regard to the circumstances of the case, the Court sees no reason to depart from the assessment of the domestic courts that the applicant did not clearly and obviously reject Nazi ideology in his blog post (see paragraphs 17 and 25 above).

55. While the sentence of 120 day-fines was not negligible, the Court notes that the sentence had been reduced from a prison sentence to a fine in course of the proceedings (see paragraphs 16-17 above) and that the applicant had been convicted of a similar offence only a few weeks before he published the blog post at issue.

56. Reiterating that the historical experience of Germany is a weighty factor to be taken into account when determining, when it comes to recourse to symbols such as those at issue in the present case, whether there exists a pressing social need for interfering with an applicant's right to freedom of expression, as guaranteed by Article 10 of the Convention, the Court finds, in light of all the circumstances of the case, that the domestic authorities adduced relevant and sufficient reasons and did not overstep their margin of appreciation. The interference was therefore proportionate to the legitimate aim pursued and was thus "necessary in a democratic society".

57. Accordingly, the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 5 April 2018.

Claudia Westerdiek
Registrar

Erik Møse
President