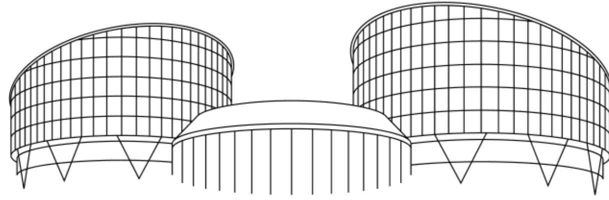

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF HOFFER AND ANNEN v. GERMANY

(Applications nos. 397/07 and 2322/07)

JUDGMENT

STRASBOURG

13 January 2011

FINAL

20/06/2011

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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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

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

Peer Lorenzen, *President,*
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*
Bertram Schmitt, ad hoc *judge,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 7 December 2010,

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

PROCEDURE

1. The case originated in two applications (nos. 397/07 and 2322/07) 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 Ms Collene Hoffer, who has Australian and Italian nationality, and a German national, Mr Klaus Annen ("the applicants"), on 22 December 2006.

2. The applicants were represented by Mr L. Lennartz, a lawyer practising in Euskirchen. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, of the Federal Ministry of Justice.

3. The applicants alleged, in particular, that their criminal convictions violated their right to freedom of expression and that the length of the proceedings before the Federal Constitutional Court was in breach of the "reasonable time" requirement of Article 6 § 1.

4. On 4 February 2010 the President of the Fifth Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1). Having been informed of the case by a letter of 9 February 2010, the Italian Government did not express any wish to intervene under Article 36 § 1 of the Convention.

5. Mrs R. Jaeger, the judge elected in respect of Germany, having withdrawn from sitting in the case, the Government appointed Mr Bertram Schmitt to sit as an *ad hoc* judge.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1945 and 1951 respectively and live in Heilbronn and Weinheim.

7. On 8 October 1997 the applicants distributed four-page folded pamphlets to passers-by in front of a Nuremberg medical centre. The front page contained the following text:

> “'Killing specialist' for unborn children Dr. F. [is] on the premises of the Northern medical centre, Nuremberg”.

8. The middle pages contained information on the development of the human foetus and about abortion techniques. It further contained the appeals:

> “Please support our struggle against the unpunished killing of unborn children”

and

> “Therefore: No to abortion”

The verso read as follows:

> “Support our protest and our work. Help to ensure that the Fifth Commandment “Thou shall not kill” and the Basic Law of the Federal Republic of Germany are in future respected by all doctors in Nuremberg!
>
> Stop the murder of children in their mother's womb on the premises of the Northern medical centre.
>
> then: Holocaust
>
> today: Babycaust
>
> (*damals: Holocaust heute: Babycaust*)
>
> Whoever remains silent becomes guilty too!”

9. The pamphlet bore the name and address of the second applicant as the person legally responsible for its content.

10. On behalf of the medical centre and Dr F., the City of Nuremberg brought criminal charges against the applicants for defamation.

11. On 16 July 1998 the Nuremberg District Court (*Amtsgericht*) acquitted the applicants on the grounds that their action was justified under section 193 of the Criminal Code (*Strafgesetzbuch*, see Relevant domestic law below). According to the District Court, the dissemination of the pamphlets was covered by the right to freedom of expression as guaranteed by Article 5 of the German Basic Law, since the pamphlet, taken as a

whole, was not intended to debase Dr F. or the medical centre, but to express the applicants' general rejection of the performance of abortions. The District Court noted that the applicants considered the number of abortions performed in Germany to be crimes which were as abhorrent as the Holocaust. It was not up to the court to evaluate this statement, which was covered by the right to freedom of expression.

12. Following an examination of the statements contained in the pamphlet, the District Court considered that the applicant's right to freedom of expression had to prevail over the doctor's interest in the protection of his personal honour.

13. On 26 May 1999 the Nuremberg-Fürth Regional Court (*Landgericht*) quashed the District Court's judgment and convicted the applicants of defamation to the detriment of the medical centre and of Dr F. The Regional Court considered that the statement “then: Holocaust / today: Babycaust”, seen in the context of the other statements made in the pamphlet, had to be interpreted as putting the lawful activity performed by Dr F. on a level with the Holocaust, a synonym for the most abhorrent and unjustifiable crimes against humanity. According to the Regional Court, this statement was not covered by the applicants' right to freedom of expression, as it debased the doctor in a way which had not been necessary in order to express the applicants' opinion. While expressions of opinion which related to questions of public interest enjoyed a higher degree of protection than those relating to purely private interests, it had to be taken into account if and to which extent the person addressed had participated in the public debate. Furthermore, it had to be considered if the person expressing his thoughts could be at least expected to replace his statement by a statement which was less detrimental to the other person's honour. Applying these principles, the Regional Court considered that the applicants had failed sufficiently to take into account the doctor's interests. It had to be conceded that the applicants, as anti-abortion activists, had a political aim which they were allowed to pursue even by use of exaggerated and polemic criticism. However, by putting the doctor's legal actions on one level with the arbitrary killings of human beings performed by a regime of injustice, the applicants literally qualified him as a mass murderer. According to the Regional Court, this statement amounted to unjustifiable abusive insult (*Schmähkritik*).

