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

FOURTH SECTION

DECISION

Application no. 10876/21
Lutz SCHELHORN and Danny SCHELHORN
against Germany

The European Court of Human Rights (Fourth Section), sitting on 8 October 2024 as a Committee composed of:

Faris Vehabović*, President*,
Armen Harutyunyan,
Anja Seibert-Fohr*, judges*,
and Simeon Petrovski, *Deputy Section Registrar,*

Having regard to:

the application (no. 10876/21) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 12 February 2021 by two German nationals, Mr Lutz Schelhorn and Mr Danny Schelhorn, who were born in 1959 and 1987 respectively, and live in Stuttgart ("the applicants") and were represented by Mr S. von Raumer, a lawyer practising in Berlin;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The applicants are members of the "Hells Angels Motorcycle Club" ("HAMC") Stuttgart. The case concerns the ban of public use of the symbol "HAMC" as well as the alleged lack of impartiality of the president of the Federal Constitutional Court who was part of the bench adjudicating the applicants' constitutional complaint.

2. In Germany, the "HAMC" is divided into local charters without a national umbrella organisation. Fourteen of these charters are banned due to their criminal activities. The remaining charters, including the "HAMC Stuttgart", still exist and their operation is not unlawful. All "HAMC" charters use the same symbol, notably on their vests and motorcycles, to

which the name of the city of the local charter – in the case at hand "Stuttgart" – is normally added under the symbol (so-called "bottom rocker").

3. Pursuant to section 9 §§ 1 and 2 in conjunction with section 20 § 1 of the Act on Associations (AA), the public use of symbols of a banned association or of a symbol which has such level of similarity to a symbol of a banned association that it could be confused with it constitutes a criminal offence punishable by a fine or an imprisonment of up to one year. Given the inconsistent approach of the criminal courts whether the use of the "HAMC" symbol in combination with the name of a charter which was not banned fell within the remit of these provisions, section 9 § 3 was added to the AA in 2017. According to this provision, section 9 § 1 AA also applies where an association that is not banned uses the symbol of a banned association "in essentially the same form", with that latter term referring, in particular, to situations where the symbol of a banned association, or parts thereof, is combined with a different regional name and the overall appearance resembles the symbol of the banned association.

4. The applicants lodged a constitutional complaint with the Federal Constitutional Court against this provision, alleging a breach of their fundamental rights. By order of 9 July 2020, the Federal Constitutional Court declined to accept the constitutional complaint for adjudication (no. 1 BvR 2067/17, served on the applicants on 14 August 2020). The Federal Constitutional Court in essence found that the statutory ban on public use of association-specific symbols amounted to a serious interference with the applicants' rights to freedom of expression and of association. It was, however, proportionate since the legislature had considerable reasons to ban the public use of symbols of a banned association even if combined with a different regional name. In particular, the ban on public use of symbols was inextricably linked to, and served to implement, the ban of the association itself, which was based on the association's criminal activities and subject to stringent legal requirements.

5. As a result, the public use of the "HAMC" symbol is *de facto* prohibited and punishable in Germany.

6. The applicants in essence assert before the Court that being a "Hells Angel" and a member of "HAMC Stuttgart" constituted the core of their identity. Part of that identity was to wear the symbols of their club in public. The ban thus amounted to a serious interference with their rights under Articles 10 and 11 of the Convention and Article 1 of Protocol 1 to the Convention, which was neither prescribed by law nor pursued a legitimate aim. Neither the legislature nor the Federal Constitutional Court had produced evidence that the general public associated the "HAMC" symbols in combination with the suffix "Stuttgart" with any banned "HAMC" charter. There was also no proof that all "HAMC" charters or "HAMC" members were criminal or that the use of "HAMC" symbols had an intimidating effect on the public. In any event, blanket bans on ambiguous symbols were, in

principle, deemed to be disproportionate under the Court's case-law (reference was made to *Vajnai v. Hungary*, no. 33629/06, ECHR 2008) due to their chilling effect.

7. The applicants further complain under Article 6 § 1 of the Convention that the Federal Constitutional Court's bench included its president, who was a member of Parliament, as well as a deputy leader of the parliamentary group of the governing party in 2017. It was thus likely that he had voted in favour of section 9 § 3 of the AA, even though there was no proof in this respect.

THE COURT'S ASSESSMENT

A. Alleged violation of Article 11 of the Convention

8. As the essence of the applicants' complaint relates to displaying their "HAMC" membership in public (see paragraph 6 above), the Court finds it appropriate to examine the complaint under Article 11 of the Convention, considered in the light of Article 10 (see, *mutatis mutandis*, *Herri Batasuna and Batasuna v. Spain*, nos. 25803/04 and 25817/04, § 74, ECHR 2009). It finds that the ban on using the "HAMC Stuttgart" symbol in public pursuant to section 9 § 3 of the AA in conjunction with section 20 § 1 thereof, amounted to an interference with the applicants' rights under Article 11 of the Convention, considered in the light of Article 10

9. It is satisfied that this interference was "prescribed by law" and that section 9 § 3 of the AA, as interpreted by the Federal Constitutional Court, was sufficiently precise and foreseeable as to its scope.

