



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

Information Note on the Court's case-law 222

October 2018

***E.S. v. Austria* - 38450/12**

Judgment 25.10.2018 [Section V]

Article 10

Article 10-1

Freedom of expression

Criminal conviction and fine for statements accusing the Prophet Muhammad of paedophilia: *no violation*

Facts – The applicant held seminars with the title “Basic information on Islam” at the right-wing Freedom Party Education Institute. At one such seminar, referring to a marriage which Muhammad had concluded with Aisha, a six-year old, and consummated when she had been nine, she stated *inter alia* “[Muhammad] liked to do it with children”, “the thing with Aisha and child sex” and “a 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?”

In 2011, as a result of these statements, the applicant was convicted of disparagement of religious precepts pursuant to Article 188 of the Criminal Code. She was sentenced to pay a fine of EUR 480, or serve 60 days of imprisonment in the event of default. The domestic courts made a distinction between child marriages and paedophilia. In their opinion, by accusing Muhammad of paedophilia, the applicant had merely sought to defame him, without providing evidence that his primary sexual interest in Aisha had been her not yet having reached puberty or that his other wives or concubines had been similarly young. In particular, the applicant had disregarded the fact that the marriage with Aisha had continued until the Prophet's death, when she had already turned eighteen and had therefore passed the age of puberty.

Law – Article 10: Prescribed by law, the interference had pursued the legitimate aim of preventing disorder by safeguarding religious peace and protecting religious feelings, which corresponded to protecting the rights of others within the meaning of Article 10 § 2 of the Convention.

As the subject matter of the instant case was of a particularly sensitive nature, the domestic authorities had a wide margin of appreciation, as they were in a better position to evaluate which statements were likely to disturb the religious peace in their country.

As for the context of the impugned statements, the seminars had been widely advertised to the public on the Internet and via leaflets, sent out by the head of the right-wing Freedom Party, addressing them especially to young voters and praising them as “top seminars” in the framework of a “free education package”. The title of the seminar had given the – in hindsight misleading – impression that it would include objective information on Islam. Anyone interested in participating had been able to enrol and as such the applicant could therefore not have assumed that there would only be like-minded people in the room but also people who might be offended by her statements.

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

The applicant's statements had been capable of arousing justified indignation given that they had not been made in an objective manner aimed at contributing to a debate of public interest, but could only have been understood as aimed at demonstrating that Muhammad was not a worthy subject of worship. The applicant had described herself as an expert in the field of Islamic doctrine, already having held seminars of that kind for a while, thus she had to have been aware that her statements were partly based on untrue facts and apt to arouse (justified) indignation in others. Presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society.

The applicant had subjectively labelled Muhammad with paedophilia as his general sexual preference, while failing to neutrally inform her audience of the historical background, which consequently did not allow for a serious debate on that issue, and had thus made a value judgement without sufficient factual basis. Even if they were to be classified as factual statements, she had failed to adduce any evidence to that end. As to the applicant's argument that a few individual statements had to be tolerated during a lively discussion, it was not compatible with Article 10 of the Convention to pack incriminating statements into the wrapping of an otherwise acceptable expression of opinion and deduce that this would render the statements, exceeding the permissible limits of freedom of expression, passable. Moreover, the applicant had been wrong to assume that improper attacks on religious groups had to be tolerated even if they were based on untrue facts. On the contrary, the Court had held that statements which were based on (manifestly) untrue facts did not enjoy the protection of Article 10.

With respect to the proportionality of the sanction, it was noted that the applicant had been ordered to pay a moderate fine of only EUR 480 in total for the three statements made, although the Criminal Code provided for up to six months' imprisonment. The fine imposed was on the lower end of the statutory range of punishment. Given the aforementioned, the criminal sanction had not been disproportionate.

In conclusion, the domestic courts had comprehensively assessed the wider context of the applicant's statements, and carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected, and to have religious peace preserved in Austrian society. They had discussed the permissible limits of criticism of religious doctrines versus their disparagement, and found that the applicant's statements had been likely to arouse justified indignation in Muslims. In addition, the impugned statements had not been phrased in a neutral manner aimed at being an objective contribution to a public debate concerning child marriages but rather amounted to a generalisation without factual basis. Thus, by considering them as going beyond the permissible limits of an objective debate and classifying them as an abusive attack on the Prophet of Islam, which was capable of stirring up prejudice and putting at risk religious peace, the domestic courts had come to the conclusion that the facts at issue contained elements of incitement to religious intolerance. They had thereby put forward relevant and sufficient reasons and had not overstepped their – wide – margin of appreciation. The interference with the applicant's rights under Article 10 had indeed corresponded to a pressing social need and had been proportionate to the legitimate aim pursued.

Conclusion: no violation (unanimously).

(See also *Otto-Preminger-Institut v. Austria*, [13470/87](#), 20 September 1994; *Wingrove v. the United Kingdom*, [17419/90](#), 25 November 1996; *İ.A. v. Turkey*, 42571/98, 13 September 2005, [Information Note 78](#); and *Giniewski v. France*, 64016/00, 31 January 2006, [Information Note 82](#))

© Council of Europe/European Court of Human Rights
This summary by the Registry does not bind the Court.

Click here for the [Case-Law Information Notes](#)