



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

FIFTH SECTION

**CASE OF ANNEN v. GERMANY**

*(Application no. 3690/10)*

JUDGMENT

STRASBOURG

26 November 2015

**FINAL**

**26/02/2016**

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Annen v. Germany,**

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

Boštjan M. Zupančič, *President*,

Angelika Nußberger,

Ganna Yudkivska,

Vincent A. De Gaetano,

André Potocki,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 13 October 2015,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in an application (no. 3690/10) 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”) by a German national, Mr Klaus Günter Annen (“the applicant”), on 18 January 2010.

2. The applicant was represented by Mr L. Lennartz, a lawyer practising in Euskirchen. The German Government (“the Government”) were represented by their Agents, Mrs K. Behr and Mr H.-J. Behrens, of the Federal Ministry of Justice.

3. The applicant mainly alleged that his right to freedom of expression had been violated.

4. On 25 March 2013 the application was communicated to the Government.

5. Written submissions were received from the Alliance Defending Freedom and *Aktion Lebensrecht für Alle* as well as from the European Centre for Law and Justice, which had been granted leave by the President to intervene as third parties (Article 36 § 2 of the Convention and Rule 44 § 2).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

#### A. The proceedings at issue

6. The applicant was born in 1951 and lives in Weinheim.

7. On 18 and 19 July 2005 the applicant, who campaigns against abortion, distributed leaflets in the immediate vicinity of the medical practices of anesthetists Dr M. and Dr R., who run a day clinic. Furthermore, the applicant deposited leaflets in all letterboxes in the vicinity of the day clinic.

8. The front page of the leaflets contained the following text in bold letters:

“In the day clinic Dr M./Dr R. [full names and address] unlawful abortions are performed” (*“In der Tagesklinik Dr.M./Dr.R. [...] werden rechtswidrige Abtreibungen durchgeführt”*)

9. Followed by an explanation set in smaller letters:

“which are, however, allowed by the German legislator and are not subject to criminal liability. The attestation of counselling protects the “doctor” and the mother from criminal responsibility, but not from their responsibility before God.” (*“die aber der deutsche Gesetzgeber erlaubt und nicht unter Strafe stellt. Der Beratungsschein schützt „Arzt“ und Mutter vor Strafverfolgung, aber nicht vor der Verantwortung vor Gott.“*)

10. A box below contained the following text:

“According to international criminal law: murder is the intentional “bringing-to-death” of an innocent human being!” (*“Sinngemäß aus den internationalen Strafgesetzen: Mord ist das vorsätzliche “Zu-Tode-Bringen” eines unschuldigen Menschen!”*)

11. On the back of the folded leaflet, the applicant quoted the Federal Constitutional Court’s leading judgment with regard to abortion (see paragraph 28 below) as well as a statement by Christoph-Wilhelm Hufeland, the personal physician of Goethe and Schiller, dealing with the role of doctors in relation to voluntary euthanasia and abortion. He also cited section 12 § 1 of the Law on Conflicts in Pregnancy (see paragraph 27 below) and asked readers to make use of their influence on those performing and assisting in abortions.

Furthermore, the following text appeared on the back of the folded leaflet:

“The murder of human beings in Auschwitz was unlawful, but the morally degraded NS-State allowed the murder of innocent people and did not make it subject to criminal liability.” (*“Die Ermordung der Menschen in Auschwitz war rechtswidrig, aber der moralisch verkommene NS-Staat hatte den Mord an den unschuldigen Menschen erlaubt und nicht unter Strafe gestellt.”*)

12. Below this sentence the leaflet referred to the website “www.babycaust.de”. This website, which was operated by the applicant, contained, *inter alia*, an address list of so-called “abortion doctors”, in which the day clinic and the full names of Dr M. and Dr R. were mentioned. This list was accessible on the website under the link “death or life”/“request for prayers for Germany” (*Gebetsanliegen für Deutschland*).

13. Dr M. and Dr R. filed a request for a civil injunction against the applicant. They submitted that only legal abortions were performed at their day clinic. The applicant’s leaflet created the erroneous impression that the abortions performed were contrary to the relevant legal provisions.

14. On 22 January 2007 the Ulm Regional Court granted the requested injunction and ordered the applicant to desist from further disseminating in the immediate vicinity of the day clinic leaflets containing the plaintiffs’ names and the assertion that unlawful abortions were performed in the plaintiffs’ medical practice. The Regional Court further ordered the applicant to desist from mentioning the plaintiffs’ names and address in the list of “abortion doctors” on the website “www.babycaust.de”.

15. The Regional Court considered that the statements in the applicant’s leaflet made the incorrect allegation that abortions were performed outside the legal conditions. This was not called into question by the further explanation that the abortions were not subject to criminal liability, as the whole layout of the leaflet was intended to draw the reader’s attention to the first sentence set in bold letters, while the further additions were set in smaller letters with the intent of dissimulating their content. The Regional Court further considered that by singling out the plaintiffs, who had not given him any reasons to do so, the applicant had created a so-called “pillory effect”. The allegations raised by the applicant seriously interfered with the plaintiffs’ personality rights. It followed that the applicant’s right to freedom of expression had to cede.

