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

FIFTH SECTION

DECISION

Application no. 55977/13
NATIONALDEMOKRATISCHE PARTEI DEUTSCHLANDS (NPD)
against Germany

The European Court of Human Rights (Fifth Section), sitting on 4 October 2016 as a Chamber composed of:

Khanlar Hajiyev, *President*,
Angelika Nußberger,
Erik Møse,
Faris Vehabović,
Yonko Grozev,
Síofra O'Leary,
Carlo Ranzoni, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having regard to the above application lodged on 2 September 2013,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands*, NPD), is a German political party. It was represented before the Court by Mr P. Richter, a lawyer practising in Saarbrücken.

A. The circumstances of the case

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

1. The applicant

3. The applicant was founded on 28 November 1964. It regularly participates in elections to the European Parliament, the Federal Parliament (*Bundestag*), parliaments of the *Länder* and municipal elections. At the time the present application was lodged, the applicant was represented in the parliaments of the *Land* of Mecklenburg-West Pomerania and the *Land* of Saxony, as well as numerous city councils and county councils.

2. The first party ban proceedings

4. In 2001, the Federal Parliament, the Federal Council (*Bundesrat*) and the Federal Government (*Bundesregierung*) lodged an application for the ban of the applicant (*Verbotsantrag*) with the Federal Constitutional Court (nos. 2 BvB 1/01, 2 BvB 2/01, 2 BvB 3/01) pursuant to Article 21 § 2 of the Basic Law (see relevant domestic law and practice, paragraph 15). The plaintiffs alleged that the applicant was unconstitutional and sought to damage the free democratic basic order (*freiheitlich-demokratische Grundordnung*). They claimed that the applicant propagated views that were National Socialist, anti-Semitic, racist and anti-democratic and sought to abolish what it called the "system" imposed by the Allied powers at the end of the Second World War. They further stated that the applicant worked towards restoring the "community of the people" (*Volksgemeinschaft*) and towards replacing the multi-party parliamentary democracy by a "rule of the people" (*Volksherrschaft*) of the "national elites" (*nationale Eliten*). Finally, they alleged that the members and supporters of the applicant did not hesitate to use violence and threatened their opponents with "reckoning" (*Abrechnung*) upon taking power.

5. On 18 March 2003 the Federal Constitutional Court decided to discontinue the proceedings because the statements cited in support of the unconstitutionality of the party could not be clearly distinguished from those of undercover agents of the intelligence services. It found that the principle of separation between party and State (*Staatsfreiheit*), which was an essential requirement for proceedings aimed at banning the applicant, was not respected due to the influence of those agents, who were even present in the party's leadership, on the applicant's decision-making process.

3. The proceedings at issue

6. On 8 November 2012 the applicant lodged an application against the Federal Parliament, the Federal Council and the Federal Government with the Federal Constitutional Court (no. 2 BvE 11/12), seeking a declaration that it was not unconstitutional within the meaning of Article 21 § 2 of the Basic Law. In the alternative (*hilfsweise*), it requested to find that the defendants violated its rights under Article 21 § 1 first sentence of the Basic

Law by constantly stating that the applicant was unconstitutional, thereby causing the effects of *de facto* ban, without initiating party ban proceedings. In the further alternative (*höchst hilfsweise*) it requested to find that its rights were violated because there was no remedy allowing political parties to ascertain their constitutionality before the Federal Constitutional Court.

