

European Court of Human Rights: Annen (No. 2 and 5) v. Germany

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*Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy*

Yet again, the European Court of Human Rights (ECtHR) has been requested to balance the right to reputation and the right to freedom of expression with regard to Internet content. The cases of *Annen v. Germany* are about a series of interferences with the right to freedom of expression of Klaus Günter Annen, a campaigner against abortion who also operates an anti-abortion website. While the other cases deal with distributing leaflets and campaigning in the immediate vicinity of medical practices and clinics where abortions are performed, two of the cases concern injunctions against Annen, as well as a judicial order to pay damages for the violation of the personality rights of doctors performing abortions who had been accused by Annen of “aggravated murder”. Annen’s website had also associated one of the medical doctors with the Third Reich, equating abortions with the crimes of the Third Reich and stigmatising the doctor as a murderer.

Annen lodged a complaint with the ECtHR, arguing that the injunctions and the order to pay damages had violated his freedom of expression as provided in Article 10 of the European Convention on Human Rights (ECHR). At the outset, the ECtHR considered that it was not in dispute that the injunction and the order to pay damages interfered with Annen’s right to freedom of expression, that the interferences were prescribed by German law (Articles 823 and 1004 of the Civil Code), and that they pursued the legitimate aim of protecting the rights of others. Therefore, it remained to be determined whether the interferences by the German judicial authorities were ‘necessary in a democratic society’. The ECtHR reiterated that 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”, it may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the ECHR which may come into conflict with one another 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 and the right to reputation enshrined in Article 8.

The ECtHR referred to the wording on Annen’s website and agreed with the findings by the domestic courts that the website contained the general statement that abortions, as performed by the named doctors, were acts of aggravated

murder. According to the ECtHR, these accusations had no factual basis, as Article 218A of the Criminal Code exempts doctors from criminal liability and there is no domestic case law or other evidence in domestic law supporting Annen's claim. The ECtHR also noted 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 that they might also incite to hatred and aggression.

The ECtHR, in Annen No. 5, further observed that the domestic courts additionally justified the injunction and the order to pay damages by Annen's comparison of abortion with the Holocaust and the atrocities under the Nazi regime. It agreed with the findings of the domestic courts that Annen had equated the medical activities of the named doctor to the utterly unjustifiable atrocities inflicted on Jews under the Nazi regime. It reiterated that the impact an expression of opinion has on another person's personality rights cannot be detached from the historical and social context in which the statement was made and that references to the Holocaust must be seen in the specific context of German history.

Lastly, the ECtHR observed that Annen had not been criminally prosecuted or convicted for slander and that he had not been prevented from campaigning against abortions in general. Indeed, Annen had only been prohibited from describing abortions, as performed by the named doctors, as aggravated murder, and therefore from implying that they were committing that criminal offence. As far as damages were concerned, the ECtHR observed that the domestic courts had elaborated in detail why the violations of the doctor's personality rights had been particularly serious and why they had considered damages appropriate. On these grounds, the ECtHR concluded that the injunction and the order to pay damages were not disproportionate to the legitimate aim pursued, and that the reasons given by the domestic courts were relevant and sufficient. The interference with Annen's right to freedom of expression could therefore reasonably be regarded as necessary in a democratic society for the protection of the reputation and rights of the named doctors. Accordingly, in both judgments, the ECtHR found no violation of Article 10 of the ECHR.

Judgment by the European Court of Human Rights, Fifth Section, case of Annen (No. 2) v. Germany, Application no. 3682/10, 20 September 2018

<http://hudoc.echr.coe.int/eng?i=001-186117>

Judgment by the European Court of Human Rights, Fifth Section, case of Annen (No. 5) v. Germany, Application no. 70693/11, 20 September 2018

<http://hudoc.echr.coe.int/eng?i=001-186123>