16. The Regional Court considered that the same principles applied to the mentioning of the plaintiffs’ names on the website entitled “babycaust.de”. This implied a connection between the plaintiffs and crimes which were, according to the applicant, comparable to the crimes committed by the Nazis during the Holocaust, and was not covered by the applicant’s freedom of expression and had thus not to be tolerated by the plaintiffs.

17. On 27 October 2007 the Stuttgart Court of Appeal rejected the applicant’s appeal. It did not find it necessary to examine whether the text of the leaflets had to be qualified as a statement of facts or as an expression of opinion as, in any event, the applicant’s freedom of opinion had to cede.

The Court of Appeal confirmed the Regional Court's assessment that the text in the leaflet implied that the plaintiffs performed unlawful actions. This was not called into question by the further explanations, as the average reader could not be expected to draw the distinction between the act of abortion which was justified under Article 218a § 2 of the Criminal Code and the act of abortion which was merely exempt from prosecution under Article 218a § 1 of the Criminal Code (see paragraph 26 below). Seen from a layman's point of view, the text of the leaflet created the impression that the act of abortion, as permitted by the German legislator, amounted to unlawful homicide, or even to murder. The statement was at the very least ambiguous and had not to be tolerated by the plaintiffs.

18. Even if one were to assume that the leaflet did not contain a wrong statement of facts, the applicant's freedom of expression had to cede. The Court of Appeal reiterated that freedom of expression conveyed the right to express an opinion even in an offending, shocking or disturbing way. If the expression of opinion was part of a debate on matters of public interest, there was an assumption militating in favour of freedom of expression. However, in the instant case the applicant had created a massive "pillory effect" by singling out the plaintiffs, who had not given the applicant any reason to do so. The performance of abortions was criticised with harsh and rigid words. This was further aggravated by the Holocaust reference. The Court of Appeal further noted that the applicant was not under any specific pressure to express his general criticism of the facilitation of abortions with such a massive violation of the plaintiffs' personality rights.

19. The Court of Appeal further considered that it had not been necessary for the plaintiffs to submit the exact content of the website, as this website was generally accessible and its content was thus known. It then went on to state:

"The content of the webpage is likewise characterised by the fact that the defendant labels individuals, including the plaintiffs, "abortion doctors" and puts their actions on a level with the national-socialist Holocaust and with mass murder. Therefore, the plaintiffs' claim to compel the defendant to refrain from performing the impugned action must be granted. In that connection, the court refers to its above reasoning. Furthermore, the defendant himself admitted that he had, on the webpage, labelled the plaintiffs "abortion doctors" who are directly or indirectly involved in the performance of abortions."

20. The Court of Appeal did not grant leave to appeal on points of law.

21. On 12 February 2008 the Federal Court of Justice refused the applicant's request for legal aid, on the ground that the applicant's intended appeal on points of law lacked sufficient prospect of success.

22. On 17 March 2008 the applicant lodged a constitutional complaint against the judgments of the Ulm Regional Court, of the Stuttgart Court of Appeal and against the decision of the Federal Court of Justice. He complained, in particular, that the impugned decisions violated his right to freedom of expression.

23. On 2 July 2009 the Federal Constitutional Court, sitting as a Committee of three judges, refused to admit the applicant's complaint for adjudication for being inadmissible, without providing reasons (no. 1 BvR 671/08). This decision was served on the applicant's counsel on 18 July 2009.

## **B. Further developments**

24. On 8 June 2010 the Federal Constitutional Court, sitting as a Committee of three judges, granted a further constitutional complaint of the applicant dealing with another set of proceedings before the Munich Regional Court and the Munich Court of Appeal (no. 1 BvR 1745/06). In this set of proceedings the courts had granted a civil injunction against the applicant, as the Ulm Regional Court and the Stuttgart Court of Appeal had done in the present case. They had ordered him, *inter alia*, to desist from disseminating leaflets similar to the ones now in dispute in the immediate vicinity of another gynaecological practice and to desist from publishing on his webpage the information that the doctor in question had performed or assisted in "unlawful" abortions.

25. The Federal Constitutional Court held that the civil injunction had violated the applicant's right to freedom of expression as provided in Article 5 § 1 of the German Basic Law (*Grundgesetz*) because the civil courts had not sufficiently taken into account that the doctor, who had himself publicly announced on the Internet that he performed abortions in his gynaecological practice, had not been confronted with an extensive loss of social reputation as a result of the applicant's activities. Furthermore, it underlined that the applicant had only blamed the doctor for having carried out allegedly immoral acts, but had not reproached him for having committed acts which were subject to criminal liability or forbidden by law in a wider sense. The Federal Constitutional Court moreover insisted on the fact that the applicant had contributed to a highly controversial debate of public interest and pointed out that, against the factual background of that case, the courts had not sufficiently clarified why and to what extent the special relationship between the doctor and women searching for counselling and medical treatment in the practice might have been jeopardised.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

26. The relevant provisions of the criminal code read as follows:

### **Section 218 Abortion**

“(1) Whosoever terminates a pregnancy shall be liable to imprisonment of not more than three years or a fine. Acts the effects of which occur before the conclusion of the nidation shall not be deemed to be an abortion within the meaning of this law.

