



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

FIFTH SECTION

Application no. 5709/09
Ulrich BROSA
against Germany
lodged on 12 January 2009

STATEMENT OF FACTS

1. The applicant, Mr Ulrich Brosa, is a German national, who was born in 1950 and lives in Amöneburg.

A. The circumstances of the case

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

1. Proceedings before the Kirchhain District Court

2. In the run-up to mayoral elections the applicant distributed a leaflet concerning X, one of the candidates. The headline on the leaflet read: "Don't vote for an agitator" (*Wählen Sie keinen Scharfmacher*).

3. On 6 July 2005 the Kirchhain District Court issued an injunction prohibiting the applicant from distributing the leaflet because it alleged that one of the mayoral candidates was involved with a neo-Nazi organisation. It further prohibited the applicant from disseminating other allegations of fact (*Tatsachenbehauptungen*) claiming that X was providing cover for neo-Nazi organisations. The District Court warned the applicant that any breach of the restraining order was punishable by a fine of up to 250,000 euros (EUR) or by imprisonment of up to six months. The applicant objected.

4. On 18 August 2005 the Kirchhain District Court confirmed the injunction. It established that the applicant had compiled the leaflet, which contained the sentences: "Several neo-Nazi organisations are based in Amöneburg. Berger-88-e.V. is particularly dangerous and X is providing cover for it" (*Amöneburg ist Sitz mehrerer Neonaziorganisationen.*



Besonders gefährlich sind die Berger-88-e.V., die X deckt). The District Court found that the allegation that X was supporting a neo-Nazi organisation had damaged his reputation and social standing. It therefore concluded that the allegation had violated X's personality rights (*allgemeines Persönlichkeitsrecht*). The District Court further observed that the leaflet had alleged that X had been providing a cover for a neo-Nazi organisation and thus contained factual allegations. It observed that there was insufficient evidence to prove the accuracy of the statement at the time of the leaflet's distribution. As a consequence, the court held that it should be assumed that the allegation was false and thus did not benefit from the freedom of expression protection guaranteed by section 5 of the Basic Law (see domestic law below). In addition, the court held that the applicant had failed to prove the accuracy of his allegation in the course of the proceedings. It weighed the applicant's right to freedom of expression against X's personality rights. In this context, it took account of the fact that the leaflet had been distributed before an election and of the severity of its impact on X. The District Court came to the conclusion that X's personality rights had been violated.

2. Proceedings before the Marburg Regional Court

5. On 28 June 2006 the Marburg Regional Court dismissed an appeal lodged by the applicant. It confirmed that the statement at issue had violated X's personality rights and that he was entitled to claim hardship pursuant to Articles 823 and 1004 (by analogy) of the Civil Code (see paragraphs 13 and 14 below). The Regional Court explained that the statement in question contained two different allegations fact: firstly, it alleged that Berger-88-e.V. was a particularly dangerous neo-Nazi organisation; and secondly, it alleged that X had been aware of that fact but had nevertheless been providing cover for the organisation. The Regional Court found that that statement had damaged X's reputation.

6. Further, the Regional Court concluded that the applicant had failed to prove the accuracy of his statements. It provided a detailed reasoning, firstly, regarding the allegation that Berger-88-e.V. was a neo-Nazi organisation. The court considered in detail the applicant's submissions indicating, in his view, the neo-Nazi character of the organisation. These concerned, *inter alia*, the name, symbols and sweaters used by the organisation, as well as the alleged behaviour of its members. In particular, the court could not establish that a member of the organisation had shouted "Heil Hitler" during an Easter bonfire or that members had participated in a "fraternity party" which celebrated Hitler's birthday. The court concluded that, while some indications in the overall picture might arouse a suspicion of engagement in neo-Nazi activities, the applicant had failed to adduce sufficient evidence to prove that that was indeed the case.

7. Secondly, the Regional Court gave reasons why the applicant had failed to adduce sufficient evidence that X had known about and approved of the neo-Nazi character of the organisation. It dismissed in this respect the applicant's argument that X should have distanced himself from the organisation. The court observed that the applicant had reproached X in the leaflet not for his failure to distance himself from the organisation but for

publicly approving of its activities despite knowing the particular danger emerging from the organisation.

8. Lastly, the Regional Court held that, pursuant to section 5 of the Basic Law, the applicant's statements did not benefit from the protection afforded by the freedom of expression provisions. It found that the statements had been made in the context of mayoral elections and were thus intended to influence the public's perception of X. The court observed that the statements therefore aimed at forming public opinion. In principle, statements aiming to form an opinion (*meinungsbezogene Tatsachenbehauptungen*) were protected by freedom of expression provisions under section 5 of the Basic Law. Referring to the case law of the Federal Constitutional Court, the Regional Court went on to explain, however, that this did not hold true for statements the accuracy of which was dubious. If insufficient verifiable facts were available – even when applying minimum requirements in this respect – statements aimed at forming an opinion were not protected by section 5 of the Basic Law. Nevertheless, the Regional Court refrained from assessing whether sufficient verifiable facts had been available in the case at hand.

9. The Regional Court considered that the applicant had, in any event, alleged that X had provided cover for the organisation, despite being aware of and approving of its dangerousness and its neo-Nazi character. The applicant failed to submit any facts in support of that allegation. The sole fact that, in a letter to a newspaper editor, X had contradicted the applicant's opinion about the neo-Nazi character of the organisation did not entitle the applicant to allege that X had been providing a cover for a dangerous neo-Nazi organisation.

10. On 29 January 2007 the Regional Court dismissed the applicant's complaint that he had not received a fair hearing.

11. On 1 July 2008 the Federal Constitutional Court (file no. 1 BvR 597/07) refused to admit the applicant's constitutional complaint for consideration.

B. Relevant domestic law

12. Section 5 of the Basic Law (*Grundgesetz*) reads as follows:

“ [Freedom of expression, arts and sciences]

(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) The limits of these rights shall be defined by the provisions of general laws, provisions for the protection of young persons, and provisions for the protection of a person's reputation ...”

13. 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 other similar right shall be liable to pay compensation for the resulting damage.

14. In accordance with Article 1004 of the Civil Code, where a person's property is damaged other 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. It is the established case law of the German courts that Article 1004 applies also to actions for injunctions to protect general personality rights.

COMPLAINTS

15. The applicant complained under Article 10 of the Convention that he had been served with an injunction prohibiting him from distributing a leaflet.

16. Under Article 5 of the Convention, the applicant complained that he had been attacked more than thirty times by different people and that the German courts' decisions encouraged right-wing extremists to commit crimes. Under Article 6 of the Convention, the applicant complained of unfair civil proceedings, because the courts had allegedly refused to call witnesses and to request the inclusion of a criminal case file. Under Article 13 of the Convention, the applicant complained that the Federal Constitutional Court had refused to consider his constitutional complaint.

QUESTION TO THE PARTIES

Has there been a violation of the applicant's right to freedom of expression, contrary to Article 10 of the Convention?