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Holocaust denial is not protected by the European Convention on Human Rights

Registrar of the Court (03.10.2019) - In today's Chamber judgment 1 in the case of Pastörs v. Germany (application no. 55225/14) the European Court of Human Rights held, unanimously, that

the applicant's complaint under Article 10 (freedom of expression) was manifestly ill-founded and had to be rejected, and,

by four votes to three that there had been no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned the conviction of a Land deputy for denying the Holocaust during a speech in the regional Parliament.

The Court found in particular that the applicant had intentionally stated untruths to defame Jews. Such statements could not attract the protection for freedom of speech offered by the Convention as they ran counter to the values of the Convention itself. There was thus no appearance of a violation of the applicant's rights and the complaint was inadmissible.

The Court also examined a complaint by the applicant of judicial bias as one of the Court of Appeal judges who had dealt with his case was the husband of the first-instance judge. It found no violation of his right to a fair trial because an independent Court of Appeal panel with no links to either judge had ultimately decided on the bias claim and had rejected it.

Principal facts

The applicant, Udo Pastörs, is a German national who was born in 1952 and lives in Lübtheen (Germany).

On 28 January 2010, the day after Holocaust Remembrance Day, Mr Pastörs, then a member of the Land Parliament of Mecklenburg-Western Pomerania, made a speech stating that "the so-called Holocaust is being used for political and commercial purposes". He also referred to a "barrage of criticism and propagandistic lies" and "Auschwitz projections".

In August 2012 he was convicted by a district court, formed of Judge Y and two lay judges, of violating the memory of the dead and of the intentional defamation of the Jewish people.

In March 2013 the regional court dismissed his appeal against the conviction as ill-founded.

After reviewing the speech in full, the court found that Mr Pastörs had used terms which amounted to denying the systematic, racially motivated, mass extermination of the Jews carried out at Auschwitz during the Third Reich. The court stated he could not rely on his free speech rights in respect of Holocaust denial. Furthermore, he was no longer entitled to inviolability from prosecution as the Parliament had revoked it in February 2012.

He appealed on points of law to the Court of Appeal which, in August 2013, also rejected his case as ill-founded. At that stage he challenged one of the judges adjudicating his appeal, Judge X, claiming he could not be impartial as he was the husband of Judge Y, who had convicted him at first instance. A three-member bench of the Court of Appeal, including Judge X, dismissed the complaint, finding in particular that the fact that X and Y were married could not in itself lead to a fear of bias.

Mr Pastörs renewed his complaint of bias against Judge X before the Court of Appeal, adding the other two judges on the bench to his claim. In November 2013 a new three-judge Court of Appeal panel, which had not been involved in any of the previous decisions, rejected his complaint on the merits. Lastly, the Federal Constitutional Court declined his constitutional complaint in June 2014.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) and Article 6 § 1 (right to a fair trial), Mr Pastörs complained about his conviction for the statements he had made in Parliament and alleged that the proceedings against him were unfair because one of the judges on the Court of Appeal panel was married to the judge who had convicted him at first instance and could therefore not be impartial.

The application was lodged with the European Court of Human Rights on 30 July 2014.

Judgment was given by a Chamber of seven judges, composed as follows:

Yonko Grozev (Bulgaria), President, Angelika Nußberger (Germany), André Potocki (France), Síofra O'Leary (Ireland), Mārtiņš Mits (Latvia), Gabriele Kucsko-Stadlmayer (Austria), Lado Chanturia (Georgia), and also Milan Blaško, Deputy Section Registrar.

Decision of the Court

Article 10 (freedom of Expression)

As with earlier cases involving Holocaust denial or statements relating to Nazi crimes, the Court examined Mr Pastörs' complaint under both Article 10 and Article 17 (prohibition of abuse of rights).

It reiterated that Article 17 was only applicable on an exceptional basis and was to be resorted to in cases concerning freedom of speech if it was clear that the statements in question had aimed to use that provision's protection for ends that were clearly contrary to the Convention.

The Court noted that the domestic courts had performed a thorough examination of Mr Pastörs' utterances and it agreed with their assessment of the facts. It could not accept, in particular, his assertion that the courts had wrongfully selected a small part of his speech for review. In fact, they had looked at the speech in full and had found much of it did not raise an issue under criminal law.

However, those other statements had not been able to conceal or whitewash his qualified Holocaust denial, with the Regional Court stating that the impugned part had been inserted into the speech like "poison into a glass of water, hoping that it would not be detected

immediately".

The Court placed emphasis on the fact that the applicant had planned his speech in advance, deliberately choosing his words and resorting to obfuscation to get his message across, which was a qualified Holocaust denial showing disdain to its victims and running counter to established historical facts. It was in this context that Article 17 came into play as the applicant had sought to use his right to freedom of expression to promote ideas that were contrary to the text and spirit of the Convention. Furthermore, while an interference with freedom of speech over statements made in a Parliament deserved close scrutiny, such utterances deserved little if any protection if their context was at odds with the democratic values of the Convention system.

