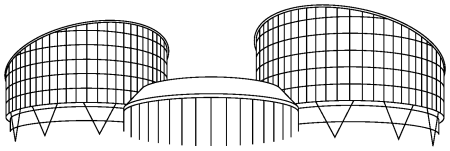

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Applications nos. 29222/11 and 64345/11
Ulrich FUCHS
against Germany

The European Court of Human Rights (Fifth Section), sitting on 27 January 2015 as a Chamber composed of:

Mark Villiger, *President*,
Angelika Nußberger,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having regard to the above applications lodged on 9 May 2011 and 7 October 2011 respectively,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Ulrich Fuchs, is a German national, who was born in 1958 and lives in Miesbach. He is a practising lawyer.

A. The circumstances of the case

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

1. Incidents following the search of the applicant's rooms

3. The applicant owns rooms in Munich, which he let to the H. association. The H. association sublet rooms *inter alia* to a mutual support group of men struggling with paedophile tendencies.

4. On 11 December 2003 the rooms were searched by the police. The following day, the applicant went to the local police station to obtain information. He was briefly shown a search warrant, issued by a court, addressing a group called "AG Pädo". Since the applicant could not show power of attorney of a group with that name, he was refused a copy of the search warrant.

5. On 15 December 2003 the applicant, representing the H. association, lodged the following criminal complaint with the public prosecutor:

> "Dear Mmes and Sirs,
>
> I hereby give notice that I am representing [the H. association], Munich. During the week from 8 December 2003 to 12 December 2003 there was a break-in into the rooms of the association at the address ... in Munich.
>
> The front door was damaged and cupboards were forced open.
>
> The door was probably opened with a picklock and hence the door was damaged. The inner door knob was torn down. A metal cupboard was forced open. Whether and to what extent documents and papers were stolen cannot be communicated yet. The damaged cupboard has not been touched to avoid any destruction or modification of traces.
>
> According to third parties not involved it supposedly was a police action. A query with the police resulted that there is no search warrant addressing the H. association.
>
> It is to be pointed out that the preconditions for a search warrant concerning the H. association have not been given at any time.
>
> It is requested to proceed with the necessary measures for the identification of the perpetrators. In order to preserve evidence all activities in the rooms were halted.
>
> It is therefore requested to communicate which persons were directly or indirectly involved with the burglary according to the investigations of the prosecuting authorities.
>
> At the same time notification is requested, when the investigations are concluded and the damages can be repaired.
>
> Yours sincerely,
>
> Ulrich Fuchs
>
> Legal practitioner"

6. Public prosecution instituted criminal investigations against unknown persons, which were discontinued on 10 March 2004 after police had provided the information that the incident had not been a burglary, but a search carried out by police on the basis of a search warrant.

2. The applicant's statements as a defence counsel

7. The applicant acted as defence counsel to Mr. K., who was suspected of having downloaded child pornography on his computer. Files were encrypted and the police was not able to open them themselves. Police

resorted to a sworn-in private IT expert, Mr H., who presented his results but did not explain the exact methods applied.

8. On 4 October 2004 the applicant submitted comments on the indictment on his client's behalf to the Munich District Court, which contained the following passages:

> "...
>
> Evidence is based on files, found with the indictee, which have been altered, meaning the assessment of files containing child pornography is carried out on a file newly created by the experts.
>
> A thorough description is lacking as to how these new files were created.
>
> Based on the correct expertise of the ...criminal police it is certain that without prior altering the saved files cannot be deciphered. The presented evidence therefore is highly dubious. For this reason the methods should be made transparent before the beginning of trial because otherwise no independent expertise will be at hand. The investigating private company has a considerable personal interest in successful results, no matter whether the findings are correct or findings after producing an object of investigation containing the desired result...."

9. On 15 October 2004 Mr H. lodged a criminal complaint against the applicant.

3. Criminal proceedings against the applicant

10. On 21 July 2005 the Munich District Court convicted the applicant of misleading the authorities about the commission of an offence (*Vortäuschen einer Straftat*) and of defamation (*üble Nachrede*) and sentenced him to a criminal fine.

