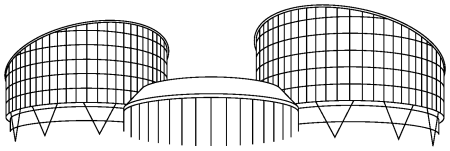

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ANNEN v. GERMANY (No. 3)

(Application no. 3687/10)

JUDGMENT

STRASBOURG

20 September 2018

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Annen v. Germany (no. 3),

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

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

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 28 August 2018,

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

PROCEDURE

1. The case originated in an application (no. 3687/10) 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 15 January 2010.

2. The applicant was represented by Mr L. Eck, a lawyer practising in Passau. The German Government ("the Government") were represented by their Agents, Mr H.-J. Behrens and Ms K. Behr, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged that a civil injunction, ordering him to desist from asserting that a doctor performed unlawful abortions in his medical practice, had violated his freedom of expression under Article 10 of the Convention.

4. On 3 January 2017 the complaint concerning Article 10 of the Convention was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1951 and lives in Weinheim. He is a campaigner against abortion and operates an anti-abortion website.

6. On 25 November 2004 and 7 December 2004 the applicant distributed leaflets in the immediate vicinity of the medical practice of Dr S. The leaflets contained, *inter alia*, the following text on the front page:

> "Did you know that Dr S. [full name and address] performs abortions that are unlawful according to the case-law of the Federal Constitutional Court?" (*Wussten Sie schon, dass Dr S. ... Abtreibungen durchführt, die nach der Rechtsprechung des Bundesverfassungsgerichts rechtswidrig sind?*)

Underneath, the following was in smaller type:

> "According to international criminal law: aggravated 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!)*

The back side of the folded leaflet contained the following text:

> "The aggravated murder of human beings in Auschwitz was unlawful, but the morally degraded NS State allowed the aggravated 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.*)

The applicant further quoted parts of the Federal Constitutional Court's leading judgment of 28 May 1993 (BVerfGE 88, 203) (see paragraph 17 below) with regard to abortion and a statement by Christoph-Wilhelm Hufeland, the personal physician of Goethe and Schiller. He also cited section 12(1) of the Conflicts in Pregnancy Act (see paragraph 17 below) and asked readers to make use of their influence on those performing and assisting in abortions.

7. By a letter of 23 December 2004 Dr S. requested that the applicant sign a declaration to cease and desist. The applicant refused and published the following statement on his website:

> "If Dr S. [full name], by carrying out abortions, publicly shows that he agrees with abortions, then he should stand by his opinion. Instead Dr S. considers the leaflet campaign to be slander, threatens an interim injunction and has already given his lawyer a mandate to lodge a criminal complaint for defamation/slander. We ask ourselves: Is Dr S. unprincipled and characterless?" (*Wenn Dr S. mit der Durchführung von Abtreibungen öffentlich bekundet, dass er für Abtreibungen ist, dann sollte er auch dazu stehen. Stattdessen sieht Dr S. in der Flugblatt-Verteilaktion eine Rufmordkampagne, droht mit einer einstweiligen Verfügung und hat bereits seinem Rechtsanwalt die Vollmacht gegeben, eine Strafanzeige wegen Beleidigung/Verleumdung zu erwirken. Wir fragen uns: Ist Dr S. stand- und charakterlos?*)

8. Subsequently Dr S. applied to the Karlsruhe Regional Court for a civil injunction ordering the applicant not to claim on the Internet that the plaintiff performed unlawful abortions and not to disseminate leaflets containing his name and the assertion that unlawful abortions were performed in his medical practice. He also lodged a claim for non-pecuniary damages in the amount of 20,000 euros (EUR) and for pre-trial legal fees.