(2) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if the offender acts against the will of the pregnant woman; or through gross negligence causes a risk of death or serious injury to the pregnant woman.

(3) If the act is committed by the pregnant woman the penalty shall be imprisonment of not more than one year or a fine.

(4) The attempt shall be punishable. The pregnant woman shall not be liable for attempt.”

### **Section 218a Exception to liability for abortion**

“(1) The offence under section 218 shall not be deemed fulfilled if

the pregnant woman requests the termination of the pregnancy and demonstrates to the physician by certificate pursuant to section 219 (2) 2<sup>nd</sup> sentence that she obtained counselling at least three days before the operation; the termination of the pregnancy is performed by a physician; and not more than twelve weeks have elapsed since conception.

(2) The termination of pregnancy performed by a physician with the consent of the pregnant woman shall not be unlawful if, considering the present and future living conditions of the pregnant woman, the termination of the pregnancy is medically necessary to avert a danger to the life or the danger of grave injury to the physical or mental health of the pregnant woman and if the danger cannot reasonably be averted in another way from her point of view.”

27. The relevant provision of the Law on Conflicts in Pregnancy (*Schwangerschaftskonfliktgesetz*) reads as follows:

### **Section 12 Refusal**

“(1) Nobody is obliged to assist in abortions. ...”

28. The Federal Constitutional Court, in its leading judgment of 28 May 1993 (BVerfGE 88, 203), accepted abortions being performed by physicians after the pregnant woman had obtained counselling by a third person, and developed a rather singular approach by qualifying certain acts of abortion as unlawful, but not punishable. Abortions which are performed without the establishment of a medical indication must not be treated as being justified (not unlawful) (*Schwangerschaftsabbrüche, die ohne Feststellung einer*



*Indikation nach der Beratungsregelung vorgenommen werden, dürfen nicht für gerechtfertigt (nicht rechtswidrig) erklärt werden*). However, abortions performed by a physician within twelve weeks after conception and following obligatory counselling are considered to be unlawful, but are exempt from criminal liability.

29. The relevant provisions of the German Civil Code read as follows:

**Section 823**

“(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person, is liable to make compensation to the other party for the damage arising from this. ...”

**Section 1004**

“(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction. ...”

30. According to the case-law of the German civil courts, section 823 §§ 1 and 2 in conjunction with section 1004 (in analogous application) of the Civil Code grants any person whose personality rights concretely risk being violated by another person a claim to compel that other person to refrain from performing the impugned action.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

31. The applicant complained that the civil injunction issued against him violated his right to freedom of expression as provided in Article 10 of the Convention, which, 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... for the protection of the reputation or rights of others, ...”

32. The Government contested that argument.

## A. Admissibility

### 1. *The parties' submissions*

33. The Government argued that the applicant, when lodging his complaint under Article 10 of the Convention, had simply referred to the statements he had made in his constitutional complaint to the Federal Constitutional Court, without submitting any further arguments under the Convention. Therefore, the application had not been sufficiently substantiated.

34. Moreover, the Government contended that the applicant had failed to lodge an appeal with the Federal Court of Justice against the Court of Appeal's decision not to grant leave to appeal. They also pointed out that the Federal Constitutional Court had refused to admit the applicant's complaint for adjudication for being inadmissible. Thus, he had failed to exhaust domestic remedies.

35. The applicant contested this view, outlining in particular that his submissions regarding the alleged violation had been clear and precise in themselves.

### 2. *The Court's assessment*

36. While the Court is not persuaded that a mere reference to the submissions before a domestic supreme jurisdiction represents sufficient substantiation of a complaint under the Convention, it notes that the applicant indicated the factual basis of the complaint as well as the nature of the alleged violation of the Convention. The Court is therefore satisfied that the applicant fulfilled the requirements to introduce a sufficiently substantiated complaint (compare, *mutatis mutandis*, *Allan v. the United Kingdom* (dec.), no. 48539/99, 28 August 2001 and *Božinovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 68368/01, 1 February 2005).

37. With regard to the applicant's failure to lodge an appeal on points of law with the Federal Court of Justice, the Court notes that this appeal is one of the remedies which should, in principle, be exhausted in order to comply with Article 35 § 1 of the Convention. However, in the present case, by decision of 12 February 2008, the five judges of the Federal Court of Justice who were also competent to adjudicate the applicant's case, refused to grant the applicant legal aid to lodge an appeal against the Court of Appeal's decision not to grant leave to appeal, arguing that his appeal had no reasonable prospects of success. The Court notes that appeals to the Federal Court of Justice, before which the applicant is obliged to be represented by a lawyer specially admitted to that court, can succeed only on points of law. In the light of the reasons given by the Federal Court of Justice for refusing to grant the applicant legal aid, it considers that the applicant cannot be blamed for having failed to exhaust domestic remedies by not continuing with the

appeal proceedings (see *Gnahoré v. France*, no. 40031/98, § 48, 19 September 2000 and *Storck v. Germany* (dec.), no. 61603/00, 26 October 2004).

38. The Court further notes that the Federal Constitutional Court considered the applicant's constitutional complaint to be inadmissible without, however, indicating with which admissibility requirement the applicant had failed to comply.