11. That court observed that the applicant had been aware of the fact that no burglary had taken place, but that a search had been carried out by police officers on the basis of a search warrant. Accordingly, the District Court considered that the applicant was guilty of misleading the authorities about the commission of an offence, irrespective of the question whether that search had been lawful or not.

12. It further considered that the applicant had alleged that the sworn-in expert had created false results.

13. On 8 February 2006 the Munich Regional Court upheld the conviction for misleading the authorities but considered that the applicant was guilty of insult instead of defamation. That court considered that the statement "...no matter whether the findings are correct or findings after producing an object of investigation containing the desired result..." could only be understood as implying that the expert would manipulate evidence in order to obtain the "desired" result, should the situation arise. This statement could not be justified by the legitimate pursuit of his client's interests. A lawyer did not have the right generally and unfoundedly to insinuate that an expert would be ready to manipulate evidence.

14. On 22 September 2006 the Munich Court of Appeal quashed the Regional Court's judgment as far as the applicant had been convicted of insult, upheld the sentence for misleading the authorities and remitted the case to the Regional Court.

15. On 22 March 2007 the Munich Regional Court amended the original judgment, convicted the applicant of defamation and imposed a cumulative sentence for the acts of defamation and misleading the authorities amounting to 140 daily rates of 30 euros (EUR) each.

16. The Munich Regional Court considered that the applicant's submissions dated 4 October 2004 contained the allegations that the expert H. had created new data in order to obtain the "desired results" and that he had an interest in falsifying evidence. These allegations constituted factual assertions which were suited to defame the expert H. The Court of Appeal further considered that there was no indication that the applicant's assertions had any factual basis. On the contrary, the expert had explained in a comprehensible way how he had been able to decrypt the data contained on Mr K.'s computer without altering its content. There was no reason to doubt the expert's submissions.

17. The Regional Court further considered that the applicant had been aware of the defamatory character of his statements. As the applicant had made the offensive statements in his capacity as defence counsel, it had further to be examined whether the statements were justified as a legitimate defence of his client's interests. Referring to the Court's judgment in the case of *Steur v. the Netherlands* (no. 39657/98, ECHR 2003-XI), the Court of Appeal considered that while drastic words were permitted in the "struggle for justice", a lawyer's conduct had to be "discreet, honest and dignified". Furthermore, a lawyer could be expected to verify his allegations as far as possible and to obtain additional information where necessary. The Court of Appeal further considered that the insulting character of the allegations was of a particular gravity, as they did not only touch the expert's personal honour, but also his professional reputation and even amounted to the allegation that the expert had participated in a criminal offence. The mere fact that the publicly appointed and sworn-in expert had recourse to additional exploratory means which he had obtained from a colleague did not allow the assumption that he had falsified evidence. While it had to be conceded that the methods applied by the expert when opening the encrypted files warranted further explanation, the absence of such explanation did not give the applicant the right to allege falsifications.

18. The Regional Court considered as mitigating factor that the applicant's allegations had not been made publicly, but were only accessible to the parties to the proceedings. It observed, however, that the defamatory statements were addressed to the public prosecution, with whom the expert had a direct working relationship. Furthermore, it was clear that the statements would also come to the court's knowledge.

19. The applicant lodged an appeal on points of law. On 16 August 2007 the Public Prosecutor submitted comments in reply.

20. On 14 September 2007 the Munich Court of Appeal rejected the applicant's appeal on points of law on the grounds that the examination of the thoroughly reasoned judgment did not disclose any errors to the applicant's detriment. The Court of Appeal further referred to the "correct comments" submitted by the Public Prosecutor.

21. On 30 October 2010 the Federal Constitutional Court refused to admit the applicant's constitutional complaint without providing further reasons.

4. Disciplinary proceedings against the applicant

22. On 15 September 2009 the Munich District Disciplinary Court for Lawyers (*Anwaltsgericht*) issued a reprimand against the applicant and imposed a fine of EUR 3000. When establishing the facts of the case, the Disciplinary Court referred, in particular, to the case-files of the criminal proceedings against the applicant. The Disciplinary Court considered that the applicant, by committing the two acts which already formed the subject matter of the criminal proceedings, had breached his duty to exercise his profession in a conscientious way and to be worthy of the trust owed to his professional status.

