



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

FIFTH SECTION

DECISION

Application no. 37054/17
NATIONALDEMOKRATISCHE PARTEI DEUTSCHLANDS (NPD)
against Germany

The European Court of Human Rights (Fifth Section), sitting on 21 November 2017 as a Committee composed of:

Erik Møse, *President*,
Angelika Nußberger,
Yonko Grozev, *judges*,

and Anne-Marie Dougin, *Acting Deputy Section Registrar*,

Having regard to the above application lodged on 16 May 2017,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands*, NPD), is a German political party. It was represented before the Court by Mr P. Richter, a lawyer practising in Saarbrücken.

2. The applicant party was founded on 28 November 1964. It regularly participates in elections for the European Parliament, the Federal Parliament (*Bundestag*), parliaments of the *Länder* and municipal elections.

3. On 3 December 2013 the Federal Council of Germany (*Bundesrat*) lodged an application with the Federal Constitutional Court to ban the applicant party. The Federal Constitutional Court held on 17 January 2017 that the applicant party's political concept was aimed at abolishing the free democratic basic order and replacing the existing constitutional system with an authoritarian national state adhering to the idea of an ethnically-defined "people's community" (*Volksgemeinschaft*). However, owing to a lack of specific and weighty indications suggesting that this endeavour would be successful, the party could not be banned (2 BvB 1/13).

A. The circumstances of the case

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

1. *The publication at issue*

5. On 7 May 2014, in the course of campaigning for election to the European Parliament, the applicant party published on two of its websites a press release entitled “NPD extends invitations to a panel discussion with T.S., H.B. and R.R.” (*NPD lädt zu Podiumsdiskussion mit T.S., H.B. und R.R.* ; names abbreviated by the Court). The text of the press release alleged that it was not commonplace in the German media landscape to debate with representatives of the applicant party and that it had therefore decided to invite relevant individuals itself for a stimulating discussion. The topic of the debate would be the immigration of Sinti and Roma from Bulgaria and Romania which, in the applicant party’s opinion, led to “untenable situations in German cities” and “abuse of the welfare state through Sinti and Roma” as well as an “immense level of crime”. The panel discussion was to take place in Berlin Neukölln city hall on 19 May 2014 at 3 p.m.

6. On the same day the Berlin administration clarified in a press release of its own, entitled “Deception of the public by NPD”, that Berlin Neukölln city hall was unavailable for the “defamatory event” and that the applicant party had not even requested permission to use the venue.

7. None of the three persons mentioned in the title of the applicant party’s press release had previously held out any prospect of participating in the panel discussion or had any contact with the applicant party. H.B. promptly declined the invitation and R.R., chairperson of the Central Council of German Sinti and Roma, lodged a criminal complaint for coercion against the applicant party. On 8 May 2014 T.S. informed the applicant party, through his lawyer, that he would not participate in the panel discussion. The applicant party’s invitation letter to T.S. had included the notice that the applicant party “would continue to advertise the invitee’s presence until he had declined the invitation”.

8. T.S. is a member of the Social Democratic Party of Germany and a former Senator of Finance for the state of Berlin. He published a controversial book in 2010 advocating a restrictive immigration policy and the reduction of state welfare benefits. He was widely criticised for the statements in his book, *inter alia*, by members of his own party.

9. After being informed about T.S.’s refusal to participate, the applicant party added the word “amended” (*ergänzt*) in brackets to the title of the press release and added the phrase “AMENDMENT 3: T.S. has communicated through his lawyer that he will definitely not participate in the planned event”, in normal font at the end of the text. In a second version

of the press release, “amended” was not added to the title but the “Amendment 3” phrase appeared in bold font at the end of the text.

10. The applicant party continued to display both versions of the amended press release on its websites until at least 14 May 2014. Elections for the European Parliament were held in Germany on 25 May 2014.

2. The interim proceedings

11. On 8 May 2014 T.S. requested the applicant party to sign a declaration to cease and desist from advertising the debate with his name via the press release. Upon the applicant party’s refusal, he applied for an interim injunction, which was granted by the Cologne Regional Court on 14 May 2014. The applicant party appealed and it appears from the applicant’s submission to the Court that, after having been informed by the Court of Appeal that the continuing need for legal relief in interim proceedings appeared doubtful, T.S. withdrew his application in the interim proceedings.