Summing up, the Court held that Mr Pastörs had intentionally stated untruths in order to defame the Jews and the persecution that they had suffered. The interference with his rights also had to be examined in the context of the special moral responsibility of States which had experienced Nazi horrors to distance themselves from the mass atrocities.

The response by the courts, the conviction, had therefore been proportionate to the aim pursued and had been "necessary in a democratic society". The Court found there was no appearance of a violation of Article 10 and rejected the complaint as manifestly ill-founded.

Article 6 § 1 (right to a fair trial)

The Court reiterated its subjective and objective tests for a court or judge's lack of impartiality: the first focused on a judge's personal convictions or behaviour while the second looked at whether there were ascertainable facts which could raise doubts about impartiality. Such facts could include links between a judge and people involved in the proceedings.

It held that the involvement in the case of two judges who were married, even at levels of jurisdiction which were not consecutive, might have raised doubts about Judge X lacking impartiality. It was also difficult to understand how the applicant's complaint of bias could have been deemed as inadmissible in the Court of Appeal's first review, which had included Judge X himself.

However, the issue had been remedied by the review of Mr Pastörs' second bias complaint, which had been aimed at all the members of the initial Court of Appeal panel and had been dealt with by three judges who had not had any previous involvement in the case. Nor had the applicant made any concrete arguments as to why a professional judge married to another professional judge should be biased when deciding on the same case at a different level of jurisdiction.

There were thus no objectively justified doubts about the Court of Appeal's impartiality and there had been no violation of Article 6.

Separate opinions

Judges Grozev and Mits expressed a joint dissenting opinion which is annexed to the judgment.

No violation of rights of former Soviet security officer

found guilty of genocide

CASE OF DRĖLINGAS v. LITHUANIA (Application no. 28859/16)

Registrar of the Court (12.03.2019) - In today's Chamber judgment in the case of Drėlingas v. Lithuania (application no. 28859/16) the European Court of Human Rights held, by five votes to two, that there had been:

no violation of Article 7 (no punishment without law) of the European Convention on Human Rights.

The case concerned the applicant's conviction for genocide for taking part in a 1956 operation to arrest two partisans who had resisted Soviet rule.

The Court concluded that Lithuania's Supreme Court had now resolved previously existing legal discrepancies in domestic practice on such genocide trials, discrepancies which had led to the Court finding a violation in the similar case of Vasiliauskas v. Lithuania in 2015.

In particular, the Supreme Court had explained why the partisans who had resisted Soviet rule could be considered as an important part of the nation and thus be covered by international law, Article II of the Genocide Convention, at the time of the events.

The applicant had to have been aware in the 1950s that he could be prosecuted for genocide and his conviction had been foreseeable. There had therefore been no violation of the Convention.

Principal facts

The applicant, Stanislovas Drėlingas, is a Lithuanian national born in 1931 who lives in Utena (Lithuania).

Mr Drėlingas, who served in the MGB and KGB Soviet security forces, took part in an operation in 1956 to detain two partisans, Adolfas Ramanauskas (whose code name was Vanagas) and his wife Birutė Mažeikaitė (code name Vanda), who were opposed to Soviet rule in Lithuania.

The two were arrested, which led to Mr Ramanauskas being severely ill-treated in detention and then executed in 1957 while Ms Mažeikaitė had to serve eight years in a prison camp in Siberia.

In 2014, after Lithuania had regained its independence, Mr Drėlingas was charged under the Criminal Code with genocide for his role in the operation against Mr Ramanauskas and Ms Mažeikaitė and was found guilty by Kaunas Regional Court in March 2015.

The court held that Mr Ramanauskas had been a prominent partisan who had led resistance to Soviet rule, and that the partisans were representatives of the Lithuanian nation. The aim of the arrest operation had been to eliminate part of a national group and Mr Drėlingas had thus been guilty of genocide, for which there was no domestic statute of limitations.

The court rejected his arguments that he could not be held responsible for the fate of the two partisans as he had not personally arrested or sentenced them. He was given a five-year term of imprisonment. The appeal court and the Supreme Court, in April 2016, upheld his conviction, the Supreme Court reducing his sentence to five months' detention and releasing him for time served.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution. In particular, the Supreme Court examined the Strasbourg Court's 2015 Grand Chamber judgment in Vasiliauskas v. Lithuania, which had found a violation of Article 7 as the courts had defined partisans as a separate "political group". However, such a group was not protected by international law under the 1948 Genocide Convention and Mr Vasiliauskas's conviction had not been foreseeable.

In Mr Drėlingas's case, the Supreme Court provided an explanation for why Mr Ramanauskas and Ms Mažeikaitė had to be considered as members of a distinct national and ethnic group and so fall under the Genocide Convention. At the time of the events Mr Drėlingas therefore had to have been aware that he could face criminal liability for genocide.