39. Having regard to the material before it, the Court notes that the applicant, represented by counsel, in his submissions to the Federal Constitutional Court raised in substance the complaints he then brought before this Court. It is not obvious that he failed to comply with a particular formal requirement for lodging his constitutional complaint. The Court is not in a position in the present case to establish the reason why the applicant's constitutional complaint was considered inadmissible (compare, *inter alia*, *Luig v. Germany* (dec.), no. 28782/04, 25 September 2007; *Granos Organicos Nacionales S.A. v. Germany* (dec.), no. 19508/07, 12 October 2010). Therefore the applicant has to be regarded as having exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention.

40. In conclusion, the Court rejects the Government's objections as to admissibility. It further notes that the complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) nor inadmissible on any other grounds. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **(a) The applicant**

41. The applicant alleged that his statements, according to which unlawful abortions had been performed which, however, had not been subject to criminal liability, constituted true statements of fact and formed part of a controversial debate on the laws governing abortion. Therefore, his right to express freely his opinion on abortion and to name those performing it had to outweigh the doctors' personality rights.

42. According to the applicant, he had not singled out the two doctors: neither by distributing the leaflets nor by mentioning the doctors' names and the day clinic's address on the webpage had he created a "pillory effect". The applicant pointed out that he had not listed only those two doctors on the webpage, but also many others performing abortions in line with the relevant German laws.

43. Regarding the webpage, the applicant further stated that he was no longer able to submit the exact content of the disputed webpage at the time relevant for the civil injunction. Nevertheless, he presented screenshots of similar sites offering a general overview of the webpage's former content and layout. He contested the screenshots presented by the Government, arguing that they had been taken from other webpages not relevant for the present application. The applicant also emphasised that the domestic courts had failed to take into account the context and the layout of the webpage listing the doctors' names and the day clinic's address. He specified that the doctors' names were not mentioned on the first page of his website, but only under the link "death or life"/"request for prayers for Germany" (*Gebetsanliegen für Deutschland*), asking visitors to the page to pray for those who performed, assisted with or supported abortions. The information affecting the two doctors had been organised in an alphabetical list ranking the cities concerned.

**(b) The Government**

44. The Government submitted that the interference with the applicant's right to freedom of expression had been justified as the domestic courts had given precedence to the doctors' personality rights after having properly classified, assessed and weighed the conflicting positions.

45. The Government further claimed that an average citizen, when confronted with the applicant's statements in the leaflet, would have come to the conclusion that abortions had been performed contrary to the relevant laws and that the doctors had, therefore, committed criminal offences. Although the applicant had corrected this impression, the clarification had not been sufficient. The Government pointed out that the layout of the leaflet had been intended to disguise the clarification which had been set in smaller letters and to focus the reader's attention on the statement that "unlawful abortions" had been performed.

46. Furthermore, the Government argued that the complete prohibition on publishing the doctors' names and the day clinic's address on the webpage was proportionate and necessary in a democratic society. They stated that the applicant had not been prohibited from expressing his critical opinion of abortion in general. Moreover, while admitting that no screenshots of the applicant's webpage had been included in the courts' case files, the Government presented screenshots of several current webpages also created by the applicant which they claimed to be similar to the one that he had set up at the relevant time. They emphasised that the website's layout had included a left-hand frame showing the pulse of a baby's heart, blood dripping down and other explicit images. Dramatically worded statements comparing abortions to the Holocaust had been displayed prominently on the webpage. According to the applicant's statement in the domestic

proceedings, the statements printed in the leaflet had also been included on the webpage.

47. Referring to the Court's judgment in the case *Hoffer and Annen v. Germany* (nos. 397/07 and 2322/02, 13 January 2011), the Government also pointed out that the parallels drawn with the Holocaust in both the leaflets and the webpage constituted, in the historical and social context, a very serious violation of the doctors' personality rights as protected by Article 8 of the Convention. They further submitted that the applicant had created a massive "pillory effect" by singling out the doctors. The impact of the applicant's campaign on the doctors' professional and private lives had to be taken into account. According to one of the doctors, the address list published on the applicant's webpage had been the first link to appear in a "google" search. As a consequence of the negative public attention, the doctors had closed the day clinic and had to build up another professional practice.

## *2. The third parties' submissions*

### **(a) Alliance Defending Freedom and *Aktion Lebensrecht für Alle* (ADF/ALfA)**

48. The Alliance Defending Freedom (ADF) and *Aktion Lebensrecht für Alle* (ALfA) considered that the issue of abortion was one of great public interest and concern. They pointed out that the debate was often characterised by strong language on both sides. However, referring to the Court's case-law, the ADF and ALfA emphasised that controversial opinions expressed in the course of an intense political debate of public interest were protected under Article 10, even if formulated in strong, offensive, shocking or disturbing language. Furthermore, given the importance of campaign groups in the democratic process, they submitted that there had to be significant reasons for any restrictions on pro-life campaigning. They invited the Court to find that the so-called protection of personality rights – a right which, according to the ADF and ALfA, was not found in the Convention – was not a sufficient reason for interfering with the freedom of speech of pro-life groups.

