EUROPEAN COURT OF HUMAN RIGHTS

FIFTH SECTION

APPLICATION NO. 3690/10

Annen

Applicant

v.

Germany

Respondent

WRITTEN OBSERVATIONS OF THIRD PARTY INTERVENERS:

Aktion Lebensrecht für Alle

And

Alliance Defending Freedom

Filed on
18 June 2013

Introduction

1. These written comments are submitted by Alliance Defending Freedom ("ADF") and Aktion Lebensrecht für Alle ("ALfA") pursuant to Article 36(2) of the Convention and Rule 44 of the Rules of Court.

2. Founded in 1977, ALfA advocates the unrestricted right to life of every person. ALfA is one of the largest pro-life organizations in Germany and represents more than 10,000 members. In addition, ALfA is a member of the Federal Right to Life Association (BVL). Established in 1994, Alliance Defending Freedom is an international legal organization that advocates for religious freedom, the right to life and marriage and the family. With its European headquarters in Vienna, Austria, ADF has defended the right to freely and peacefully demonstrate against abortion throughout Europe.

3. These written comments assess the Court's governing jurisprudence as it should apply to freedom of expression, particularly regarding issues of a fundamental public interest such as abortion. By direction of the Court, this brief does not address the specific facts of the case or its applicant.

1. Abortion and Public Interest and Concern

4. The fundamental question of when life begins and when it should be worthy of protection is a matter of intense public and political debate. In many countries around the world abortion remains illegal or permitted only to save the life of the mother,[1] and in Europe, ever since laws permitting abortion were introduced during the second half of the last century, campaign groups, lawyers and politicians have actively campaigned for the protection of unborn life and against laws permitting abortion.

5. Throughout Europe there are hundreds of national "pro-life" campaign groups and many organizations that operate on an international level. Similarly, there are numerous pro-abortion organizations that campaign and advocate for more permissive and liberal abortion laws throughout Europe. In European countries where laws on abortion are more restrictive – such as Ireland and Poland – there are frequent campaigns to liberalize abortion laws.[2] Conversely, campaigns regularly take place in other European countries where abortion laws are more liberal.[3]

[1] According to a document produced by the United Nations agency, UN-Women, there are 61 countries in the world where abortion is rarely permitted. *See* http://progress.unwomen.org/wp-content/uploads/2011/06/EN-Summary-Progress-of-the-Worlds-Women1.pdf.

[2] For example, there is currently heated debate surrounding the introduction of a draft bill on abortion.

[3] For example, there are currently campaigns taking place to restrict abortion laws in Lithuania (*see http://www.lrt.lt/naujienos/lietuvoje/2/18634/seimas_linkes_uzdrausti_abortus_*), Spain (*see* http://sociedad.elpais.com/sociedad/2013/05/12/actualidad/1368389663_855946.html) and the United Kingdom (*see* http://prolife.org.uk/2013/01/parliamentary-inquiry-into-abortion-on-the-grounds-of-disability/).

6. The debate concerning the moral and legal issues surrounding abortion is therefore highly intense. Moreover, because of the primary issue involved – life itself – the debate is also highly important. To pro-life campaigners, abortion is the intentional taking of human life. To pro-abortion campaigners, restrictions on abortion represent discrimination and a denial of women's rights. Given the importance of the issue and the strength of feelings involved, strong and provocative language is to be expected on both sides of a heated debate.

7. Although few cases have come before the European Court of Human Rights on the issue of abortion protests,[4] in European jurisdictions there are several examples where protests against abortion and abortion providers – including graphic or strongly worded protests – have been protected on the basis of freedom of expression.

8. For example, in the Slovak Republic case of *Centre for Bio-ethical Reform Europe v. Slovak Republic* [2009] III. ÚS 42/09-77, a Slovak pro-life group held a campaign against abortions in front of the Technical University in Kosice. The exhibition, named "STOP GENOCIDE," included 12 posters depicting genocide and aborted human foetuses. Upon receiving a complaint by a representative of one television station, the police came to the exhibition and suspected that a misdemeanour against public order was being committed. The organizers were told to remove the posters otherwise the police would intervene. The organizers subsequently concluded the exhibit and packed away the posters and the police took no further action.