7. In support of its application, the applicant cited leading politicians – Prime Ministers and Ministers of the Interior of different *Länder* and members of the Federal Parliament – who had stated that the NPD was unconstitutional. The applicant alleged that its members who were working in the public sector had been subject to disciplinary measures or even been excluded from public service because of their affiliation with the party. It submitted that its candidates were not allowed to stand at municipal elections in the *Land* of Mecklenburg-West Pomerania and in the *Land* of Thuringia. The applicant submitted that it had made 328 unsuccessful requests to open accounts at public and private banks and that it had to pursue legal action against public banks in 35 cases. It further submitted that it was required to engage in proceedings before the administrative courts almost every time it intended to rent communal space for its events, because the towns had refused to let it use their premises due to a fear of acts by "the extreme left". The applicant added that it did no longer find companies willing to provide liability insurance for its events, which was a prerequisite for renting communal space. It complained that its authorised demonstrations were regularly disturbed by opponents and that the police did not sufficiently protect these demonstrations. It pointed out that its members were regularly victims of criminal offences committed by "the extreme left". The applicant moreover complained that public funds allocated to projects against "the extreme right" referred to it as a party of the extreme right and concluded that these funds were used to combat it. Finally, it claimed that the media did not sufficiently give it the floor.

8. The applicant maintained that the remedies available before domestic courts were not sufficient to protect its interests, given the extent of discrimination and restrictive measures it was confronted with on the one hand and its limited resources on the other hand. It considered that the constant "stigmatisation" and perpetual debate about its potential ban amounted to a "*de facto* ban". It submitted that the defendants were, by stigmatising the applicant and by calling on the public to "combat against the far right" (*Kampf gegen Rechts*), also at the origin of and hence responsible for the discriminatory acts and criminal offences which private actors committed against the applicant and its members.

9. On 20 February 2013 the Federal Constitutional Court dismissed the application. The decision was served on the applicant on 6 March 2013.

10. The Federal Constitutional Court held that the application for a declaration that the applicant was not unconstitutional was inadmissible. It stated that Section 43 § 1 of the Federal Constitutional Court Act

(*Bundesverfassungsgerichtsgesetz*, see relevant domestic law and practice, paragraph 16) provided that only the Federal Parliament, the Federal Council and the Federal Government could apply for decision on whether a political party was unconstitutional. Domestic law did not provide that a political party could have recourse to the Federal Constitutional Court to have its constitutionality ascertained. It observed that this did not amount to a gap in legal protection, since the applicant and its members could pursue legal action before administrative, civil and criminal courts whenever its or their rights were infringed.

11. In response to the applicant's argument that it did not have the resources to pursue legal action in each and every case, the Federal Constitutional Court stated that this posed a practical challenge that could be overcome with reasonable efforts. It emphasised that a political party which participated in forming public opinion had to accept being criticised as "hostile to the constitution" (*verfassungsfeindlich*) within the limits of freedom of expression. Where public authorities engaged in political debate, they had to respect the limits set by the Basic Law, which were subject to judicial review. The Federal Constitutional Court considered that a discussion whether or not to initiate party ban proceedings was lawful as long as it contributed to the decision-making process and was not aimed at discriminating against the party concerned. It noted that there were remedies which allowed the applicant to challenge the allegation that it was unconstitutional, such as remedies against the surveillance by intelligence services. It observed that the same held true for the applicant's members with regard to their employment in public service and added that a lack of success in the respective court proceedings did not mean that there was a gap in legal protection.

12. The Federal Constitutional Court further found that the application, lodged in the alternative, to find that the defendants violated the applicant's rights under Article 21 § 1 first sentence of the Basic Law by constantly stating that the applicant was unconstitutional, thereby causing the effects of *de facto* ban, without initiating party ban proceedings, was also inadmissible. It found that, even though this application could in principle be the subject of a "dispute between constitutional organs" (*Organstreitverfahren*, see relevant domestic law and practice, paragraphs 15, 17 and 18), it was not sufficiently substantiated. It noted that the statements and measures cited by the applicant were not made on behalf of the Federal Parliament, the Federal Council or the Federal Government, but rather by some of their members only. Therefore, they could not be attributed to these organs. Nor did the applicant substantiate that they infringed, or were about to infringe, its status as a political party.