9. On 30 September 2005, the date of the oral hearing before the Karlsruhe Regional Court, the applicant distributed a second leaflet directly in front of Dr S.'s practice. Among other places, the applicant deposited this second leaflet, in which Dr S. was not mentioned by name, into letterboxes in the immediate vicinity of the latter's practice. The following sentence was on the front side of the leaflet:

> "Near you: unlawful ABORTIONS ... and YOU are silent about the AGGRAVATED MURDER of our CHILDREN?" (*In Ihrer Nähe: rechtswidrige ABTREIBUNGEN ... und SIE schweigen zum MORD an unseren KINDERN?*) [Emphases in original]

The back of the folded leaflet contained the following text:

> "These pre-natal infanticides have meanwhile taken on proportions that bring to mind a new HOLOCAUST!" (*Diese vorgeburtlichen Kindstötungen haben mittlerweile Ausmaße angenommen, welche an einen „neuen HOLOCAUST" erinnern!*) [Emphases in original]

Farther down the leaflet read:

> "I'm simply unable to understand that medical personnel and doctors, who are supposed to help and save lives, stoop to take part in aggravated murder." (*Noch weniger kann ich verstehen, dass Mediziner und Ärzte, welche helfen und Leben retten sollen, sich für's Morden hergeben*)

10. On 4 November 2005 the Karlsruhe Regional Court granted the requested injunction and ordered the applicant to desist from asserting publicly, both in writing and orally, on the Internet as well as on leaflets, that the plaintiff performed unlawful abortions in his medical practice. In addition, the Regional Court awarded compensation for the pecuniary damage requested by the plaintiff (EUR 811.88) and dismissed the claim in respect of non-pecuniary damage.

11. The court held that the applicant's statements were protected by freedom of expression and contributed to a public debate. Moreover, they had to be classified as statements of fact and, as such, the information that abortions were unlawful was in line with the judgment of the Constitutional Court and not incorrect. However, when read in conjunction with the whole leaflet, the statements had a "pillory effect" and amounted to a serious interference with Dr S.'s personality rights, which was not justified by the applicant's freedom of expression. The court came to this conclusion based on the facts that the applicant had singled out Dr S. by mentioning him by name and distributing the leaflets in the vicinity of his practice, that he had quoted the Federal Constitutional Court's judgment only in parts and had omitted the parts that stated that doctors had not been subject to criminal liability, that he had implied by defining aggravated murder that Dr S. had committed this criminal offence and that he had associated Dr S. with the Holocaust. Nonetheless, in regard to non-pecuniary damage the court concluded that even though the attacks on Dr S.'s reputation had been grave

enough to justify the injunction, they had not been sufficiently serious to justify non-pecuniary damage.

12. The applicant and Dr S. appealed against the Regional Court's decision. Additionally Dr S. expanded his action to include the second leaflet (see paragraph 9 above), which subsequently became the subject matter of the judgment of the Karlsruhe Court of Appeal.

13. On 28 February 2007 the Karlsruhe Court of Appeal confirmed the reasoning of the Regional Court and in essence dismissed both appeals. However, it partly modified the Regional Court's judgment concerning the precise wording of the requested injunction. It ordered the applicant to desist from asserting in public that Dr S. performed unlawful abortions in his medical practice and asserting in direct connection to this that "aggravated murder is the intentional 'bringing-to-death' of an innocent human being". The Court of Appeal further ordered the applicant to desist from asserting that Dr S. performed unlawful abortions causing "infanticide". At the outset, it emphasised that the applicant's view that abortions should be subject to criminal liability and were not compatible with higher-ranking law fell within the applicant's freedom of expression. However, the court also noted that the very wording of the applicant's statements showed that he labelled abortions, as performed by the plaintiff, aggravated murder, which could not be tolerated, neither if the statements were considered statements of fact nor if considered value judgments. In the court's view the applicant had created an unacceptable "pillory effect" by singling out the plaintiff, who had not given the applicant any reason to do so. In that regard the court noted that Dr S. had not been involved in the public debate about abortions in any way.

14. In regard to the second leaflet the Court of Appeal held that even though Dr S. had not been mentioned by name, it had referred to him as it had been distributed in front of his medical practice and deposited in letterboxes in the vicinity. Similarly to the first leaflet, a not negligible part of the readers would have understood from the leaflet that Dr S.'s professional activities had constituted aggravated murder. However, even if understood in a non-legal sense, the leaflet had made it understood that the applicant had conducted illegal and punishable abortions. Since the applicant had not clarified that he had only been criticising abortions, which were according to the case-law of the Federal Constitutional Court (see paragraph 17 below) unlawful but not subject to criminal liability, he had exceeded the limits of justifiable criticism. As to the claim for damages the Court of Appeal upheld the first-instance judgment. It also did not grant leave to appeal on points of law.