In another set of proceedings in 2016 the Supreme Court also quashed Mr Vasiliauskas's domestic conviction. It noted that he had been found guilty of genocide in relation to a "separate political group", which was not a term found in the Genocide Convention but one which had been introduced into Lithuanian law after the re-establishment of independence. He had therefore been prosecuted retroactively, which was a violation of his rights.

Complaints, procedure and composition of the Court

Relying on Article 7 (no punishment without law), Mr Drėlingas complained that his conviction for genocide had violated his rights because the national courts' broad interpretation of that crime had had no basis in international law.

The application was lodged with the European Court of Human Rights on 18 May 2016.

Decision of the Court

The applicant argued in particular that there had been no basis in public international law for his conviction, which had been based on a retroactive application of domestic law, violating Article 7.

The Court first rejected his arguments that he could not be held liable for the fates of the two partisans as he had neither directly arrested them nor taken part in the decision-making procedure.

The Court observed that the domestic courts had examined the first part of his submission thoroughly and the Court saw no reason to question their findings. As regards the second point, the Court reiterated its finding in Vasiliauskas that even private soldiers could not show total, blind obedience to orders which infringed recognised human rights. As an officer of the security forces he must have known what would happen to the two resistance members.

The Court then examined whether the lack of clarity in domestic law on the crime of genocide, which it had identified in Vasiliauskas, had now been dispelled.

It noted that the Supreme Court judgment in Mr Drėlingas's case had analysed Vasiliauskas and had drawn the conclusion that the finding of a violation of Article 7 had been due to the domestic courts' failure to substantiate their findings that the partisans had constituted a significant part of a national group and had thus come under Article II of the Genocide Convention.

In Mr Drėlingas's case the Supreme Court had provided a detailed explanation of the significance of the partisans, noting, among other things, that they had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation. The Supreme Court had concluded that the partisans were a significant part of a protected national and ethnic group within the meaning of both the 1948 Genocide Convention and domestic law under Article 99 of the Criminal Code.

The Supreme Court had also referred to a 2014 Constitutional Court ruling which had added to the historical context on the partisan movement and its significance for the Lithuanian nation.

Furthermore, the Supreme Court had re-opened the domestic proceedings in Mr Vasiliauskas's case and had acknowledged the Strasbourg Court's findings without reservation. It had also held that Mr Vasiliauskas could not be prosecuted for the genocide of members of a political group.

The Court concluded that the Supreme Court had in Mr Drėlingas's case removed the lack of clarity which the Court had identified in Vasiliauskas, caused by the discrepancy between Article 99 of the Criminal Code and its reference to political groups and Article II of the Genocide Convention.

The Supreme Court had also clarified the scope of review of charges of genocide, including a prohibition on the retroactive prosecution for the genocide of people belonging to a political group and the need to establish intent.

Given such developments, the domestic system, based on international law in the shape of the Genocide Convention and the case-law of the Constitutional and Supreme Courts, no longer showed the shortcomings identified in Vasiliauskas. Mr Drėlingas's conviction for genocide had thus been foreseeable and had not resulted in a violation of Article 7.

Separate opinions

Judges Motoc and Ranzoni expressed dissenting opinions which are annexed to the judgment.

Just satisfaction judgment in the case of Georgia v. Russia (I)

European Court of Human Rights (31.01.2019) - https://bit.ly/2GfDscf - In today's **Grand Chamber** judgment[1] in the case of **Georgia v. Russia (I)** (application no. 13255/07) the European Court of Human Rights held, by sixteen votes to one,

that **Russia had to pay Georgia 10,000,000 euros (EUR) in respect of non-pecuniary damage** suffered by a group of at least 1,500 Georgian nationals;

that that amount was to be distributed to the individual victims by paying EUR 2,000 to the Georgian nationals who had been victims only of a violation of Article 4 of Protocol No. 4 (collective expulsion), and EUR 10,000 to EUR 15,000 to those among them who had also been victims of a violation of Article 5 § 1 (unlawful deprivation of liberty) and Article 3 (inhuman and degrading conditions of detention) of the European Convention on Human Rights, taking into account the length of their respective periods of detention.

Principal facts

In a judgment on the merits, delivered on 3 July 2014, the Court held that in the autumn of 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals had been put in place in the Russian Federation and had amounted to an administrative practice for the purposes of Convention case-law.

The Court also held that there had been a violation of, inter alia, Article 4 of Protocol No. 4, Article 5 §§ 1 and 4 and Article 3 of the Convention, and of Article 13 taken in conjunction with Article 5 § 1 and with Article 3.

As the question of the application of Article 41 of the Convention was not ready for decision, the Court had reserved it and invited the applicant Government and the respondent Government to submit their observations on the matter and, in particular, to notify the Court of any agreement that they might reach. As the parties had not reached an agreement, the applicant Government had submitted their claims for just satisfaction and the respondent Government had submitted their observations.

On 6 November 2015 the President of the Grand Chamber invited the applicant Government to submit a list of the Georgian nationals who had been victims of a "coordinated policy of arresting, detaining and expelling Georgian nationals" put in place in the Russian Federation in the autumn of 2006. The applicant Government filed a list of 1,795 alleged victims on 1 September 2016.