### **(b) European Centre for Law and Justice (ECLJ)**

49. In addition to the arguments also brought forward by the ADF and ALfA, the European Centre for Law and Justice (ECLJ) stressed that the applicant, when referring to Auschwitz and the Nazi regime, had neither intended to trivialise nor to exploit the Holocaust nor to interfere with the doctors' reputation but had pursued, especially with regard to his German audience, the legitimate aim of pointing out the difference between legality and justice. Moreover, the ECLJ argued that the abortion-Holocaust comparison had long been drawn in the debate, for example in pro-life campaigns in Poland and the United States of America.

### 3. *The Court's assessment*

50. The Court considers, and it was not disputed by the Government, that the civil injunction issued by the national courts amounted to an “interference” with the applicant’s right to freedom of expression as guaranteed by Article 10 of the Convention. Such interference will infringe the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was “prescribed by law”, whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was “necessary in a democratic society” in order to achieve those aims.

51. The Court finds, and this is common ground between the parties, that the interference was prescribed by section 823 § 1 in conjunction with section 1004 § 1 of the Civil Code (see paragraphs 29 and 30 above), and that the Civil Courts’ decisions were designed to protect “the reputation or rights of others”, namely the reputation and personality rights of Dr M. and Dr. R. The parties disagree, however, as to whether the interference was “necessary in a democratic society”.

#### (a) **General principles**

52. 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 *Delfi AS v. Estonia* [GC], no. 64569/09, § 131, 16 June 2015 with further references):

“(i) Freedom of expression constitutes 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 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’. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective ‘necessary’, within the meaning of Article 10 § 2, implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of 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 are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

53. Another principle that has consistently emphasised in the Court's case-law is that there is little scope under Article 10 of the Convention for restrictions on political expressions or on debate on questions of public interest (see, among other authorities, *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V; *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV; and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 102, ECHR 2013 (extracts)).

54. The Court further reiterates that the right to protection of reputation is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI; *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010). In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, no. 28070/06, § 64, 9 April 2009; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012 and *Delfi AS*, cited above, § 137).

55. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; *Axel Springer AG*, cited above, § 84 and *Delfi AS*, cited above, § 138).

56. In cases such as the present one the Court considers that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the person who has made the statement in dispute or under Article 8 of the

Convention by the person who was the subject of that statement. Indeed, as a matter of principle these rights deserve equal respect. Accordingly, the margin of appreciation should in principle be the same in both cases (compare *Axel Springer AG*, cited above, § 88 with further references).

57. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011; *Axel Springer AG*, cited above, § 88; *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 66, ECHR 2012 (extracts)).

**(b) Application of the above principles to the present case**

*(i) Order to desist from further disseminating leaflets in the immediate vicinity of the day clinic*

58. Turning to the circumstances of the instant case the Court notes, at the outset, that the domestic courts expressly acknowledged that the applicant's statement in the leaflet addressed questions of public interest and that he was allowed to pursue his political aims even by the use of exaggerated and polemic criticism. The courts also accepted that there was an assumption in favour of freedom of expression in cases of this kind.

59. The Court further observes that the domestic courts found that the applicant had created the erroneous impression that abortions had been performed outside the legal conditions, because the whole layout of the leaflet was intended to draw the reader's attention to the first sentence set in bold letters, while the further explanation was set in smaller letters with the intent of dissimulating its content. Furthermore, the domestic courts held that the applicant had created a massive "pillory effect" by singling out the two doctors. This had been further aggravated by the Holocaust reference.

60. The Court notes that the German law, under section 218a of the Criminal Code, draws a fine line between abortions which are considered to be "unlawful", but exempt from criminal liability, and those abortions which are considered as justified and thus "lawful" (see paragraphs 26 to 28 above). It follows that the applicant's statement that "unlawful abortions" had been performed was correct from a judicial point of view (see *Annen v. Germany* (dec.), nos. 2373/07 and 2396/07, 30 March 2010).

61. The Court moreover considers that – although the leaflet's layout was clearly designed to draw the reader's attention to the first sentence set in bold letters – the very wording of the applicant's further explanation, according to which the abortions were not subject to criminal liability, was sufficiently clear, even from a layperson's perspective. Although the assessment and interpretation of the factual background of a case is primarily a matter for the domestic courts, the Court, in the particular



circumstances of the present case and also bearing in mind the judgment of the Federal Constitutional Court of 8 June 2010 (see paragraphs 24 and 25 above) dealing with almost identical questions, is convinced that the mere fact that the additional explanation had not been visually highlighted does not imply that a reasonable person with ordinary awareness would assume that the abortions were performed outside the legal conditions and were forbidden in a stricter sense of criminal liability. With regard to the impact of the additional explanation, the Court also reiterates that it was directly attached to the first part of the applicant's statement and thus immediately accessible to the reader. Therefore, the facts of the present case have to be distinguished from those underlying the applicant's prior applications which the Court found to be manifestly ill-founded (see *Annen v. Germany* (dec.), nos. 2373/07 and 2396/07, cited above, and *Annen v. Germany* (dec.), no. 55558/10, 12 February 2013). In these cases, the applicant had disseminated leaflets and carried a cardboard poster which had given information about "unlawful" abortions, however without any further legal explanation being directly accessible to the reader.