9. The applicant felt that being asked to pack away the exhibition amounted to the suppression of free speech and the Constitutional Court agreed with this assessment. The Constitutional Court emphasized that free speech protects shocking and disturbing information, citing *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737 as authority. The Court also noted that a campaign to change the legal status quo is protected by freedom of speech and because there was no legitimate aim and no pressing social need, the Court found a breach of Article 26 of the Slovak Constitution (free speech) and Article 10 of the European Convention on Human Rights.

10. Similarly, in 2011 two British pro-life campaigners were prosecuted for displaying graphic images of aborted human foetuses outside of an abortion clinic. Andrew Stephenson and Kathryn Sloane are members of the pro-life group, Abort67, which for five years has been demonstrating directly outside an abortion clinic in Brighton,

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On a European level, the "One of Us" campaign is currently seeking to gather one million signatures "to protect the dignity of the person and life from conception at a European scale." (*See* http://www.oneofus.eu/initiative-explanation/).

[4] In *Bowman v. The United Kingdom* (141/1996/760/961) 19 February 1998, the applicant had distributed half a million leaflets with information on electoral candidates on one side, and a picture of "an unborn baby ten weeks after conception" on the other side. The Court held that the prosecution of the applicant, for spending too much money on publications during an election period, amounted to restriction on freedom of expression and was a violation of Article 10.

England. On 22 June 2011 the campaigners were arrested for displaying graphic images and refusing to take them down. They were prosecuted under section 5 of the Public Order Act, which criminalizes "threatening, abusive or insulting" words or behaviour, but on 17 September 2012 they were acquitted in court. As with the Slovak case, ECHR freedom of expression jurisprudence was used in their defence.[5]

11. As with other topics of public interest, the issue of abortion is often debated with strong language. However, relying on Convention principles, the domestic courts of many Member States have held that freedom of speech must not be overridden, despite the offense caused to some members of society by the particular form of speech chosen by some pro-life organizations.

2. Freedom of Expression and ECHR Case Law

12. Freedom of expression is one of the most important freedoms in the constitutional system of any democratic nation. Accordingly, the right to speak freely features prominently in all of the international human rights documents. As the recent General Comment by the UN Human Rights Committee states:

> Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.[6] They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.[7]

13. In keeping with other international human rights bodies, the European Court of Human Rights has had a longstanding tradition of giving robust protection to freedom of expression.

14. Article 10 of the Convention provides that "everyone has the right to freedom of expression" and the Court has stated on numerous occasions that freedom of expression has a "special importance" under the Convention.[8] Moreover, Article 10 not only protects the substance of the ideas and information expressed but also their form.[9]

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[5] For an analysis of the case, see http://www.christianconcern.com/our-concerns/abortion/pro-life-freedom-of-expression-case-analysis.

[6] Citing Communication No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007; No. 628/1995, *Park v. Republic of Korea*, Views adopted on 5 July 1996.

[7] Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, § 2.

[8] See *Ezelin v. France* (1992) 14 E.H.R.R. 362 § 51. Article 11 of the Convention provides that "Everyone has the right to freedom of peaceful assembly." The two freedoms are closely linked and in *Ziliberberg v Moldova* (Application No 61821/00) 4 May 2004, the Court observed that "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society."

[9] *De Haes v Belgium* (1997) 25 E.H.R.R. 1, § 48.

15. In the seminal case of *Handyside v. United Kingdom*, the Court explained the importance of freedom of speech to democracy itself:

> Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[10]

16. Any interference with the right to freedom of expression will only be lawful if it is justified under Article 10 § 2. For the interference in question to be justified it must be prescribed by law; pursue a legitimate aim and be necessary in a democratic society. However, the Court has stated that any exceptions to the right to freedom of expression must be "construed strictly and the need for any restrictions must be established convincingly"[11] and only "convincing and compelling reasons" can justify a restriction on freedom of expression.[12]

17. Furthermore, there is very little scope under the Convention for restrictions on the debate of questions of public interest[13] and Contracting States "have only a limited margin of appreciation"[14] in restricting freedom of expression.