3. The proceedings at issue

12. After the applicant party had refused again to sign a declaration to cease and desist, T.S. initiated the main proceedings and applied for an injunction. On 26 November 2014 the Cologne Regional Court granted the injunction and held that the headline of the press release, in an intentionally misleading way, suggested that T.S. would actually take part in the debate instead of clearly and truthfully stating that T.S. had merely been invited (“invitation to a panel discussion with T.S.” instead of “T.S. invited to a panel discussion”). By intentionally causing this misinterpretation, the applicant party had exploited T.S.’s advertising impact and thereby infringed his personality rights. It had not been sufficient to add the correcting amendment at the end of the text since at least some readers would still have the impression that T.S. would actually participate. The court observed that finding a violation of T.S.’s personality rights did not require that the infringing interpretation was the only possible, and therefore imperative, interpretation of a given statement. A factual statement that suggested a false and infringing option as one possible interpretation was sufficient to violate one’s personality rights.

13. On 24 March 2015 the Cologne Court of Appeal dismissed the applicant party’s appeal, reasoning that it had illegally exploited the advertising impact of T.S.’s name. The court specified that it did not consider the press release – viewed in its entirety – to be a false statement of facts. However, it was clear from the content and context of the press release that its sole purpose was to draw attention to the applicant party during an electoral campaign and it did so in a misleading way. The court was convinced that the applicant party had never intended the panel

discussion actually to take place. It had not referred to political statements or views of the invitees but merely exploited the publicity drawn to their well-known names. The fact that not commercial but political advertising was concerned aggravated the infringement of personality rights in the present case because at least some readers would associate T.S. with the applicant party's political aims. T.S. had a legitimate interest not to be associated with the applicant party, particularly as he was a member of a different party. The press release offered very little actual information and demonstrated no value judgments concerning T.S. Nonetheless, as the press release was published in the context of an electoral campaign, it constituted a contribution by the applicant party to the formation of the political will of the people and was therefore protected by the party's freedom of expression, which had to be balanced with T.S.'s personality rights. The applicant party's interests were, however, not sufficient to justify the interference with T.S.'s personality rights.

14. On 13 September 2016 the Federal Court of Justice rejected the applicant party's appeal against the Court of Appeal's refusal of leave to appeal on points of law. On 22 February 2017 the Federal Constitutional Court declined to admit the applicant party's constitutional complaint, without giving reasons (1 BvR 2368/16).

B. Relevant domestic law

1. The Basic Law

15. The relevant provisions of the Basic Law, in so far as relevant, read:

Article 1

“(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. ...”

Article 2

“(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. ...”

Article 5

“(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour. ...”

Article 21

“(1) Political parties shall participate in the formation of the political will of the people. ...”

2. *The Civil Code*

16. Article 823 § 1 of the Civil Code (*Bürgerliches Gesetzbuch*) provides that anyone who, intentionally or negligently, unlawfully infringes another person's right to life, physical integrity, health, freedom, property or another similar right will be liable to pay compensation for the resulting damage.

17. In accordance with Article 1004 § 1 of the Civil Code, where a person's property is damaged otherwise than by removal or illegal retention, the owner may require the perpetrator to cease the interference. If there are reasonable fears that further damage will be inflicted, the owner may seek an injunction. Article 1004 § 2 of the Civil Code provides that a claim is ruled out if the owner is obliged to tolerate the interference.

18. A person's personality right enjoys the protection of Article 2 § 1 and Article 1 § 1 of the Basic Law, and is therefore recognised as "another similar right" within the meaning of Article 823 § 1 of the Civil Code (Federal Court of Justice, judgment of 25 May 1954, no. I ZR 211/53). Furthermore, the scope of Article 1004 of the Civil Code has been extended by the Federal Court of Justice and the provision is applicable to violations of other rights protected by Article 823 of the Civil Code. Thus it also protects a person's right to reputation and personality rights (see, for example, Federal Court of Justice, judgment of 28 July 2015, no. VI ZR 340/14).

COMPLAINT

19. The applicant party complained under Article 10 of the injunction granted in the main proceedings against its press release.

THE LAW

20. The applicant party submitted that prohibiting distribution of the press release violated its right to freedom of expression as protected by Article 10 of the Convention, which reads, as far as relevant:

"1. Everyone has the right to freedom of expression. ...

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, ..."