14. The Regional Court further considered that the other statements contained in the pamphlet were covered by the applicants' right to freedom of expression and had to be accepted. Having regard to all the factors of the case, the Regional Court considered it appropriate to impose twenty daily fines of 20 German marks (DEM) each on the first applicant and thirty daily fines of 60 DEM each on the second applicant, as the person having assumed legal responsibility for the pamphlet's content.

15. On 8 December 1999 the Bavarian Court of Appeal (*Bayerisches Oberstes Landesgericht*) rejected the applicants' appeal on points of law.

16. On 7 January 2000 the applicants lodged complaints with the Federal Constitutional Court.

17. On 24 May 2006 the Federal Constitutional Court, sitting as a panel of three judges, quashed the Regional Court's judgment insofar as the applicants had been convicted of defamation to the detriment of the medical centre and dismissed the remainder of the applicants' complaints.

18. The Federal Constitutional Court considered, at the outset, that the criminal courts, when interpreting and applying the criminal law, had to respect the limits imposed by the right to freedom of expression as guaranteed by Article 5 of the Basic Law. The court further considered that the Regional Court had respected these principles.

19. According to the Federal Constitutional Court, the applicants had not confined themselves generally to criticising the performance of abortions – which they remained free to do – but had directed their statements directly against Dr F. It was clear from the overall context that the incriminated statement referred to Dr F., who was expressly mentioned on the front page. The Federal Constitutional Court further noted that the lower courts had assumed that the impugned statement put the doctor's professional activities on the same level as the Holocaust. It further observed that the Federal Court of Justice, in separate proceedings referring to the same pamphlet, assumed that the statement was meant to express the opinion that the abortions performed by the doctor amounted to mass homicide. However, this interpretation of the statement, which also contained the Holocaust reference, also contained a serious interference with the doctor's personality rights.

20. The Federal Constitutional Court further considered that the statement seriously infringed the doctor's personality rights. While the applicants' statement did not qualify as abusive insult, the Regional Court's decision was not objectionable as that court had duly weighed the conflicting interests – that is, the applicants' right to freedom of expression and the doctor's personality rights. In particular, the Regional Court had taken into account that the doctor had practised within the framework of the law and had not actively participated in the public debate on abortion. Furthermore, the applicants could have been reasonably expected to express their general criticism without the serious violation of the doctor's personality rights. This decision was served on the applicants' counsel on 22 June 2006.

21. On 9 November 2006 the Nuremberg Regional Court, following remittal, re-assessed the fines imposed as a penalty for defamation to the doctor's detriment. On 26 June 2007 the Nuremberg Court of Appeal quashed this judgment and remitted the case to the Nuremberg Regional Court.

22. On 25 September 2008 the Nuremberg Regional Court re-assessed the sentences and imposed fifteen daily fines of 10 EUR each on the first applicant and ten daily fines of 10 EUR each on the second applicant, thereby taking into account the second applicant's previous convictions.

23. On 2 April 2009 the Nuremberg Court of Appeal dismissed the applicants' appeal on points of law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

24. Article 5 of the German Basic Law provides:

> "(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."

25. The relevant provisions of the German criminal code read:

Section 185

Defamation

> "Defamation shall be punished with imprisonment of not more than one year or a fine and, if the defamation is committed by means of an assault, with imprisonment of not more than two years or a fine."

Section 193

Safeguarding legitimate interests

> "...utterances made in order to exercise or protect rights or to safeguard legitimate interests...shall only entail liability to the extent that the existence of defamation results from the form of the utterance or the circumstances under which it was made."

26. On 30 May 2000 the Federal Court of Justice, in separate proceedings, rejected the Nuremberg clinic's civil action for an injunction against the applicants to desist from further distributing the pamphlet which forms the subject matter of the proceedings before the Court. The Federal Court of Justice interpreted the statement "then: Holocaust / today: Babycaust" as expressing the opinion that the performance of abortions constituted a reprehensible mass killing of human life. The Federal Court of Justice further considered that, in the context of the public debate on the fundamental question of the protection of unborn life, the clinic had to accept the applicants' expression of opinion.