18. In regard to the third requirement under Article 10 § 2 that the interference be "necessary in a democratic society",[15] the Court has noted that the adjective "necessary" implies the existence of a "pressing social need" and the word does not have the flexibility of expressions such as "useful," "reasonable" or "desirable."[16] Moreover, the grounds advanced by the respondent State must be both relevant and sufficient to establish that the interference complained of was necessary in a democratic society.[17] If there is not a reasonable relationship of proportionality between the restrictions imposed by the national courts on freedom of expression and the legitimate aim pursued, the Court will find a violation of Article 10.[18]

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[10] (1976) 1 E.H.R.R. 737 § 49.
[11] *Şener v. Turkey*, no. 26680/95, § 39, ECHR 2000-III. See also *Thoma v. Luxembourg*, no. 38432/97, §§ 43, 48, ECHR 2001-II; see also *The Observer and The Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p. 30, § 59.
[12] *Id.*, § 40.
[13] *Vajnai v. Hungary*, Application no. 33629/06, judgment of 8 October 2008, § 47.
[14] *United Communist Party of Turkey and Others v. Turkey*, [G.C.], Application no. 133/1996/752/951, judgment of 30 January 1998, § 46.
[15] *Vögt v. Germany* (1996) 21 EHRR 205 § 52.
[16] *Handyside* at § 48.
[17] *Axel Springer AG v Germany* (App no. 39954/08), 7 February 2012, § 110.
[18] *Axel Springer AG* § 110.

19. In deciding whether an interference corresponds to a pressing social need and is proportionate to the legitimate aim pursued, several factors may be considered. The Interveners submit that, with regard to campaign groups which protest against abortion, several factors in particular ought to be taken into consideration: (i) the freedom under the Convention to offend, shock and disturb, (ii) the heightened protection for topics of public interest and concern, and (iii) the importance of campaign groups to the democratic process.

i. The freedom to offend, shock and disturb

20. Firstly, it is the clear jurisprudence of the Court that controversial opinions expressed in strong language are protected under Article 10.[19] This has been the long-standing view of the Court and has meant that, as the following cases demonstrate, many "offensive" forms of expression have been protected by Article 10.

21. The case of *Oberschlick v. Austria (No. 2)*, 1 July 1997, R.J.D. 1997-IV, concerned a journalist who was convicted by the Austrian authorities for insulting and defaming a prominent politician. The applicant had labelled the politician an "idiot" in a newspaper article and the national courts held that the right to freedom of opinion "must not lead to insults replacing arguments of substance in political debate." This Court, however, found the conviction to be in breach of Article 10. The Court noted that the article was polemical, in particular the word "idiot," and no doubt offended the politician. However, the Court stated that, "It must be remembered that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed."[20]

22. In *Gündüz v. Turkey*, (App no. 35071/97), 4 December 2003, the leader of an "Islamic sect" was convicted for making a series of offensive remarks on television. In particular he referred to children that are born following a civil ceremony marriage as "piçs" – a particularly pejorative term designed to cause offense. Again, the European Court found that the conviction was a violation of Article 10, and noted at paragraph 48 that taken in context, the comments "cannot be construed as a call to violence or as hate speech based on religious intolerance."

23. In *Giniewski v. France* (2007) 19 E.H.R.R. 34, a journalist was convicted for defamation for making racially defamatory statements against the Christian community. In particular, the applicant had written that the doctrine of the Catholic Church contained the seeds of anti-Semitism that fostered the idea and implementation of the Holocaust. The European Court again found the conviction to be in violation of the Convention, stating that although the published text "contains

[19] Such protections do not extend to statements that incite violence against an individual or a sector of the population. See *Surek v. Turkey* (No. 3), [G.C] Application no. 24735/94, judgment of 8 July 1999.
[20] *Oberschlick* at § 34.

conclusions and phrases which may offend, shock or disturb some people, the Court has reiterated that such views do not in themselves preclude the enjoyment of freedom of expression."[21]

24. In the case of *Klein v. Slovakia* (App no. 72208/01), 31 October 2006, the applicant was convicted for "defamation of nation, race and belief" for writing an article in which he criticized the Archbishop of Trnava, Slovakia, at one point calling him an "ogre". The domestic courts held that, "The article in question is vulgar and it ridicules and offends. In the view of the Regional Court it therefore enjoys no protection." However, the European Court did not agree and, despite noting that the article was a "strongly worded pejorative opinion" containing "oblique vulgar and sexual connotations" and aimed at a particular individual, the Court held that the conviction was in violation of Article 10 of the Convention.

25. Therefore, the clear and consistent case law of the Court has been that offensive, shocking and disturbing speech is worthy of protection under Article 10 of the Convention – including strongly worded anti-abortion protesting.