62. While the Court furthermore accepts the domestic courts' position, according to which the applicant's campaign had been directly aimed at the two doctors, it also notes that the applicant's choice of presenting his arguments in a personalised manner, by disseminating leaflets indicating the doctors' names and professional address in the immediate vicinity of the day clinic, enhanced the effectiveness of his campaign. The Court also points out that the applicant's campaign contributed to a highly controversial debate of public interest. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake (see *A, B and C v. Ireland* [GC], no. 25579/05, § 233, ECHR 2010). Although the Government pointed out that the doctors, as a consequence of negative public attention, had closed the day clinic and had built up another professional practice, it is not clear from their allegations whether the applicant's activities actually caused this development. In this respect, the Court further notes that the doctors did not lodge a claim for compensation with the civil courts due to the negative impact on their business.

63. As to the applicant's reference to the Auschwitz concentration camps and the Holocaust, the Court reiterates that the impact an expression of opinion has on another person's personality rights cannot be detached from the historical and social context in which the statement was made. The reference to the Holocaust must also be seen in the specific context of German history (see *Hoffer and Annen v. Germany*, nos. 397/07 and 2322/07, § 48, 13 January 2011, and *PETA Deutschland v. Germany*, no. 43481/09, § 49, 8 November 2012). However, given the very wording of the leaflet, the Court cannot agree with the domestic courts' interpretation that the applicant had compared the doctors and their professional activities

to the Nazi regime. In fact, the applicant's statement according to which the killing of human beings in Auschwitz had been unlawful, but allowed, and had not been subject to criminal liability under the Nazi regime, may also be understood as a way of creating awareness of the more general fact that law may diverge from morality. Although the Court is aware of the subtext of the applicant's statement, which was further intensified by the reference to the webpage "www.babycast.de", it observes that the applicant did not – at least not explicitly – equate abortion with the Holocaust. Thus, the Court is not convinced that the prohibition of disseminating the leaflets was justified by a violation of the doctors' personality rights due to the Holocaust reference alone.

64. Having regard to the foregoing considerations and, in particular, the fact that the applicant's statement, which was at least not in contradiction with the legal situation with regard to abortion in Germany, contributed to a highly controversial debate of public interest, the Court, in view of the special degree of protection afforded to expressions of opinion which were made in the course of a debate on matters of public interest (see *Tierbefreier e.V. v. Germany*, no. 45192/09, § 51, 16 January 2014 with further references) and despite the margin of appreciation enjoyed by the Contracting States, comes to the conclusion that the domestic courts failed to strike a fair balance between the applicant's right to freedom of expression and the doctors' personality rights.

65. There has therefore been a breach of Article 10 of the Convention in respect of the order to desist from further disseminating the leaflets.

(ii) *Order to desist from mentioning the doctors' names and address in the list of "abortion doctors" on the website*

66. With regard to online publications, the Court has previously held that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general (see *Delfi AS*, cited above, § 133 with further references). The Court also reiterates the Internet's importance for the exercise of the right to freedom of expression generally (see *Times Newspapers Ltd v. United Kingdom (nos. 1 and 2)*, no. 3002/03 and 23676/03, § 27, 10 March 2009). At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no. 33014/05, § 63, ECHR 2011 (extracts)).

67. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated as never before, worldwide, in a matter of seconds, and sometimes remain

persistently available online. Bearing in mind the need to protect the values underlying the Convention, and considering that the rights under Articles 10 and 8 of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights. Thus, while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights (see *Delfi AS*, cited above, § 110).

68. The Court notes, at the outset, that the Court of Appeal found that the labelling of the doctors as “abortion doctors” on a website which was called “www.babycaust.de” implied a connection between the doctors and crimes which were, according to the applicant, comparable to the crimes committed by the Nazis during the Holocaust. It thus concluded, in eight lines of its relevant judgment, that the applicant had put the doctors’ actions on a level with the Holocaust and with mass murder, and that this was not covered by the applicant’s freedom of expression (see paragraph 19 above).

69. The Court further notes that the Court of Appeal considered that it had not been necessary for the doctors to submit the exact content of the website, as this website was generally accessible and its content was thus known. Furthermore, the Court observes, and this was not contested by the Government, that neither a description of the webpage’s exact content and layout nor a screenshot was included in the domestic case files.

70. As to the judgment’s reasoning, the Court observes that the Court of Appeal limited itself to finding that the same principles which had been elaborated with regard to the leaflet should also apply to the website. The domestic courts thus appear neither to have examined the content and the overall context of the specific link “death or life”/“request for prayers for Germany” under which the doctors’ names and professional address had been published in an alphabetical list, nor to have interpreted the expression “abortion doctors” against the background that abortions were in fact performed at the day clinic.

71. The Court reiterates that its task is to review whether the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, whether they relied on an acceptable assessment of the relevant facts (paragraph 54 above). It further observes that an examination of the case would therefore involve individual and contextual assessment, with reference to the situation at the time when the impugned publication was put online (compare *Ringier Axel Springer Slovakia, a. s. v. Slovakia*, no. 41262/05, § 106, 26 July 2011; *Ringier Axel Springer Slovakia, a.s. v. Slovakia (no. 3)*, no. 37986/09, §§ 83, 84, 7 January 2014).