On 13 September 2016 the President of the Grand Chamber also asked the respondent Government to submit their comments on the list filed by the applicant Government, which the respondent Government did on 13 April 2017.

[1] Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 26 March 2007 under Article 33 (Inter-State cases) of the Convention. Following a hearing on 16 April 2009, the application was declared admissible by a Chamber on 30 June 2009 and relinquished to the Grand Chamber on 15 December 2009. From 31 January to 4 February 2011 a witness hearing was held in Strasbourg. A Grand Chamber hearing took place in public in the Human Rights Building, Strasbourg, on 13 June 2012. A judgment on the merits was delivered on 3 July 2014.

Judgment on just satisfaction was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), President,
Angelika **Nußberger** (Germany),
Linos-Alexandre **Sicilianos** (Greece),
Ganna **Yudkivska** (Ukraine),
Robert **Spano** (Iceland),
Vincent A. **De Gaetano** (Malta),
André **Potocki** (France),
Dmitry **Dedov** (Russia),
Jon Fridrik **Kjølbro** (Denmark),
Branko **Lubarda** (Serbia),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pauliine **Koskelo** (Finland),
Georgios A. **Serghides** (Cyprus),
Marko **Bošnjak** (Slovenia),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),
and also Lawrence **Early**, Jurisconsult.

Decision of the Court

Just satisfaction (Article 41)
The Court observed that it was the first time since the just satisfaction judgment in Cyprus v. Turkey (just satisfaction) that it was required to examine the question of just satisfaction in an inter-State case. In that judgment the Court had referred, inter alia, to the principle of public international law relating to a State's obligation to make reparation for violation of a treaty obligation, and to the case-law of the International Court of Justice, before concluding that Article 41 of the Convention did, as such, apply to inter-State cases.

In that judgment the Court had also set out three criteria for establishing whether awarding just satisfaction was justified in an inter-State case: the type of complaint made by the applicant Government, which had to concern the violation of basic human rights of its nationals or other victims; whether the victims could be identified; and the main purpose of bringing the proceedings.

In the present case the Court noted that the applicant Government had submitted in their application that the respondent Government had permitted or caused to exist an administrative practice of arresting, detaining and collectively expelling Georgian nationals from the Russian Federation in the autumn of 2006, resulting in a violation of Articles 3, 5, 8, 13, 14 and 18 of the Convention, and of Articles 1 and 2 of Protocol No. 1, Article 4 of Protocol No. 4 and Article 1 of Protocol No. 7. Following the adoption of the principal judgment, the applicant Government had submitted claims for just satisfaction

in compensation for violations of the Convention committed with regard to Georgian nationals. At the Court's request, the applicant Government had also submitted a detailed list of 1,795 alleged and identifiable victims of the violations found in the principal judgment. Just satisfaction was thus sought with a view to compensating individual victims.

As the three criteria referred to above were satisfied in the present case, the Court found that the applicant Government were entitled to submit a claim under Article 41 and that an award of just satisfaction was justified in the present case.

After carrying out a preliminary examination of the list submitted by the applicant Government and of the comments in reply submitted by the respondent Government, the Court considered that it could in the present case base itself on a "sufficiently precise and objectively identifiable" group of at least 1,500 Georgian nationals who had been victims of a violation of Article 4 of Protocol No. 4 (collective expulsion). Among these, a certain number had also been victims of a violation of Article 5 § 1 (unlawful deprivation of liberty) and Article 3 (inhuman and degrading conditions of detention).

Having regard to all the relevant circumstances of the present case, the Court deemed it reasonable to award the applicant Government a lump sum of 10,000,000 euros (EUR) in respect of nonpecuniary damage suffered by that group of at least 1,500 Georgian nationals. The Court considered that this sum must be distributed by the applicant Government to the individual victims of the violations found in the principal judgment, with EUR 2,000 payable to the Georgian nationals who had been victims only of a violation of Article 4 of Protocol No. 4 and an amount ranging from EUR 10,000 to EUR 15,000 payable to those among them who had also been victims of a violation of Article 5 § 1 and Article 3 of the Convention.

The Court also considered that it must be left to the applicant Government to set up, under the supervision of the Committee of Ministers, an effective mechanism for distributing the sums in question to the individual victims of the violations found in the principal judgment, having regard to the indications given by the Court.

Separate opinions

Judges Yudkivska, Mits, Hüseynov and Chanturia expressed a joint partly concurring opinion. Judge Dedov expressed a dissenting opinion. These opinions are annexed to the judgment.

Bivolaru v. Romania

Excessive length of criminal proceedings concerning a conviction for sexual relations with a minor

Registrar of the Court (02.10.2018) - In today's Chamber judgment1 in the case of Bivolaru v. Romania (no. 2) (application no. 66580/12) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights regarding the complaint of a failure by the High Court to take steps to hear Mr Bivolaru in person, and a violation of Article 6 § 1 (right to a fair trial within a reasonable time) with regard to the length of the proceedings.