23. In the appeal proceedings, the applicant requested the Bavarian Disciplinary Court of Appeal (*Anwaltsgerichtshof*) to obtain the case-file in the criminal proceedings against K., in order to prove that the expert H. had not been willing to disclose his examination methods.

24. On 20 April 2010 the Bavarian Disciplinary Court of Appeal rejected the applicant's appeal. That court considered that the applicant's letter dated 4 October 2004 did not contain any objective criticism of the expert's work in the particular case, but was aimed at globally depreciating his actions and at generally declaring his expert findings unusable. This was demonstrated by the general terms "the investigating private company has a considerable personal interest in successful results, no matter....". The Disciplinary Court of Appeal considered that such a globally depreciating statement of facts was not covered by a lawyer's pursuit of his client's interests. When assessing the sentence, the court considered that the applicant had violated the personal and professional honour of the sworn-in expert and had accused him of being generally ready to falsify evidence.

25. On 1 February 2011 the Special Division of the Federal Court of Justice dealing with matters relating to lawyers (*Senat für Anwaltssachen des Bundesgerichtshofes*) unanimously dismissed the applicant's complaint against the denial to grant leave to appeal.

26. On 15 March 2011 the applicant filed a constitutional complaint in which he complained that the decisions violated his right to freedom of

conscience and of profession, that the disciplinary courts had violated the principle of equality of arms and that the decisions taken had been arbitrary.

27. On 30 March 2011 the Federal Constitutional Court refused to admit the constitutional complaint, considering it inadmissible for lack of substantiation.

B. Relevant domestic law

28. The relevant provisions of the German Criminal Code (*Strafgesetzbuch*) read as follows:

Section 145d

Misleading the authorities about the commission of an offence

"(1) Whosoever intentionally and knowingly misleads a public authority or an agency competent to receive criminal complaints about the fact

1. that an unlawful act has been committed

...

shall be liable to imprisonment of not more than three years or a fine...."

Section 185

Insult

"Insult shall be punished with imprisonment not exceeding one year or a fine..."

Section 186

Defamation

"Whosoever asserts or disseminates a fact related to another person which may defame him or negatively affect public opinion about him, shall, unless this fact can be proven to be true, be liable to imprisonment not exceeding one year or a fine and, if the offence was committed publicly or through the dissemination of written materials (...), to imprisonment not exceeding two years or a fine."

Section 193

Fair comment; defence

"Critical opinions about scientific, artistic or commercial achievements, utterances made in order to exercise or protect rights or to safeguard legitimate interests, as well as remonstrations and reprimands by superiors to their subordinates, official reports or judgments by a civil servant, and similar cases shall only entail liability to the extent that the existence of an insult results from the form of the utterance of the circumstances under which it was made."

29. The Federal Code for the Legal Profession (*Bundesrechtsanwaltsordnung*) provides, insofar as relevant:

Section 113

Sanctioning breaches of duty

"(1) Disciplinary sanctions are imposed on a lawyer, who culpably breaches his obligations under this Code or under the Professional Code of Conduct."

Section 114

Disciplinary measures

"(1) Disciplinary measures are

1. Admonishment,

2. reprimand,

3. imposition of a fine of up to twenty-five-thousand euros,

4. imposition of a ban from practising in a specific field of law ... for a period of one to five years,

5. disbarrment."

Section 118

Relation between the disciplinary proceedings and criminal...proceedings

"...

(3) The facts established in the judgment in criminal ...proceedings are binding in the disciplinary proceedings...."

30. A general description of the features of the Act on Protracted Court Proceedings and Criminal Investigations (the Remedy Act) and its interim provision can be found in the decisions in the cases of *Taron v. Germany* (dec.) no. 53126/075, §§ 18-29, 29 May 2012 and *Garcia Cancio v. Germany* (dec.) no. 19488/09, §§ 26-35, 29 May 2012.

COMPLAINTS

31. The applicant complained under Articles 10, 8 and 6 of the Convention about the proceedings leading to his criminal and disciplinary convictions and of the length thereof. He further complained about a lack of impartiality of the disciplinary court and about having been discriminated against for having represented a person suspected of paedophile acts. He finally complained about having been denied an effective remedy against the disciplinary proceedings.