15. On 29 May 2007 the Federal Court of Justice refused a request by the applicant for legal aid for his complaint against the denial of leave to appeal on points of law on the grounds that the applicant's intended appeal on points of law lacked sufficient prospect of success.

16. On 2 July 2009 the Federal Constitutional Court refused to admit a complaint lodged by the applicant for adjudication for being inadmissible, without providing reasons (no. 1 BvR 1659/07).

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The relevant domestic law and practice have been set out in the Court's judgment in the case *Annen (no. 2)* (no. 3682/10, §§ 13 – 18, 20 September 2018).

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

18. The applicant complained that the injunction, ordering him to desist from asserting that Dr S. performed unlawful abortions in his medical practice, had violated his freedom of expression as provided in Article 10 of the Convention, which reads, in so far as relevant, 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 ...."

A. Admissibility

19. The Court notes that this complaint is neither inadmissible for non-exhaustion of domestic remedies (see *Annen v. Germany*, no. 3690/10, §§ 37-40, 26 November 2015) nor manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

20. The applicant argued that the Court of Appeal's desist order had interfered with his freedom of expression without being justified by the protection of the personality rights of Dr S. He submitted that his leaflets had contributed to a public debate and had not personally attacked Dr S., but

had criticised the legal situation in Germany under which abortions performed by a doctor within twelve weeks of conception and following obligatory counselling were considered to be unlawful, but were exempt from criminal liability. The use of the term "aggravated murder" did not have to be understood as a legal qualification of Dr S.'s professional activities but as critique of the "killing" of unborn children. The applicant further submitted that abortions could be considered aggravated murder in a legal sense, since the killing of defenseless unborn babies could be seen as malicious, within the meaning of Article 211 of the Criminal Code. In any case, in the light of his contribution to a public debate of great importance, possible interferences with doctors' personality rights had to be justified.

21. The Government submitted that the injunction by the Court of Appeal had not violated the applicant's freedom of expression. The courts had carefully weighed the applicant's freedom of expression against the rights of Dr S., arising from Article 8 § 1 of the Convention. They acknowledged that the applicant had made his statement in the context of the public debate about abortion. Within the scope of its margin of appreciation, the domestic courts had come to the compelling conclusion that the statements in the leaflets, distributed by the applicant, had constituted such a serious violation of Dr S.'s personality rights as to justify a restriction on the applicant's freedom of expression.

22. The Government further submitted that the domestic courts had carried out an extensive analysis of the leaflets, discussed various conceivable possibilities of interpretation and come to the convincing conclusion that Dr S. had been pilloried as a supposed lawbreaker. Based on this conclusion it had issued an injunction which had been limited to the claim that Dr S. had performed unlawful abortions and had put these within the same context as "aggravated murder", and/or expressly characterising them as "infanticide". The applicant had not been prohibited from taking a public – and very clear – stance against abortion and the Court of Appeal had even emphasised the applicant's right, protected by freedom of expression, to characterise abortion as an injustice. Moreover, he had also not been prohibited *per se* from personally and sharply criticising abortion providers such as Dr S. for their activities.

2. The Court's assessment

23. At the outset the Court considers – and this is not in dispute between the parties – that the injunction interfered with the applicant's freedom of expression, had a legal basis and pursued the legitimate aim of protecting the rights and reputation of Dr S. It therefore remains to be determined whether the interference was "necessary in a democratic society" and whether the balancing exercise undertaken by the domestic courts was in conformity with the criteria laid down in the Court's case-law.

24. 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 ..."

25. 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). In cases that concerned allegations of criminal conduct the Court also took into account that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proved guilty (see, among other authorities, *Worm*

v. Austria, 29 August 1997, § 50, Reports of Judgments and Decisions 1997-V and *Du Roy and Malaurie v. France*, no. 34000/96, § 34, ECHR 2000-X).

26. 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).