72. More specifically, the Court also notes that the domestic courts do not seem to have drawn a distinction between, on the one hand, the applicant's statement on the leaflet, which had a geographically limited impact, and, on the other hand, his statements on the Internet, which could be disseminated worldwide. Additionally, an individual and contextual assessment might have included such matters as, for example, the exact content, the overall context and the specific layout of the applicant's webpage listing the doctors' names, the necessity to protect sensitive data as well as the doctors' previous behaviour, for example whether they themselves had publicly announced on the Internet that abortions were performed in the day clinic. Moreover, the domestic courts might have taken into consideration the impact of the applicant's statement on third parties and whether or not it was likely to incite aggression or violence against the doctors, in particular as their names and addresses had been mentioned on the applicant's website.

73. The Court, while it cannot judge on the substance of the case, considers that by mainly referring to their conclusions concerning the leaflet and by failing to address specific elements related to the applicant's Internet site, the domestic courts cannot be said to have applied standards which were in conformity with the procedural principles embodied in Article 10 of the Convention and to have based themselves on an acceptable assessment of the relevant facts (compare, among others, *Lombardi Vallauri c. Italie*, no. 39128/05, § 46, 20 October 2009; *Tănăsioaica v. Romania*, no. 3490/03, § 47, 19 June 2012; *Ringier Axel Springer Slovakia, a.s. v. Slovakia (no. 2)*, no. 21666/09, § 54, 7 January 2014).

74. The foregoing considerations are sufficient to enable the Court to conclude that the legal protection received by the applicant at the domestic level was not compatible with the procedural requirements of Article 10 of the Convention. There has accordingly been a violation of that provision in respect of the order to desist from mentioning the doctors' names and address on the website.

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

75. The applicant complained of a violation of his right to a fair trial in respect of the proceedings before the Federal Court of Justice and the Federal Constitutional Court. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

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

76. According to the applicant, both courts had violated his right to a fair trial because neither the Federal Court of Justice nor the Federal Constitutional Court had given reasons for their decisions.

77. The Court reiterates that the guarantees enshrined in Article 6 § 1 include the obligation for courts to give sufficient reasons for their decisions (see *H. v. Belgium*, 30 November 1987, § 53, Series A no. 127-B). Nonetheless, the Court has held that for national superior courts – such as the Federal Court of Justice and the Federal Constitutional Court – it suffices, when declining to admit or dismissing a complaint, simply to refer to the legal provisions governing that procedure if the questions raised by the complaint are not of fundamental importance (see, among many other authorities, *Vogl v. Germany* (dec.), no. 65863/01, 5 December 2002 and *Greenpeace e.V. and others v. Germany* (dec.), no. 18215/06, 12 May 2009).

78. The Court notes that the Federal Court of Justice’s decision had been limited to the subject of legal aid and that the Federal Constitutional Court had refused to admit the applicant’s constitutional complaint for adjudication for being inadmissible. The Court, under these circumstances, considers the courts’ reasoning sufficient.

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

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### A. Damage

81. The applicant claimed an undefined amount in respect of non-pecuniary damage on the ground that the Government had, in their submissions to the Court, alleged that he had shown provocative behaviour not only with regard to the circumstances underlying the present case, but also when campaigning against abortion on other occasions. The applicant argued that this amounted to “hostile conduct”.

82. The Government argued that the alleged “hostile conduct” in the course of the proceedings before the Court should not give rise to compensation for damage.

83. The Court does not discern any causal link between the violation found and the non-pecuniary damage alleged; it therefore rejects this claim.

## **B. Costs and expenses**

84. Submitting documentary evidence, the applicant claimed in total 13,696.87 euros (EUR) for costs and expenses before the civil courts. Moreover, he claimed EUR 2,403.80 for expenses incurred before the Federal Constitutional Court.

85. The Government did not comment on this.

86. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that the applicant failed to submit documentary evidence related to the expenses incurred before the Federal Constitutional Court. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 13,696.87 for costs and expenses before the civil courts, plus any tax that may be chargeable.

## **C. Default interest**

87. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## **FOR THESE REASONS, THE COURT**

1. *Declares*, unanimously, the complaint under Article 10 § 1 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds*, by five votes to two, that there has been a violation of Article 10 § 1 of the Convention in respect of the order to desist from further disseminating the leaflets;
3. *Holds*, by five votes to two, that there has been a violation of Article 10 § 1 of the Convention in its procedural aspect in respect of the order to desist from mentioning the doctors' names and address on the website;
4. *Holds*, by five votes to two,
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 13,696.87 (thirteen thousand six

hundred and ninety six euros and eighty seven cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 November 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek  
Registrar

Bostjan M. Zupančič  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Yudkivska and Jäderblom is annexed to this judgment.

B.M.Z.  
C.W.

## JOINT DISSENTING OPINION OF JUDGES YUDKIVSKA AND JÄDERBLOM

We respectfully disagree with the majority's finding of violations of Article 10 in this case.

The injunctions issued against the applicant consisted of an order to desist from “further disseminating in the immediate vicinity of the day clinic leaflets containing the plaintiffs' names and the assertion that unlawful abortions were performed in the plaintiffs' medical practice” and from spreading information about the plaintiffs' names and addresses via a website at the address [www.babycaust.de](http://www.babycaust.de) (paragraph 14 of the judgment).