THE LAW

A. Joinder of the applications

32. Having regard to the similar subject matter of the applications, the Court finds it appropriate to join them in a single decision, in accordance with Rule 42 § 1 of the Rules of Court.

B. Alleged violation of Article 10 of the Convention

33. The applicant complained that his criminal and disciplinary convictions violated his right to freedom of expression under Article 10 of the Convention, providing:

> "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."

34. The applicant submitted that his criminal information to the police authorities had been correct. The fact that he had omitted certain facts could not entail criminal liability. In his capacity as a lawyer, he had not been obliged to disclose all facts known to him, in particular, if those facts where known to him only in connection with another client's brief and fell under his obligation to confidentiality.

35. In respect of his conviction for defamation, the applicant submitted that he must be allowed, in his capacity as defence counsel, to criticise the expert's methods and to express doubts as to the accuracy of the expert opinion.

36. The Court considers that the applicant's convictions interfered with his right to freedom of expression. It observes that the convictions were based on the relevant provisions of the Criminal Code and of the Federal Code for the Legal Profession and were thus "prescribed by law" within the meaning of paragraph 2 of Article 10.

37. The Court further considers that the applicant's conviction for misleading the authorities served the aim of protecting the public prosecution's function in preventing disorder or crime and that the

conviction for defamation pursued the legitimate aim of protecting the reputation and rights of the sworn-in expert H.

38. It remains to be examined whether the interferences in question were "necessary in a democratic society. The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient. In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Stoll v. Switzerland* [GC], no. 69698/01, § 101, ECHR 2007-V).

39. A specific feature of the present case is that the applicant is a professional lawyer and that the actions leading to his convictions related to this professional activity. In *Nikula v. Finland*, (no. 31611/96, §§ 45-50, ECHR 2002-II, also see *Steur v. the Netherlands*, no. 39657/98, § 36, ECHR 2003-XI) the Court has summarised the specific principles applicable to the legal profession as follows:

> "45. The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein (see *Schöpfer v. Switzerland*, judgment of 20 May 1998, Reports of Judgments and Decisions 1998-III, pp. 1052-53, §§ 29-30, with further references)."

40. Turning to the facts of the present case, the Court observes that the domestic courts based the applicant's criminal and disciplinary convictions for misleading the authorities on the consideration that the applicant had knowingly submitted incomplete and thus misleading information on the search of office space, thus causing public prosecution to instigate futile investigations. The Court observes that the State parties to the Convention are entitled to sanction the deliberate submission of misleading information to public prosecution, in order to safeguard public prosecution's function in preventing disorder or crime. The Court considers that the applicant has not convincingly explained that it would have amounted to a breach of professional confidentiality towards his client if he had presented the complete facts known to him, including the fact that a court had issued a search warrant. There is, furthermore, no indication that the fines imposed

on the applicant were disproportionate to the aim pursued. In the light of this, the Court accepts that the interference with the applicant's right to freedom of expression was justified under paragraph 2 of Article 10 as being necessary in a democratic society for the prevention of disorder or crime.

41. With regard to the applicant's conviction of defamation to the detriment of the sworn-in expert H., the Court notes that the domestic courts considered that the applicant's submissions as a defence counsel contained the allegations that the expert H. had created new data in order to obtain the result desired by public prosecution and that he had a personal interest in falsifying evidence. The Court further notes that the Munich Regional Court, in its judgment given on 22 March 2007, carefully examined whether the statements could be justified as a legitimate defence of his client's interests, thereby referring to the Court's case-law on the role of the defence counsel in criminal proceedings. The Regional Court conceded that the methods applied by the expert necessitated further examination, but considered that this did not allow the applicant generally to imply that the expert would falsify evidence. Furthermore, the Disciplinary Court of Appeal, in its judgment given on 20 April 2010, considered that the offensive statement did not contain any objective criticism of the expert's work in the particular case, but was aimed at globally depreciating his actions and at generally declaring his expert findings unusable. Under these circumstances, the Court accepts the domestic courts conclusions that the statements which formed the subject matter of the criminal and disciplinary proceedings were not justified by the legitimate pursuit of the applicant's client's interests.