27. Although opinions may differ on the outcome of a judgment, where a balancing exercise was 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 *Lillo-Stenberg and Sæther v. Norway*, no. 13258/09, § 44, 16 January 2014 with references to *Axel Springer AG*, cited above, § 88, and *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012).

28. Turning to the circumstances of the present case, the Court observes that while the Regional Court considered the statements to be statements of fact, the Court of Appeal left this question open as in both cases the applicant's statements had not been justified. It considered that while strictly speaking calling abortions unlawful was correct, the statement read in conjunction with the rest of leaflet could be understood as alleging that Dr S.'s professional activities constituted aggravated murder.

29. The Court reiterates that it has held in a previous decision (see *Annen v. Germany* (dec.), nos. 2373/07, 2396/07, 30 March 2010) that:

> "... German law, under Article 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". It follows that the applicant's statement that the physician performed – among others – "unlawful abortions" was correct from a strictly judicial point of view. However, having regard to the fact that the applicant primarily addressed his statement to laypersons, the Court accepts that the domestic courts also took into account the point of view of a reasonable man with ordinary susceptibility, who would assume that the "unlawful" abortions were forbidden in a stricter sense and subject to criminal liability."

30. The Court considers that the present case is comparable to the case of *Annen v. Germany* (dec.) (cited above), as the leaflets provided no further explanation regarding the fact that doctors providing abortions were exempt from criminal liability under Article 218a of the Criminal Code. In contrast, the applicant even reinforced the assumption that the abortions provided by

Dr S. were subject to criminal liability by providing his own definition of aggravated murder in international law in the first leaflet and calling abortions "infanticide" in the second leaflet. The Court therefore agrees with the domestic courts, that, when taking into account the leaflets as a whole, they could be understood as alleging that Dr S.'s professional activities constituted aggravated murder. This conclusion is not called into question by the Court's judgment in the case of *Annen* (cited above), since in that case the leaflet in question had provided sufficiently clear further explanation, according to which the abortions were not subject to criminal liability.

31. The Court would further reiterate that while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. However, even where a statement amounts to a value judgment, there must be a sufficient factual basis to support it, failing which it will be excessive (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II). The Court notes that the applicant has neither in the domestic proceedings nor before the Court submitted any indication that Dr S. committed aggravated murder or that the abortions performed by him were subject to criminal liability. Moreover, in so far as the applicant argued before the Court that abortions could be considered aggravated murder within the meaning of Article 211 of the Criminal Code, the Court notes that there is no evidence for that argument in domestic law or domestic case-law. In contrast, Article 218 of the Criminal Code clearly defines abortions that are not exempted from criminal liability under Article 218a of the Criminal Code. In sum, the Court finds that, even assuming that the applicant's statements were to be considered value judgments, there was not a sufficient factual basis for calling abortions as performed by Dr S. "murder". In that regard the Court also notes that these accusations were not only very serious, something reflected in the fact that a conviction for aggravated murder would carry a life sentence, but might also incite to hatred and aggression.

32. In regard to the seriousness of the sanction imposed on the applicant, the Court observes that he was not criminally convicted for slander or ordered to pay damages (contrast *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 93, ECHR 2004-XI). In addition the injunction was limited in scope and "only" prevented the applicant from stating that Dr S. was performing unlawful abortions and putting these within the same context as "aggravated murder", and/or expressly characterising them as "infanticide". In that regard the Court notes that the applicant was not *per se* prohibited from campaigning against abortions or criticising doctors that conducted abortions.

33. Lastly, the Court notes that the domestic courts carried out a detailed analysis of the leaflets and discussed various possibilities of interpreting the statements therein. It is therefore satisfied that the legal protection received

by the applicant at the domestic level was compatible with the procedural requirements of Article 10 of the Convention.

34. In these circumstances the Court concludes that the injunction was not disproportionate to the legitimate aim pursued, namely the protection of the rights and reputation of Dr S., and that the reasons given by the domestic courts were relevant and sufficient. The interference with the applicant's exercise of his right to freedom of expression could therefore reasonably be regarded by the domestic courts as necessary in a democratic society.

35. There has accordingly been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 10 of the Convention admissible;

2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 20 September 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Yonko Grozev
Registrar	President