The case concerned criminal proceedings in which Mr Bivolaru – leader of a movement known as the "Movement for spiritual integration in the absolute" ("MISA") – was sentenced to six years' imprisonment for sexual relations with a minor.(*)

Mr Bivolaru left for Sweden, where he acquired political refugee status, while criminal proceedings against him were pending in Romania. He did not appear in person before the Romanian courts but was represented by lawyers of his choice. He was acquitted at first instance and on appeal, but convicted by the High Court, which could not hear him in person.

The Court found that the High Court had taken all the steps that could reasonably have been expected of it to ensure that Mr Bivolaru was questioned and that it could not be criticised for lack of diligence in any respect. Firstly, the High Court had offered to question Mr Bivolaru by video link but he had refused. Secondly, it had agreed to question him following a formal request for judicial assistance in Sweden, thus sending a request to the Swedish authorities and a list of questions to be put to Mr Bivolaru. However, the Swedish authorities had delayed in implementing the request despite a number of reminders from the Romanian authorities stressing its urgency. The Court also held that the overall length of the criminal proceedings had been unreasonable and that the delays had been attributable to the national authorities. In particular, the length of the first instance case (five years and three months) had had a decisive impact on the overall length of the proceedings (nine years, two months and two weeks). Mr Bivolaru also considered that he had been tried in absentia. He also complained of a violation of his right to respect for his private life on account of telephone tapping. The Court rejected those complaints.

Principal facts

The applicant, Gregorian Bivolaru (alias Magnus Aurolsson), is a Romanian national who was born in 1952. In March 2004 the Bucharest public prosecutor's office ordered criminal proceedings against Mr Bivolaru on charges of sexual relations with a minor and sexual perversion. The applicant was remanded in pre-trial detention from 30 March to 1 April 2004. After his release, on an unknown date, he travelled to Sweden, where, in 2006, he was granted political refugee status and given a new identity. In the meantime, the Bucharest public prosecutor's office committed him for trial in absentia. Mr Bivolaru, who was represented by lawyers of his choice throughout the proceedings, was acquitted at first instance and on appeal. The public prosecutor's office successfully lodged an appeal on points of law with the High Court, which concluded that the law had been wrongly applied. The High Court also decided that it should examine directly the evidence as well as the merits of the case.

In November 2012 the High Court offered to allow Mr Bivolaru to be questioned via video link, but he refused, preferring to be questioned following a formal request from a court for judicial assistance. The High Court therefore sent the Swedish authorities a request for judicial assistance and a list of questions to put to Mr Bivolaru. However, as the Swedish authorities delayed in implementing the request despite a number of reminders, the High Court decided that it was no longer necessary to wait for their reply. On 14 June 2013 it convicted Mr Bivolaru of sexual relations with a minor, basing its decision on the evidence in the file (witness statements, documents, recordings of telephone conversations).

In February 2016 Mr Bivolaru was arrested by the French authorities in Paris and in July 2016 he was surrendered to the Romanian authorities, who remanded him in custody. He was released on licence in September 2017. His application to have the criminal proceedings reopened was dismissed.

In the meantime, in June 2012, Mr Bivolaru had brought tort proceedings against the State regarding the telephone tapping. The district court found in his favour on the grounds that the warrants authorising the telephone tapping had infringed his right to respect for his private life. The court awarded him the symbolic amount of 1 Romanian leu (RON, approximately 0.30 euros (EUR)) for the non-pecuniary damage suffered.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial), Mr Bivolaru complained that he had been convicted in absentia without having been heard in person by the High Court. He also complained about the length of proceedings and the refusal of the Romanian authorities to reopen the criminal proceedings.

Relying on Article 8 (right to respect for private and family life), he complained about the tapping of his telephone. In that regard he also relied on Article 13 (right to an effective remedy), alleging that he had had no access to an effective remedy.

The application was lodged with the European Court of Human Rights on 8 October 2012. Judgment was given by a Chamber of seven judges, composed as follows:

Ganna **Yudkivska** (Ukraine), President,
Paulo **Pinto de Albuquerque** (Portugal),
Krzysztof **Wojtyczek** (Poland),
Egidijus **Kūris** (Lithuania),
Gabriele **Kucsko-Stadlmayer** (Austria),
Carlo **Ranzoni** (Liechtenstein),
Marko **Bošnjak** (Slovenia),
and also Andrea **Tamietti**, Deputy Section Registrar.

Decision of the Court

Article 6 (right to a fair trial/within a reasonable time)

Regarding the complaint about being convicted in absentia, the Court dismissed the complaint on the grounds that it was manifestly ill-founded. The Court observed, inter alia, that Mr Bivolaru had been notified of the criminal charges against him, that he had been represented throughout the proceedings by lawyers of his own choice with whom he had maintained permanent contact for the preparation of his defence, and that he had known that criminal proceedings had been brought against him. The Court also noted that there had been no denial of justice and that the Romanian justice system allowed proceedings to be reopened where the accused had been tried in absentia. In that connection it observed that the district court that had dealt with Mr Bivolaru's request to have the proceedings reopened, had carried out a detailed examination of the grounds submitted by him, and had relied on logical arguments with no trace of arbitrariness before rejecting his request.