26. Moreover, although a fair balance must be achieved where the freedom to protest clashes with the rights of others, there is no right under the Convention to not be offended, shocked or disturbed.

27. For example, in the case of *Öllinger v. Austria* (Application no. 76900/01) 29 September 2006, decided under Article 11 of the Convention, the State authorities prohibited a demonstration from taking place against a group of retired soldiers who annually attended a cemetery war memorial on All Saints' Day (when Austrians traditionally go to cemeteries to commemorate the dead). The Court held that this was a violation of the Convention. The protest may well have disturbed the soldiers but by restricting the protest, the Austrian government had "[given] too little weight to the applicant's interest in holding the intended assembly and expressing his protest ... while giving too much weight to the interest of [others] in being protected against some rather limited disturbances."[22] The Court therefore considered that the Austrian authorities had failed to strike a fair balance between the competing interests.

ii. The heightened protection for topics of public interest and concern

28. Secondly, the Court must have regard to "the special degree of protection" afforded to expressions of opinions which are made "in the course of a debate on matters of public interest."[23] Indeed, out of all the forms of expression, political expression attracts the highest form of protection under the Convention, because, as the Court

[21] *Giniewski* at § 52.
[22] *Öllinger* at § 49.
[23] *Hoffer and Annen v. Germany*, Application nos. 397/07 and 2322/07, judgment of 13 January 2011, § 44.

explained in *Lingens v. Austria* (1986) EHRR 407, "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention."[24] Similarly, Lord Nicholls explained in the House of Lords case of *Pro Life Alliance v. BBC* [2004] 1 A.C. 185 that, "Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts."[25]

29. Political speech has been interpreted broadly by the Court. In *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Series A no. 239 the Court stated that, "there is no warrant in its case-law for distinguishing ... between political discussion and discussion of other matters of public concern."[26] This principle has been reaffirmed in subsequent case law.

30. For example, in *Steel and Morris v. The United Kingdom* (App no. 68416/01) 15 February 2005, discussed in more detail below, the Court observed that the expression in question – statements contained within campaign leaflets – touched up topics such as "abusive and immoral farming and employment practices, deforestation, the exploitation of children and their parents through aggressive advertising and the sale of unhealthy food." As these were considered by the Court to be matters of "public interest and concern," they required a high level of protection.[27]

31. The issue of abortion must likewise be considered a matter of public interest and concern that requires the highest level of protection under Article 10 of the Convention

iii. The importance of campaign groups

32. Thirdly, the Court has made clear the important role that campaign groups play in the democratic process. In the case of *Steel and Morris v. The United Kingdom* (App no. 68416/01) 15 February 2005, two campaigners had printed and distributed leaflets against the food chain McDonalds and had subsequently been sued for libel. The applicants lost their case in the domestic courts and took an Article 6 and Article 10 claim to the European Court of Human Rights. In determining whether the interference with the applicants' freedom of expression had been "necessary in a democratic society," the Court laid down important principles in regard to campaigning organizations and leaflet distribution.[28]

[24] *Lingens* at § 42.
[25] *Pro Life Alliance* at § 8.
[26] *Thorgeir Thorgeirson* at § 64.
[27] S*teel and Morris* at § 88.
[28] *See* Ronan O Fathaigh, 'Anti-Abortion Protest and Freedom of Expression in Europe,' 17 *Colum. J. Eur. L. F.* 47 (2011).

33. The Court first emphasised the important role that campaign groups play in both the dissemination of information and the stimulation of public discussion. The Court stated:

> In a democratic society even small and informal campaign groups ... must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest.[29]

34. Moreover, the Court noted the "legitimate and important role that campaign groups can play in stimulating public discussion."[30]

35. Furthermore, the Court observed that journalists are allowed "recourse to a degree of exaggeration, or even provocation"[31] and similarly considered that "in a campaigning leaflet a certain degree of hyperbole and exaggeration is to be tolerated, and even expected." Despite the campaign leaflets containing "allegations of a very serious nature," which had been found to be untrue yet presented as statements of fact, the Court found a violation of Article 10 of the Convention. Although many factors led the Court to this conclusion, the importance it placed on the free exercise of campaign groups was clearly one of them.

36. Therefore, in light of the Court's jurisprudence on Article 10 and in particular, the freedom to offend, shock and disturb, the heightened protection for topics of public interest and concern and the importance of campaign groups, it is difficult to see how the Court could consider that restrictions on campaign literature and its supporting website could be justified under Article 10 § 2.