21. The applicant party argued that the press release neither contained a false statement of facts nor exploited the advertising effect of T.S.'s name.

The domestic courts had not taken into account that press releases, in general, were not means of advertisement but mere carriers of information and that political parties played an important role in forming public opinion. The press release at issue informed the public about the invitation of a well-known politician to an event planned by the applicant party and therefore did not lack informational value.

22. At the outset, the Court notes that the injunction against the press release constituted an interference with the applicant party's freedom of expression and that the applicant party did not call into question that this interference was "prescribed by law", namely Articles 1004 § 1, 823 § 1 of the Civil Code in conjunction with Articles 2 § 1 and 1 § 1 of the Basic Law. The Court is satisfied that the interference pursued the legitimate aim of protecting "the reputation or rights of others". It therefore considers that the present case requires an examination of the question of whether a fair balance has been struck between the applicant party's freedom of expression as guaranteed by Article 10 of the Convention and T.S.'s right to the protection of private life and reputation under Article 8.

23. Having considered on previous occasions similar disputes requiring an examination of the issue of a fair balance, the Court refers to the general principles that have been established in its case-law (see *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 78-88, 7 February 2012; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 95-107, ECHR 2012; and *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 83-92, 10 November 2015). Where the exercise of striking a balance between two conflicting rights 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 *Von Hannover (no. 2)*, § 107; and *Couderc and Hachette Filipacchi Associés*, § 92, both cited above).

24. The Court has identified, in so far as relevant for the present case, the following criteria in the context of balancing competing rights: the contribution to a debate of public interest; the degree to which the person affected is well-known; the prior conduct of the person concerned; the subject and content of the publication; the veracity, and form of the publication; the consequences for the person concerned and the severity of the sanction imposed (see *Axel Springer AG*, §§ 90-95; *Von Hannover (no. 2)*, §§ 109-13; and *Couderc and Hachette Filipacchi Associés*, § 93; all cited above).

25. Applying these established general principles to the present case, the Court firstly notes that the Court of Appeal concluded that the press release, and in particular mentioning T.S. by name, had a mere advertising focus. It considered that the announced panel discussion was purely fictitious, as the applicant party had not applied for the use of the venue where the event was to take place and none of the invited speakers had held out any prospect of

participating in the panel discussion, been in contact with the applicant party or confirmed their participation. Taking together the fact that the press release had been issued just over two weeks before the elections for the European Parliament and that the applicant party had stated in the invitation itself that it would continue “advertising” the invitee’s presence up to the refusal of the invitation, the court concluded that the purpose of the publication was exclusively advertisement. Moreover, the Court of Appeal held that the press release had little informational value for the public and altogether lacked informational value concerning T.S. The court noted that the applicant party did not in any way refer to T.S.’s political actions or his previous statements concerning migration, nor was there any substantial discussion of why he had been invited. Instead, in the courts’ view, the applicant party simply stated T.S.’s name for the publicity this would draw to the press release and consequently to itself and its goals during the electoral campaign.

26. The Court also observes that the applicant party submitted that a press release by a political party could not be considered mere advertisement, as press releases were *per se* carriers of information. It further submitted that the press release conveyed the correct information that T.S. had been invited to a panel discussion.

27. The Court considers that the form of the publication has only limited impact on the decision as to whether a publication has to be considered political speech or advertisement. If a publication refers only incidentally to social or political ideas and does not address matters of political debate but has the main aim of attracting people’s attention, it has to be considered closer to commercial speech than to political speech *per se*. This holds true even when the publication falls outside the commercial advertising context, because there is no inducement to buy a particular product (compare *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 62, ECHR 2012 (extracts)). The Court, therefore, accepts the Court of Appeal’s assessment that, owing to its limited informational value, the press release constituted advertisement. It also agrees, however, with the Court of Appeal that, given the applicant’s role as a political party and the fact that the press release was issued during its electoral campaign for the then upcoming elections to the European Parliament, the press release constituted political and not commercial advertisement. The Court, therefore, concludes that the press release contributed to a limited extent to a public debate.

28. The Court observes that the Court of Appeal did not explicitly assess how well-known T.S. was, but that from its reasoning it is obvious that the court was well aware of T.S.’s status as a politician and its implications for the case. In sum, the Court of Appeal justified the injunction with the advertising effect, which mentioning T.S. by name in the press release would, as intended, have for the applicant party. While the Court reiterates that the limits of acceptable comments and criticism are wider with regard

to well-known politicians acting in their public capacity than in relation to private individuals, it also notes that the present case does not concern reporting of facts capable of contributing to a debate in a democratic society or publicly criticising a well-known person, but using the renown of a third person to advance one's publicity.