With regard to Mr Bivolaru's conviction by the High Court without having been heard in person and following his acquittal on the merits and on appeal, the Court found that the High Court had taken all the steps that could reasonably have been expected of it within the existing legal framework to ensure that Mr Bivolaru was questioned and that it could not be criticised for lack of diligence in any respect. There had therefore been no violation of Article 6 § 1 of the Convention.

The High Court had had recourse to international judicial assistance to hear evidence from Mr Bivolaru. Two possibilities had been open to it: la video link or a formal request for judicial assistance. Firstly, Mr Bivolaru, with the advice of his lawyers, had expressly

refused to be questioned by video link, although that method of questioning could have been an appropriate means of hearing him directly and properly.

Secondly, the High Court had granted Mr Bivolaru's request to be questioned in Sweden following a formal request for judicial assistance, but on account of delays by the Swedish authorities in examining that request and the lack of information regarding when the questioning could take place, it had decided not to hear the applicant. Nor had the Swedish authorities provided an explanation for failing to comply with the successive time-limits set by the Romanian authorities.

After approximately six months of exchanges between the High Court and the Swedish authorities, examination of the request for judicial assistance had still been in its initial stage and there had been uncertainty both regarding its outcome and the date when, in the event of a positive response, the applicant would be questioned. The High Court had informed the Swedish authorities that its request was urgent. Moreover, the Swedish authorities had not informed the Romanian authorities of any procedural error in the formulation of their request for judicial assistance and the High Court had not had any other means of expediting the procedure in that regard.

Lastly, given the time taken to examine that request, which, in the light of the Swedish authorities' response, had not appeared likely to succeed, the High Court's decision not to follow the relevant procedure, made after a number of reminders had been sent to the Swedish authorities, did not, in the Court's view, appear unreasonable. The Court therefore considered that the High Court had taken reasonable steps to offer Mr Bivolaru an opportunity to be heard following a formal request for judicial assistance. Furthermore, the High Court was able to hear the applicant's submissions through his lawyers, who had been present during the examination of the appeal and had made their submissions before it and effectively defended their client's interests.

With regard to the length of the proceedings, the Court found that the length of the first-instance case had had a decisive impact on the overall length of proceedings, which, in the present case, was unreasonable. There had therefore been a violation of Article 6 § 1 of the Convention. The Court noted that the criminal proceedings had lasted approximately nine years, two months and two weeks before three levels of court (from March 2004 to June 2013). The case had been pending for approximately five years and three months before the Sibiu District Court on the grounds, inter alia, that many adjournments had been necessary because witnesses had not been lawfully summoned and the procedure for bringing the accused before the judge had not been correctly used. With regard to the length of the proceedings on appeal and before the High Court, the Court considered that these had been conducted diligently.

Articles 8 and 13 (right to respect for private and family life/right to an effective remedy)

With regard to the complaint concerning the right to respect for Mr Bivolaru's private life on account of telephone tapping, the Court considered that Mr Bivolaru could not claim to be a victim of a violation of Article 8 of the Convention. The complaint was therefore incompatible ratione personae with the provisions of the Convention. The Bucharest Court, in its final judgment of 23 June 2015, had expressly recognised a violation of Mr Bivolaru's right to respect for his private life. In that connection the Court held that although the amount awarded by the court in respect of nonpecuniary damage had been symbolic (ROL 1), the compensation thus established was not at odds with the Court's case-law: in recent cases in which the Court had found a violation on account of incompatibility of the domestic law with Article 8 of the Convention, the Court had held that the finding of a violation in itself represented sufficient redress for the non-pecuniary damage suffered.

With regard to the effectiveness of the domestic remedy, the Court found that the complaint was manifestly ill-founded: Mr Bivolaru had had an effective remedy before the domestic courts, which had found and given redress for the violation alleged in the tort proceedings brought before them.

Article 41 (just satisfaction)

The Court held, by six votes to one, that Romania was to pay the applicant 1,200 euros (EUR) in respect of non-pecuniary damage and EUR 5,000 in respect of costs and expenses.

Separate opinion

Judge Kūris expressed a separate opinion which is annexed to the judgment.

The judgment is available only in French.

(*) HRWF Footnote

See our report about MISA school and Grigorian Bivolaru, including the case of his alleged sexual relations with a minor. HRWF interviewed her in 2013 in the presence of her husband who was her fiancé at the time of the alleged facts and she denied any such sexual relations with Grigorian Bivolaru: http://hrwf.eu/wp-content/uploads/2014/11/MISA-Gregorian-Bivolaru-Yoga-Practitioners-in-Romania.pdf

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Freedom of expression and abortion

Freedom of expression does not give the right to label abortions performed by designated doctors "aggravated murder"

Registrar of the European Court (20.09.2018) - https://bit.ly/2zCSIdu - In today's Chamber judgments1 in the cases of Annen v. Germany (nos. 2 to 5) (application nos. 3682/10, 3687/10, 9765/10 and 70693/11) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 10 of the European Convention on Human Rights.