3. Freedom of Expression and Reputation

37. However, despite the Court's historical protections of freedom of speech under Article 10 of the Convention, as detailed above, there is a recent strand of jurisprudence that is militating against freedom of speech – namely, the Court's elevation of personal reputation or so-called "personality rights." The Interveners submit that this recent jurisprudence should not be used to prevent issues that are clearly in the public interest – such as abortion – from being rigorously debated in public life.

38. In the case of *Radio France v. France* (2005) 40 EHRR 29, the Court stated that "the right to protection of one's reputation is of course one of the rights guaranteed by

[29] *Steel and Morris* at § 88.
[30] *Id.*, at § 95.
[31] *Id.*, at § 90, citing *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38.

Article 8 of the Convention, as one element of the right to respect for private life."[32] While no authority was cited by the Court for this proposition,[33] it has nevertheless been repeated in subsequent case-law. For example, in *Cumpana v Romania* (2005) 41 EHRR 14, the Court created an additional way in which Article 10 can be restricted:

> The Court must also ascertain whether the domestic authorities struck a fair balance between, on the one hand, the protection of freedom of expression as enshrined in Article 10, and on the other hand, the protection of the reputation of those against whom allegations have been made, a right which, as an aspect of private life is protected by Article 8 of the Convention.[34]

39. Through this new approach the Court has adopted a very different understanding of Article 10. As one commentator, Eric Barendt, has noted, "It asks whether a fair balance has been struck between two Convention rights, rather than whether it was necessary in a democratic society—to which freedom of political expression is crucial—to restrict the exercise of the rights conferred by Article 10 in order to protect the right to reputation."[35]

40. Thus, while reputation is mentioned in Article 10 § 2, it is not a free standing fundamental right listed in the Convention. Instead, the right to reputation or, as the Court has stated in other cases, "personality rights,"[36] must only outweigh freedom of expression where there are convincing and compelling reasons to do so and in order to meet a pressing social need. As has been pointed out, "According to [the] traditional approach, free speech has a strongly presumptive priority over protection of reputation."[37]

41. In two 2012 Grand Chamber decisions involving Germany, *Axel Springer AG v Germany* (App no. 39954/08), 7 February 2012 and *Von Hannover v Germany (No.2)* (App Nos. 40660/08; 60641/08), 7 February 2012, the Court, to a certain degree, re-shifted the balance. In both cases it was held that freedom of expression had been violated by the permanent injunctions issued by the domestic courts to protect "personality rights."

42. After taking numerous factors into consideration, the Court concluded in *Axel Springer AG v Germany:*

[32] *Radio France* at §31.
[33] *See* Gavin Millar, 'Whither the Spirit of Lingens?', *E.H.R.L.R*, 278 (2009).
[34] *Cumpana* at § 91.
[35] Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court', [2009] 1 *Journal of Media Law* 49-72, [66].
[36] For example, *Hoffer and Annen v. Germany*.
[37] *See* Gavin Millar, 'Whither the Spirit of Lingens?', *E.H.R.L.R*, 278 (2009), 282.

> ...the grounds advanced by the respondent State, although relevant, are not sufficient to establish that the interference complained of was necessary in a democratic society. Despite the margin of appreciation enjoyed by the Contracting States, the Court considers that there is no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company's right to freedom of expression and, on the other hand, the legitimate aim pursued.
>
> Accordingly, there has been a violation of Article 10 of the Convention.[38]

43. Therefore, in order to maintain fidelity to the European Convention on Human Rights, freedom of expression must maintain its "strongly presumptive priority" over the protection of "personality rights" in the instant case.

Conclusion

44. The issue of abortion is one of great public interest and concern. It is often debated with strong language used on both sides, and many people are offended by those who take an opposing view to themselves. However, the European Court of Human Rights has had a longstanding tradition of giving robust protection to freedom of expression, including expression that is offensive, shocking and disturbing. Given the Court's heightened protection for topics of public interest and concern and the importance of campaign groups to the democratic process, there must be significant reasons for any restrictions on pro-life campaigning. The Interveners submit that the so-called protection of "personality rights" – a right not found in the Convention – is not a sufficient reason for interfering with the freedom of speech of pro-life groups.

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[38] *Axel Springer AG* at § 110.