13. Finally, the Federal Constitutional Court observed that the application, lodged in the further alternative, to find that the applicant's rights were violated because there was no remedy allowing political parties

to ascertain their constitutionality before the Federal Constitutional Court was manifestly ill-founded. It argued that there was no gap in legal protection for the reasons set out in relation to the main application (see paragraphs 10 and 11), which precluded a violation of the applicant's rights.

4. The second party ban proceedings

14. On 3 December 2013 the Federal Council lodged a new application for the ban of the applicant pursuant to Article 21 § 2 of the Basic Law with the Federal Constitutional Court (no. 2 BvB 1/13). The proceedings are pending.

B. Relevant domestic law and practice

1. The Basic Law

15. The relevant provisions of the Basic Law are worded as follows:

Article 21 [Political parties]

"(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

(2) Parties which, through their aims or the conduct of their members, seek to damage or to overthrow the free democratic constitutional system or to endanger the existence of the Federal Republic of Germany shall be held to be unconstitutional. The Federal Constitutional Court shall determine the question of unconstitutionality. (...)"

Article 93 [Jurisdiction of the Federal Constitutional Court]

"(1) The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body; (...)"

2. The Federal Constitutional Court Act

16. The relevant regulations governing the declaration of unconstitutionality of a political party are contained in the Federal Constitutional Courts Act and are worded as follows:

Section 43

"(1) The *Bundestag*, the *Bundesrat*, or the Federal Government may apply for a decision on whether a political party is unconstitutional (Article 21 § 2 of the Basic Law).

(2) The government of a *Land* may make an application only against such political parties whose organisational extent is limited to that *Land*'s territory."

Section 46

"(1) If the application proves to be well-founded, the Federal Constitutional Court shall declare that the political party is unconstitutional.

(2) The declaration may be limited to a legally or organisationally independent section of a political party.

(3) The declaration shall be accompanied by the dissolution of the political party or of its independent section, as well as by the prohibition of establishing substitute organisations. In this case, the Federal Constitutional Court may also declare that the property of the political party or its independent section be confiscated in favour of the Federation or the Land to be used for public benefit."

17. In relation to "disputes between constitutional organs", the relevant provisions are worded as follows:

Section 13

"The Federal Constitutional Court shall decide (...)

5. on the interpretation of the Basic Law in the event of disputes concerning the extent of the rights and obligations of one of the highest federal organs or of other parties who have been vested with own rights by the Basic Law or by the rules of procedure of one of the highest federal organs (Art. 93 § 1 no. 1 of the Basic Law) (...)."

Section 63

"Applicants and respondents may only be: the Federal President, the *Bundestag*, the *Bundesrat*, the Federal Government, and such parts of these organs that are vested with own rights pursuant to the Basic Law or the rules of procedure of the *Bundestag* and *Bundesrat*."

Section 64

"(1) The application shall only be admissible if the applicant asserts that an act or omission of the respondent violated or directly threatened the rights and obligations awarded to the applicant or to the applicant's organ by the Basic Law.

(2) The application shall state the provision of the Basic Law which was violated by the respondent's contested act or omission.

(3) The application must be filed within six months after the applicant gained knowledge of the contested act or omission."

3. The case-law of the Federal Constitutional Court

18. It is established case-law of the Federal Constitutional Court that political parties are organs vested with own rights pursuant to the Basic Law in the meaning of Article 93 § 1 no. 1 of the Basic Law and can assert their rights by way of a dispute between constitutional organs (decision of 20 July 1954, no. 1 PBvU 1/54, which has been consistently confirmed

since, see, among many others, judgment of 29 September 1990, nos. 2 BvE1, 3, 4/90, 2 BvR 1247/90).

COMPLAINT

19. The applicant complained under Article 13 of the Convention in conjunction with Articles 10 and 11 of the Convention, as well as Article 3 of Protocol No. 1 to the Convention, that it did not have an effective remedy at national level to protect its rights against the large number of infringements in connection with its constant "stigmatisation" as an "unconstitutional political party" and its "*de facto* ban".