27. On 25 October 2005 the Federal Constitutional Court, in different proceedings (no. 115/2005), confirmed its previous case-law that, in examining criminal or civil law sanctions for expressions of opinion which

were made in the past, the right to freedom of expression was violated if, in case of an ambiguous statement, the courts based their considerations on the meaning leading to a conviction, without having previously ruled out other possible meanings which could not justify the sanction. However, these standards did not apply to the same degree to rights to desist from making future statements.

THE LAW

I. JOINDER

28. Having regard to the similar subject matter of the applications, the Court finds it appropriate to join them.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

29. The applicants complained that their criminal convictions for distributing the pamphlets violated their right to freedom of expression as provided in Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

They complained, in particular, that the criminal courts misinterpreted their statement, which had not been directed against any particular person, but against the performance of abortions in general.

30. The Government contested that argument.

A. Admissibility

31. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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 applicants' submissions

32. According to the applicants, the domestic courts had erroneously assumed that Dr F. had not given them any reason to single him out. In 1996, Dr F., together with other physicians, lodged a constitutional complaint in which he complained about certain restrictions imposed on the performance of abortions by the Bavarian Pregnant Women's Aid Amendment Act. The proceedings and the judgment given by the Federal Constitutional Court in the physicians' favour on 27 October 1998 drew a considerable amount of public attention.

33. The fact that the performance of abortions after obligatory counselling was, under German law, not subject to criminal liability was exactly the reason why such a hefty debate arose as to whether and to what extent abortions were or were not permissible.

34. The applicants further submitted that the Federal Constitutional Court, by decision of 25 October 2005, had changed its case-law and let, in case of doubt, personality rights prevail over the right to freedom of expression. Had the Federal Constitutional Court adjudicated the applicants' case at an earlier date, they would have profited from the more liberal standards applied before. The change of the Federal Constitutional Court's case-law had not been foreseeable for them.

35. The applicants' conviction was not necessary in a democratic society. There was no German law which prohibited linking criticism to a particular person. This case had to be seen against the background of the broad social debate on the laws ruling abortions, which must not be compromised one-sidedly by the Government for the purpose of preserving other concepts and notions. The Government could not rely on the Court's decision on the second applicant's previous complaint (compare *Annen v. Germany* (dec.), no. 2373/07 and 2396/07, 30 March 2010), as the instant case concerned criminal convictions which weighed more heavily than the convictions to desist which formed the subject matter of the aforementioned proceedings.

2. The Government's submissions

36. The Government submitted that the interference with the applicants' right to freedom of expression was justified under paragraph 2 of Article 10 of the Convention as being necessary in a democratic society.

37. Taking into account all circumstances of the case, the domestic courts had interpreted that the statement “Then: Holocaust / today: Babycaust” directly referred to Dr F. The domestic courts had duly weighed up the applicants' right to freedom of expression and Dr F.'s personality rights. The impugned statement, by putting the abortions performed by the applicant on the same level as the Holocaust, constituted a particularly serious interference with the doctor's personality rights and the sanctions imposed were relatively low.

38. The fact that Dr F. had, in 1996, lodged a constitutional complaint could not be held against him as, in a State governed by the Rule of Law, the fact that a citizen made use of the legal possibilities which were offered to protect his rights could not result in a diminished protection of personality rights.

39. The Federal Constitutional Court's judgment given on 25 October 2005 (see paragraph 27, above) had not changed that court's case-law regarding criminal convictions for ambiguous statements, as it exclusively referred to the civil obligation to desist from making such statements in the future.

3. Assessment by the Court

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

41. The Court notes that the applicants' convictions were based on section 185 of the Criminal Code. The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among many other authorities, *Grigoriades v. Greece*, 25 November 1997, § 37, *Reports of Judgments and Decisions* 1997-VII). It is true that section 185 of the Criminal Code is couched in rather broad terms. Nonetheless, in the Court's view, it met the above standard. On the ordinary meaning of the word “defamation” it ought to have been clear to the applicants that they risked incurring a criminal sanction. It follows that the interference complained of was “prescribed by law”.

42. The Court further observes that the applicants' convictions were designed to protect “the reputation or rights of others”, namely Dr F.'s reputation and personality rights.

43. It remains to be determined whether the interferences were “necessary in a democratic society”. This 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 supervision by the Court (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V).

44. In exercising its supervisory function, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). The Court will also have regard to the special degree of protection afforded to expressions of opinions which were made in the course of a debate on matters of public interest (compare for example *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV and *Kubaszewski v. Poland*, no. 571/04, § 38, 2 February 2010).