The cases concerned a series of complaints by an anti-abortion activist, Klaus Günter Annen, over civil court injunctions on various actions he had taken as part of an anti-abortion campaign. The plaintiffs in the domestic proceedings were four doctors who performed abortions.

The Court held in particular that the injunctions had interfered with Mr Annen's freedom of expression, but had been necessary in a democratic society. When examining whether there had been a need for such interferences in the interests of the "protection of the reputation or rights of others", namely of the doctors, the Court's role was only to ascertain whether the domestic courts had struck a fair balance when protecting the freedom of expression guaranteed by Article 10 and the right to respect for private life protected by Article 8 of the Convention.

In sum, the Court considered that the injunctions had not been disproportionate to the legitimate aim pursued and that the reasons given by the domestic courts had been relevant and sufficient. It pointed out that the domestic authorities had carried out a

detailed analysis of the leaflets and webpage set up by Mr Annen and that the accusations by Mr Annen against the various abortion doctors had not only been very serious but might also have incited hatred and aggression. In this regard, the Court found the domestic courts' conclusion acceptable that Mr Annen's statements, in particular by using the term "aggravated murder", could be understood as personalised accusations against the doctors of having perpetrated the criminal offence of aggravated murder.

Principal facts

The applicant, Klaus Günter Annen, is a German national who was born in 1951 and lives in Weinheim (Germany). The domestic courts issued four civil injunctions against Mr Annen, prohibiting particular aspects of his anti-abortion campaign.

In the first case (application no. 3682/10) Mr Annen was ordered to refrain from referring on his webpage to abortions performed by a doctor, Dr Q., as "aggravated murder" and comparing them with the Holocaust.

While the first-instance court in May 2006 rejected Dr Q's application on the grounds that it was a fact that Dr Q. performed abortions and that the remainder of the website's content was covered by Mr Annen's freedom of expression, the Karlsruhe Court of Appeal granted an injunction in February 2007 after Dr Q. appealed. It pointed out that Mr Annen had insinuated, by using the term "aggravated murder" on the website, that Dr Q. had committed criminal offences and had compared abortions with the Holocaust. Furthermore, he had not referred to section 218a of the Criminal Code which exempted abortions as performed by Dr Q. from criminal liability. In sum, it was possible to interpret his statements as a personal accusation against Dr Q. of perpetrating aggravated murder.

At the origin of the second case (application no. 3687/10) was a public statement on a leaflet by Mr Annen that another doctor, Dr. S., had performed unlawful abortions in his practice, outside of which Mr Annen had also distributed various leaflets in November/December 2004 and in September 2005. They contained statements such as "Near you: unlawful abortions ... and you are silent about the aggravated murder of our children?"

Subsequently, Dr. S. made a request for a civil injunction which was granted by the Karlsruhe Regional Court on 4 November 2005. It held that the statements had a "pillory effect" and amounted to a serious interference with Dr S.'s personality rights, which was not justified by Mr Annen's freedom of expression. The court underlined that Mr Annen had singled out Dr S. by mentioning him by name and distributing the leaflets in the vicinity of his practice, that he had implied that Dr S. had committed the criminal offence of aggravated murder and that he had associated Dr S. with the Holocaust.

Both parties appealed. In February 2007 the Karlsruhe Court of Appeal confirmed the reasoning of the Regional Court and held that the wording of Mr Annen's statements showed that he had described the abortions performed by Dr S. as aggravated murder, which could not be tolerated. It reiterated that by singling out Dr S., Mr Annen had created an unacceptable "pillory effect". In that regard, the court noted that Dr S. had not been involved in the public debate about abortions in any way. Since Mr Annen had not clarified that he had only been criticising abortions, which according to the case-law of the Federal Constitutional Court were unlawful but not subject to criminal liability, he had exceeded the limits of justifiable criticism.

In the third case (application no. 9765/10) the application for an injunction was lodged by Dr St. because Mr Annen had approached passers-by and possible patients in the

vicinity of Dr St.'s medical practice in April 2005, while distributing leaflets. The leaflets had stated that the abortions performed by Dr St. were unlawful and compared them with the Holocaust.

The injunction was granted in October 2005 by the Mannheim Regional Court whose decision was upheld by the Karlsruhe Court of Appeal in February 2007. Both courts referred to a previous decision of the Federal Court of Justice in which it had confirmed a civil injunction against similar conduct by Mr Annen. Mr Annen had attacked Dr St.'s legal professional activities by implying that he had committed criminal acts and had interfered with the relationship of trust between doctor and patient. The injunction order was justified in view of the massive "pillory effect" he had created by singling out Dr St. and criticising him in a harsh way in the immediate vicinity of his practice.