THE LAW

20. The applicant argued that the available domestic remedies were not effective, as court decisions were rendered only after violations of its rights had been committed and could not provide adequate redress for these violations, e.g. where its candidates were not allowed to stand for election or where its demonstrations were not sufficiently protected by the police. It submitted that in light of the extent of discrimination to which it was subjected, it was unable to effectively defend its rights. Rather, a declaratory judgment, finding that it was not an unconstitutional political party, was required to put an end to the violations of its rights.

21. It relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

22. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 288, ECHR 2011).

23. Even supposing that the applicant could be said to have an arguable claim under Articles 10 and 11 of the Convention as well as under Article 3 of Protocol No. 1 to the Convention, the Court observes that the applicant did not dispute the existence of domestic remedies against each restrictive or discriminatory measure of which it – or its members and supporters –

claimed to be a victim. The Court recalls, first, that the expression "effective remedy" used in Article 13 cannot be interpreted as a remedy that is bound to succeed; it simply means an accessible remedy before an authority competent to examine the merits of a complaint (*M.R.A. and Others v. the Netherlands*, no. 46856/07, § 114, 12 January 2016). The fact that remedies used by the applicant were not successful in each and every case, does, therefore, not make these remedies ineffective. The Court observes, second, that a remedy is "effective" within the meaning of Article 13 if it prevents the alleged violation or its continuation or provides adequate redress for any breach that has already occurred (see *Makedonski v. Bulgaria*, no. 36036/04, § 56, 20 January 2011). The fact that the applicant could pursue remedies, and get redress, only after the alleged breaches have occurred thus does not make these remedies ineffective.

24. In relation to the applicant's argument that the existing remedies were ineffective because it was the victim of a large number of violations, the Court recalls that the remedy required by Article 13 must be "effective" in practice as well as in law (*M.S.S.*, cited above, § 288). It notes that the Federal Constitutional Court found that being obliged to initiate a multitude of legal proceedings before domestic courts posed a practical challenge to the applicant that could, however, be overcome with reasonable efforts (see paragraph 11). The Court considers that the fact that an applicant who alleges multiple violations through different acts or measures has to initiate separate proceedings in relation to each alleged violation does not make the respective remedies ineffective.

25. Moreover, even if domestic courts issued a declaratory judgment that it was not an unconstitutional political party, the applicant would still be required to take legal action whenever its rights were infringed by specific measures. A declaratory judgment, as desired by the applicant, would, thus, not constitute an effective remedy to prevent violations of the applicant's Convention rights. What is more, an abstract finding that a political party is not unconstitutional would not necessarily prejudge the outcome of the respective court proceedings concerning specific acts of third parties allegedly affecting the applicant. This holds true in particular in areas of law in which freedom of contract prevails and in which the conclusion of a contract depends on the free will of the contracting parties within the constitutional framework.

26. The Court further notes that the applicant's complaint concerning the alleged violation of its rights under Articles 10 and 11 of the Convention and Article 3 of Protocol No. 1 by a set of measures which, it alleged, amounted to a "*de facto* ban" could, in principle, be the subject of a "dispute between constitutional organs" before the Federal Constitutional Court pursuant to Article 93 § 1 no. 1 of the Basic Law in conjunction with Articles 13 no. 5, 63 and 64 of the Federal Constitutional Court Act (see relevant domestic law and practice, paragraphs 15, 17 and 18). The Federal

Constitutional Court declared this complaint inadmissible, finding that the applicant had not sufficiently substantiated it (see paragraph 12 above). That court also found that effective remedies were available to the applicant before administrative, civil and even criminal courts to protect its interests (see paragraphs 10, 11 and 13).

27. In light of the above, the Court is satisfied that remedies were available to the applicant at national level which enabled it to effectively enforce the substance of its rights and freedoms protected by the Convention.

28. Accordingly, 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

Declares the application inadmissible.

Done in English and notified in writing on 27 October 2016.

Milan Blaško
Registrar

Khanlar Hajiyev
President