42. The Court further observes that the criminal court took into account that the statements were not made publicly, but in written form within the context of specific criminal proceedings. The Court also observes that sworn-in experts must be able to perform their duties in conditions free of undue perturbation if they are to be successful in performing their tasks. It may therefore be necessary to protect them from offensive and abusive verbal attacks when on duty (compare, *mutatis mutandis*, *Nikula*, cited above, § 48). It finally considers that the fines imposed on the applicant do not appear to be disproportionate to the aim pursued.

43. In the light of the above considerations, the Court considers that there is no appearance of a violation of Article 10 of the Convention in the instant case. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Alleged violation of Article 6 of the Convention

44. The applicant complained that the proceedings leading to his criminal and disciplinary convictions violated his rights under Article 6 of the Convention, providing, insofar as relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal established by law."

45. The applicant complained about the disciplinary courts' refusal to have recourse to the case-file of the criminal proceedings against his client K., alleging that this would have disclosed the fact that the search warrant had been incomplete and unlawful and that the opinion submitted by the expert H. had indeed been incorrect.

46. Furthermore, the domestic courts had failed to take into account the applicant's submission that the facts reported in his criminal information had been correct, thus violating his right to be heard. In this respect, the applicant also relied on the principle of equality of arms. With regard to his conviction for defamation, the applicant complained that the courts had failed to take into account that his criticism of the expert opinion had been well-founded. He further complained that the Court of Appeal, while referring to the Public Prosecutor's comments, did not provide further reasons when rejecting his appeal on points of law.

47. The Court reiterates that it is not its tasks to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many other authorities, *Garcia Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Moreover, although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see *Garcia Ruiz,* cited above, § 26). In the present case, there is no indication that the various arguments presented by the applicant were not duly examined by the German courts. In particular, regarding the conviction for misleading the authorities, the courts elaborated on the fact that the applicant had omitted relevant information to the police authorities against better knowledge. Furthermore, the domestic courts' considerations that it was not decisive for the applicant's criminal liability whether the search warrant had been lawful or not falls within the realm of the domestic courts as part of the interpretation and application of the domestic law. With regard to the conviction for defamation, the Court of Appeal expressly took into account that the expert H. had had recourse to additional exploratory means which he had obtained from a colleague and that the methods applied necessitated further explanation in the course of the criminal proceedings against the applicant's client. The short reasoning given by the Federal Court of Justice complied with Article 6 of the Convention, given the fact that the applicant has not contested that the

Public Prosecutor' submissions referred to by that Court had been made known to the applicant before the decision was taken.

48. With regard to the applicant's complaint about the domestic court's alleged failure to have recourse to the case-file of the criminal proceedings against H., the Court reiterates that it has repeatedly held that the admissibility of evidence is a matter for regulation by national law and the national courts and that the Court's only concern is to examine whether the proceedings have been conducted fairly (see, among other authorities, *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011). The Court considers that the decision not to have recourse to the case-file of the criminal proceedings against H. does not appear to be in any way arbitrary.

49. In the light of these considerations, the Court concludes that there is no appearance of a violation of Article 6 of the Convention in the criminal and disciplinary proceedings against the applicant. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

50. The applicant further complained about the alleged lack of impartiality of the disciplinary courts and about the length of the proceedings, in particular before the Federal Constitutional Court.

51. The Court observes, however, that the applicant has not raised the issue of the alleged impartiality of the members of the Disciplinary Court before the Federal Constitutional Court. Furthermore, the applicant did not establish that he has lodged a compensation claim under the Remedy Act, neither did he submit any reasons absolving him from availing himself of this domestic remedy (in respect of the general requirement to make use of this remedy compare *Taron* and *Garcia Cancio*, both cited above, and *Bandelin v. Germany* (dec.) [Committee], no.41394/11, 22 January 2013).

52. It follows that this part of the complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

D. The remainder of the applicant's complaints

53. The applicant complained under Article 8 of the Convention that his criminal conviction violated his right to freedom of profession and his private life. He further complained under Article 13 of the Convention about having been denied an effective remedy against the disciplinary proceedings and under Article 14 of the Convention about having been discriminated against for having represented a person suspected of paedophile acts.

54. 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.

55. It follows that also this part of the application is 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

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 19 February 2015.

Claudia Westerdiek
Registrar

Mark Villiger
President