29. Similarly, it is evident from the reasoning of the Court of Appeal judgment that it took T.S.'s previous conduct into account. It considered that the applicant had been in the limelight not only as a politician but also as the author of a highly criticised book. The court concluded, however, that T.S. had never supported the applicant party's views and interpretation of his book or the applicant party itself. The Court accepts the Court of Appeal's finding that T.S.'s previous conduct had no decisive impact for striking a fair balance in the present case.

30. As to the subject and content of the publication, the Court of Appeal reasoned in detail that the announcement of the public event was only a pretext and that the real aim of the publication was exclusively to advertise and draw attention to the applicant party in the course of an electoral campaign. It also found that the press release entailed no discussion of T.S.'s book, his political activities or the topic of the allegedly planned panel discussion. The Court finds that these conclusions were comprehensibly based on facts (see paragraph 13 above) and finds therefore no reasons to call them into question.

31. As far as the veracity and form of the publication is concerned, the Court observes that the Court of Appeal concluded that the press release, when read in its entirety and together with the amendments, did not include false statements of fact. However, it also held that the headlines of the two versions of the press release were clearly "misleading, if not intentionally misinforming" the readers and that therefore at least some readers would have the impression that there was an actual connection or affiliation between T.S. and the applicant party. Whereas the Regional Court had found that the applicant party had intentionally misled readers to achieve greater publicity, the Court of Appeal left open whether the wording was intentionally misleading. Both courts, nonetheless, found that the applicant party was fully responsible for any misinforming effect, as it would have been easy for the applicant party to word the press release in a clear and unambiguous way.

32. The Court agrees that publications, in general, have to be considered as a whole when assessing whether certain statements were false, excessive or misleading. However, the Court has also acknowledged, particularly in an advertising context, that correct facts can be presented in a way that conveys a false or misleading impression to the reader (see, *mutatis mutandis*, *Brzank v. Germany*, no. 7969/04, 23 January 2007; *Heimann v. Germany*, no. 2357/05, 23 January 2007; and *A. v. Norway*, no. 28070/06, § 70, 9 April 2009). Given that it is primarily for the national courts to

decide whether advertisement is misleading (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 35, Series A no. 165), the Court accepts the conclusion of the Court of Appeal regarding the veracity and form of the press release at issue.

33. With regard to the consequences of the publication for T.S., the Court of Appeal considered that he had to expect that at least some readers would associate him and his name with the applicant party and its political views and goals. Given his membership of the Social Democratic Party – which pursues very different political aims and goals to the applicant party – the adverse effects on T.S. were serious. The Court of Appeal emphasised that public association with a political party was capable of infringing personality rights more seriously than perceived affiliation with a commercial product, because the public assumes the person's identification with the party's views and political goals. The Court agrees with this assessment as to the seriousness of the consequences for T.S.

34. In so far as the severity of the sanction is concerned, the Court notes that no penalty was imposed on the applicant party. The Court of Appeal only prohibited the future distribution of the specific press release in its precise form and wording. Consequently, the applicant party was not generally hindered from advertising for panel discussions or other events. The Court further observes that the applicant party complained about the injunction in the main proceedings only and that the Regional Court granted it on 26 November 2014. As the elections for the European Parliament were held in Germany on 25 May 2014, the Court concludes that the injunction had no consequences for the applicant party's electoral campaign. In sum, it finds that the sanction was as limited as possible.

35. Having regard to the above, the Court considers that the Court of Appeal, in balancing the right to freedom of expression with the right to respect for private life, took into account and applied the criteria set out in the Court's case-law. The Court reiterates that, where a balancing exercise 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 own view for that of the domestic courts. Such strong reasons are lacking in the present case. The Court of Appeal struck a reasonable balance between the competing rights and acted within the margin of appreciation afforded to it.

36. Accordingly, the Court finds that the injunction at issue does not disclose any appearance of a violation of the applicant party's freedom of expression as protected under Article 10 of the Convention. The application is therefore manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 14 December 2017.

Anne-Marie Dougin
Acting Deputy Registrar

Erik Møse
President