The fourth case (application no. 70693/11) dealt with a civil injunction and an order to pay damages against Mr Annen because of statements which he had made on an anti-abortion website. The website had implied that abortions amounted to aggravated murder, compared doctors performing abortions to concentration camp commanders and in general had equated abortions with the Holocaust. A link on the website directed readers to a list of doctors who performed abortions, mentioning, among others, Dr F., the plaintiff in this case.

The complaints by Mr Annen against the injunctions in all four cases were ultimately dismissed by the Federal Constitutional Court.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) Mr Annen complained that the injunctions had interfered with his freedom of expression, without being justified by the protection of the doctors' personality rights. His website and leaflets contributed to a public debate and he had not personally accused the doctors of perpetrating aggravated murder; rather he had criticised the legal framework in Germany regarding abortions.

The applications were lodged with the European Court of Human Rights on 15 January 2010, 8 February 2010 and 26 October 2011.

The judgments were given by a Chamber of seven judges, composed as follows:

Yonko **Grozev** (Bulgaria), President,

Angelika **Nußberger** (Germany),

André **Potocki** (France),

Síofra **O'Leary** (Ireland),

Mārtiņš **Mits** (Latvia),

Lətif **Hüseynov** (Azerbaijan),

Lado **Chanturia** (Georgia),

and also Claudia **Westerdiek**, Section Registrar.

Decision of the Court

Article 10

The Court underlined that its task under Article 10 was to look at the interference complained of in the light of the case as a whole and determine whether it had been "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it had been "relevant and sufficient". Where a balancing exercise had been undertaken by the national authorities in conformity with the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.

Turning to the first case (application no. 3682/10), the Court accepted the domestic Court of Appeal's conclusion that Mr Annen's statements had been ambiguous and could be understood as an accusation that Dr Q. had perpetrated the criminal offence of aggravated murder. Distinguishing the present case from the case of its previous judgment Annen v. Germany (no. 3690/10, 26 November 2015), it noted that Mr Annen had not provided the additional information that the abortions performed by Dr Q. had not been subject to criminal liability. Furthermore, there had been no factual foundation for the very serious criminal allegations made by Mr Annen. Lastly, the Court observed that Mr Annen had not been ordered to pay damages or convicted but had only had to refrain from calling the abortions "aggravated murder".

Having regard to the second case (application no. 3687/10), the Court agreed with the domestic courts observations that while - strictly speaking - calling abortions unlawful was correct, the statement by Mr Annen read in conjunction with the rest of the leaflet could be understood as an allegation that Dr S.'s professional activities constituted aggravated murder. It had to be noted that in this case too Mr Annen's accusations against Dr S. were very serious and that he, nonetheless, was not per se prohibited from campaigning against abortions or criticising doctors that performed abortions. Since the domestic courts had thoroughly discussed various possibilities of interpreting the statements in light of the freedom of expression, the Court found no violation of Article 10.

In the third case (application no. 9765/10) the Court firstly agreed with the domestic court's finding that the applicant had vilified Dr St. by implying that he had committed criminal acts. It secondly observed that Mr Annen had singled out Dr St. from all the doctors that had performed abortions and had thereby created a "pillory effect". Even though Dr St. had been involved in various legal disputes in the past, the domestic courts had concluded that this did not have any substantial effects on Dr St.`s profile and could not redound to his disadvantage. Having regard to their direct contact with their societies, the Court found that it was primarily for the domestic courts to assess how well-known a person was. In conclusion, the Court saw no reason to call the domestic courts' reasoning into question. It thirdly held that Mr Annen's "pavement counselling" had severely disrupted the relationship of trust between Dr St. and his patients.

Lastly, since Mr Annen had not been convicted for slander or ordered to pay damages, the Court held that the level of interference with his freedom of expression had been relatively low and had been "proportionate to the legitimate aims pursued". Therefore, in the Court's view, the national courts had thoroughly assessed the conflicting interests by referring to the previous judgment of the Federal Court of Justice and considering the factual and legal differences of the cases.

The Court also found no violation of Article 10 of the Convention in the fourth case (application no. 70693/11). It found that there was not a sufficient factual basis for calling abortions as performed by Dr F. "aggravated murder". Furthermore, distinguishing the present case from the case of its previous judgment Annen v. Germany (no. 3690/10, 26 November 2015), the Court observed that Mr Annen had equated the medical activities of Dr F. with the unjustifiable atrocities inflicted on Jews under the Nazi regime and had even stated that "Equating the Babycaust with the Holocaust would

mean relativising today's abortion murders". These accusations were very serious and had severely undermined Dr F.'s reputation. Based on the national courts' detailed reasoning, the Court considered therefore that both the injunction and the order to pay damages against Mr Annen had not fallen outside their margin of appreciation and had not been disproportionate. Accordingly, there had been no violation of Article 10 of the Convention in any of the four cases.