45. Turning to the circumstances of the instant case the Court notes, at the outset, that the Regional Court expressly acknowledged that the applicants' statements addressed questions of public interest and that they were allowed to pursue their political aims even by use of exaggerated and polemic criticism. They were therefore prepared to accept that all other statements contained in the pamphlet, except for the statement “Then: Holocaust / today: Babycaust”, constituted an acceptable element of a public debate falling within the scope of freedom of expression. The Court will thus limit its examination to the latter statement.

46. In the view of the domestic courts the applicants, by comparing the performance of abortions to the mass-homicide committed during the Holocaust, had violated the physician's personality rights in a particular serious way and could have been expected to express their criticism in a way which was less detrimental to the physician's honour.

47. The Court further notes that the Federal Constitutional Court acknowledged the fact that the applicants' statement could be interpreted in different ways, but considered that all possible interpretations amounted to a very serious violation of the physician's personality rights.

48. The Court observes that the impact an expression of opinion has on another person's personality rights cannot be detached from the historical and social context in which the statement was made. The reference to the Holocaust must also be seen in the specific context of the German past. The Court therefore accepts the domestic courts' conclusion that the impugned statement constituted a very serious violation of the physician's personality rights.

49. In conclusion, the Court considers that the domestic courts have duly balanced the applicants' right to freedom of expression against the physician's personality rights. It follows that the reasons relied on by the

domestic courts were sufficient to show that the interference complained of was "necessary in a democratic society". Moreover, the relatively modest criminal sanctions imposed were proportionate. Having regard to all the foregoing factors, and in particular the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts struck a fair balance between the competing interests involved.

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

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

51. The applicants complained that the length of the proceedings before the Federal Constitutional Court had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

52. The Government conceded that the proceedings before the Federal Constitutional Court lasted for a relatively long time.

53. The period to be taken into consideration began on 7 January 2000 when the applicants lodged their constitutional complaints and ended on 22 June 2006 when the Federal Constitutional Court's decision was served on the applicants' counsel. It thus lasted almost six and a half years for one level of jurisdiction.

A. Admissibility

54. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

55. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

56. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case

(see, among other authorities, *Leela Förderkreis e.V. and Others v. Germany*, no. 58911/00, §§ 59 - 66, 6 November 2008 and *Kaemena and Thöneböhn v. Germany*, nos. 45749/06 and 51115/06, §§ 61-65, 22 January 2009).

57. Having examined all the material submitted to it, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

58. There has accordingly been a breach of Article 6 § 1.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

59. Relying on Articles 7 § 1, 10 and 6 of the Convention, the applicants further complained that they had not been aware of the interpretation that the criminal courts would attach to their statement. It followed that they did not have the intention to commit a criminal act. Furthermore, the proceedings before the Federal Constitutional Court had been unfair because the case should have been adjudicated by the full senate instead of a panel of three judges. The second applicant further complained that his sentence had been increased merely because he had assumed legal responsibility for the pamphlet's content.

60. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. There is, in particular, no indication of a retroactive application of a criminal law.

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

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. Article 41 of the Convention provides:

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

A. Damage

63. The applicants left the assessment of non-pecuniary damages to the Court's discretion.

64. The Government did not express an opinion on the matter.

65. The Court, ruling on an equitable basis, awards each applicant EUR 4,000 in respect of non-pecuniary damage for the length of the proceedings before the Federal Constitutional Court.

B. Costs and expenses

66. The first applicant claimed EUR 4,364.52 for the costs and expenses incurred before the domestic courts and EUR 2,403.80 for those incurred before the Court. The second applicant claimed EUR 6,479.27 for the costs and expenses incurred before the domestic courts and EUR 2,403.80 for those incurred before the Court.

67. The Government submitted that the second applicant had partly misstated the costs incurred in the criminal proceedings.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers that the applicants have not established that the costs and expenses claimed for the proceedings before the domestic courts were incurred by them in order to seek prevention or rectification of the specific violation caused by the excessive length of the proceedings. The Court therefore rejects the claim for costs and expenses in the domestic proceedings.

69. As regards counsel fees for the proceedings before the Court, the Court, taking into account that the applicants' claims were only partly successful, considers it reasonable to award each applicant EUR 1,000 under this head, plus any tax that may be chargeable to the applicants on that amount.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the complaints under Article 10 of the Convention and under Article 6 § 1 of the Convention about the length of the proceedings before the Federal Constitutional Court admissible and the remainder of the applications inadmissible;

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

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention with regard to the length of the proceedings before the Federal Constitutional Court;

5. *Holds*
   (a) that the respondent State is to pay each of the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,
      (i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicants, for costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President