The judgment is based on a presumption that the applicant's leaflets about two doctors, as well as mentioning their names and addresses on the website, “contributed to a highly controversial debate of public interest” (see paragraphs 62 and 64) in a State which does not prohibit abortions “by law in a wider sense” (paragraph 25).

It goes without saying that the very *issue of abortion* constitutes a matter of public interest, and society remains divided over abortion rights. Thus, a similar campaign against those responsible for *government policy* in this respect would undoubtedly warrant strong protection under Article 10. The same can be said, for instance, about those who are allegedly involved in serious malpractice in this domain (compare *Bergens Tidende and Others v. Norway*, no. 26132/95, 2 May 2000).

In the present case, however, we can hardly agree that a public interest threshold is reached when one is talking about ordinary doctors, merely performing their professional duties in strict accordance with the relevant rules, like many other gynaecologists in Germany. What was the interest for the general public – (a) in being deliberately misled about their professional integrity (the first word in the leaflet about their activities was “unlawful”), and (b) in having their clinic's address published on the internet in – to say the least – a very negative context?

Two doctors were singled out as the victims of the applicant's struggle against women's procreative liberty; and what the applicant accused the two doctors of doing was no more and no less than what other doctors were doing. The form and intensity he had chosen for his campaign had an intended outcome – the doctors had to close their clinic (see paragraph 47), which was a natural consequence in the circumstances: if the first result found when “googling” the clinic was the “babycaust” website, an average potential patient might prefer to avoid it. A potential patient might also choose not to be treated by doctors whose practices were associated with the word “unlawful”. In this respect we cannot subscribe to the majority's finding in paragraph 62 that it is not clear if there was actually a causal link between the applicant's activities and the closure of the clinic.



Indeed, the applicant's campaign proved to be counter-productive: it deprived women in the vicinity of the clinic from a wide spectrum of gynaecological services outside the scope of abortion. As can be seen from the case-file material, abortions constituted a minor part of the clinic's services.

We do not share the majority's view that the judgment of the Federal Constitutional Court of 8 November 2010 was dealing with "almost identical questions". That court underlined the key difference in its judgment; in that case the doctor himself had publicly advertised the abortion services on the internet, and had therefore consciously exposed himself to criticism from the anti-abortion movement (see paragraph 25).

The exposure as such of the two doctors did not contribute to the matter of public interest. Nevertheless, the applicant was able to demonise them by mixing their names with notions related to the most horrifying crime in the history of humankind – "Holocaust", "Auschwitz", "Nazi". It is, perhaps, tolerable as an artistic device to describe mass abortion as such in general (and the applicant's website was thus not closed), but not with respect to individual doctors faultlessly performing their ordinary duties.

It is also important to mention that the applicant was not held liable for his actions, and his website is still fully operational, although without the two doctors' names or the address of their former clinic. The injunction as regards the website did not affect the applicant's right to maintain the website or his criticism of abortion contained thereon, but was restricted to the publication of the plaintiffs' personal data. As regards the leaflets, the ban was restricted to distribution in the *immediate* vicinity of the medical practice and there was nothing to stop the applicant from continuing to disseminate his criticism of the plaintiffs elsewhere. Given their very limited effect, it cannot be said that the injunction orders placed an excessive burden on the applicant.

For these reasons we cannot find that the applicant's right to freedom of expression has been violated.

Noting that the present case involved injunction proceedings, we are also unable to share the majority's criticism of the domestic courts' failure to apply "procedural principles embodied in Article 10". The reasoning by the domestic courts appears to be convincing enough (even without a clear balancing exercise based on criteria established by the Strasbourg Court's case-law), and the outcome reached is, from our point of view, compatible with the requirements of the Convention.

It also appears that the domestic courts took into account some broader consequences of the harassment actions against abortion doctors. Section 12 of the Law on Conflicts in Pregnancy (see paragraph 27) provides for the right to conscientious objection; and derision of abortion doctors, to which the applicant resorted, pushes more and more doctors to refuse to perform abortions, to the detriment of women in difficult situations. The

Parliamentary Assembly of the Council of Europe has expressed the concern that “the unregulated use of conscientious objection may disproportionately affect women, notably those having low incomes or living in rural areas”<sup>1</sup>.

As we have already mentioned, there is no doubt that the applicant participated in a debate involving moral and ethical issues, which normally calls for a high degree of protection in terms of free-speech requirements. The United States Supreme Court has recently invalidated a Massachusetts statute that prevented pro-life activists from campaigning within a 35-foot buffer zone around abortion clinics, whilst the petitioners in that case were merely offering women information about alternatives to abortion<sup>2</sup>. It could be perfectly legitimate to distribute leaflets and run a website criticising abortion as a phenomenon, which the applicant continues to do, but in the present case the actions prohibited by the domestic judicial authorities were limited to the continued destruction of the professional reputation of two doctors.

In sum, we find that the German authorities have struck a fair balance between the competing interests at stake.

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1. PACE Resolution 1763 (2010) “The right to conscientious objection in lawful medical care”, adopted by the Assembly on 7 October 2010.

2. *McCullen v. Coakley*, 573 U.S. \_\_\_\_ (2014).