10. The Court further considers that the ban on using the "HAMC Stuttgart" symbol in public can be regarded, given the reasons provided by the Constitutional Court (see paragraph 4 above), to have pursued one of the aims set out in Article 11 § 2 of the Convention, namely the "prevention of disorder or crime" and the "protection of the rights of others".

11. To determine whether the interference complained of was "necessary in a democratic society", the Court would begin by pointing out that, contrary to *Vajnai* (cited above, §§ 47 and 51), the expression at hand is not of a political nature. The margin of appreciation afforded to the respondent State in the present case was thus considerably wider than in *Vajnai*. The Court notes with respect to the severity of the interference, that it is mitigated by the fact that the applicants remained free to use the existing symbols in private.

12. Furthermore, the objective ambiguity to be attached to the public use of the "HAMC" symbol – if any – is not comparable to the one established in *Vajnai*, with regard to the Red Star (ibid., §§ 52 et seq.). The Court is ready to accept that the use of the "HAMC" symbol with the suffix "Stuttgart" entailed at least some risk of confusion with other "HAMC" charters,

including those that were banned. Moreover, it notes that the use of the "HAMC" symbol which was common to all "HAMC" charters emphasised the affiliation to other "HAMC" charters and that the applicants emphasised their affiliation to an overarching "Hells Angels" identity, which was also expressed in the use of uniform symbols. It is therefore somewhat contradictory if they deny that these uniform symbols – albeit used in combination with the name of a specific charter – also, due to their similarity, expressed a certain degree of identification with other charters of this movement, fourteen of which had been banned due to their criminal activities.

13. The Court further notes that the aim of effectively implementing a ban on criminal associations – in the present case the ban on other "HAMC" charters operating in Germany, which itself was subject to stringent legal requirements under domestic law – carries great weight in a democratic society based on the rule of law. Without effective implementation mechanisms – such as the ban at hand – bans on criminal associations could easily be circumvented, and the primordial objectives pursued therewith could become unattainable in practice.

14. Lastly, the Court emphasises that the Federal Constitutional Court analysed the proportionality of the ban at hand in a thoroughly reasoned decision, taking due note of the applicants' arguments and balancing the competing interests in a comprehensive and transparent manner. In view of this decision, the Court reiterates that its task is not to substitute its own view for that of the national authorities, which are better placed than an international court to decide both on legislative policy and on measures of implementation, but to review under Article 11 of the Convention the decisions they delivered in the exercise of their discretion (*Internationale Humanitäre Hilfsorganisation e. V. v. Germany*, no. 11214/19, § 80, 10 October 2023).

15. Having regard to the foregoing, the Court considers that the domestic authorities adduced relevant and sufficient reasons to justify the ban on using the "HAMC Stuttgart" symbol in public and that they 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".

It follows that the applicants' complaint under Article 11, considered in the light of Article 10, is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3(a) and 4 of the Convention.

B. Complaint under Article 1 of Protocol No. 1 to the Convention

16. In so far as the applicants complained under Article 1 of Protocol 1 to the Convention, the Court considers that the complaint is incompatible *ratione materiae* with Article 1 of Protocol No. 1 to the Convention. It must therefore be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Alleged violation of Article 6 of the Convention

17. The Court notes, first of all, that there is no indication that the president of the Federal Constitutional Court was subjectively biased against the applicants. The issue is whether, due to his position as a member of Parliament when the impugned law was passed, his participation in the decision of the Constitutional Court casted legitimate doubts on his objective impartiality.

18. The Court reiterates that neither Article 6 § 1 nor any other provision of the Convention requires States to comply with any theoretical constitutional concept such as the notion of the separation of powers. The question is always whether, in a given case, the requirements of the Convention, in the present case the requirement of "objective" impartiality, are met (see *Pabla Ky v. Finland*, no. 47221/99, § 29, ECHR 2004-V).

19. In this respect the Court notes that the president of the Federal Constitutional Court had, at the time when the impugned law was passed, exercised a political function in the legislature; he did not carry out advisory and judicial functions in the same case (compare and contrast *Procola v. Luxembourg,* judgment of 28 September 1995, §§ 44-45, Series A no. 326). There is no evidence that – and, if so, how – he had voted on the impugned law as a member of Parliament, nor that he had played a prominent role in the legislative procedure (compare and contrast *McGonnell v. the United Kingdom*, no. 28488/95, §§ 53 and 55, ECHR 2000-II). There is no legitimate ground to fear that the president of the Federal Constitutional Court had felt bound to decide the applicants' case in a certain way because of the political vote which he may previously have taken as a member of Parliament.

20. Given these circumstances, the Court cannot conclude that the mere fact that the president of the Federal Constitutional Court had been a member of Parliament, as well as deputy leader of the parliamentary group of the governing party when the impugned law had been passed was sufficient to raise doubts as to the independence and impartiality of this court in the case at hand (see, *mutatis mutandis, Pabla Ky*, cited above, §§ 33 et seq.).

21. It follows that the complaint under Article 6 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 7 November 2024.

Simeon Petrovski Deputy Registrar	Faris Vehabović President