



## E.S. v. Austria

Application no. 38450/12

**Country:** Austria

**Region:**

**Year:** 2018

**Court:** European Court of Human Rights European Court of Human Rights

**Health Topics:** Public safety

**Human Rights:** Freedom of expression, Freedom of religion

### Facts

In Austria, a woman was convicted after leading several seminars entitled "Basic Information on Islam" at the right-wing Freedom Party Education Institute, beginning in January 2008. These seminars were publicly advertised on the Freedom Party's website, and the leaders of the Freedom Party distributed leaflets specifically aimed to encourage young voters to attend. An undercover journalist for a local journal attended two of the seminars held on October 15 and November 12, 2009, and consequently requested a preliminary investigation against the applicant for her disparagement of Islamic doctrines. Specifically, the statements made by the applicant in question claimed that the Prophet Muhammed had pedophilic tendencies, referring explicitly to one story of fifty-six-year-old Muhammed consummating a marriage with a nine-year-old girl.

On August 12, 2010, the Vienna Public Prosecutor's Office brought charges against the applicant for "inciting hatred" pursuant of Article 283 of the Austrian Criminal Code. Due to the failure to establish certain statements made by the applicant, the Vienna Regional Criminal Court acquitted her for charges under Article 283 in February 2011, but instead convicted the applicant of disparaging religious doctrines under Article 188 of the Criminal Code. The court found her guilty of "publicly disparaging an object of veneration of a domestic church or religious society, namely Muhammed, the Prophet of Islam, in a manner capable of arousing justified indignation." The court cited the necessary balance between Articles 9 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention"). Article 9 safeguards freedom of religion, while Article 10 maintains the freedom of expression. Overall, the Regional court held that the interference with the applicant's freedom of expression was justified in that it was necessary to protect religious peace in the democratic society of Austria. The applicant was thus ordered to pay costs of proceedings and a daily fine of four euros for a period of 120 days.

The applicant consequently appealed to the Vienna Court of Appeals, arguing that her statements were statements of fact, not valued judgments. She denied any intent to disparage Muhammad or the Islam religion. The lower court had previously concluded that her statements were valued judgments based on this intent, thereby justifying their restriction of her freedom of expression. However, in December 2011, the Court of Appeals dismissed the appeal and affirmed the lower decision. The Court of Appeals found that her comments were intended as an abusive attack on the Prophet of Islam. In April 2012, the applicant lodged a request for the renewal of the proceedings with the Austrian Supreme Court, which, in December 2013, similarly dismissed her request for a renewal of proceedings. She then brought this case against the Republic of Austria the European Court of Human Rights, claiming violation of her right to freedom of expression under Article 10 of the Convention.

### Relevant Legal Provisions

Article 188 of the Austrian Criminal Code: Disparagement of religious doctrines

"Whoever, in circumstances where his or her behavior is likely to arouse justified indignation, publicly disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to up to six months' imprisonment or a day-fine for a period of up to 360 days."

Article 283 of the Austrian Criminal Code: Incitement to hatred

"1. Whoever, in a manner capable of endangering public order, publicly incites to commit a hostile act against

a church or religious community established within the country or against a group defined by its belonging to such a church or religious community, a race, a nation, a tribe or a state, shall be liable to up to two years' imprisonment.

2. Similarly, whoever publicly incites against a group defined in paragraph 1 or tries to insult or disparage them in a manner violating human dignity shall equally be held liable.

Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 of the European Convention on Human Rights: Freedom of expression

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.

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.

## Decision and Reasoning

The European Court on Human Rights (ECtHR) held that there was no violation of Article 10 of the Convention and, consequently, dismissed the application to the Court. The Court first outlined the three factors under Article 10 that determine whether the criminal conviction of the applicant constituted a just interference with her right to freedom of expression: (I) if the interference is prescribed by law; (II) if the interference "pursues one or more of the legitimate aims referred to in paragraph 2 of Article 10; and (III) if the interference is "necessary in a democratic society in order to achieve the aim or aims in question." (¶ 39).

I. With respect to the first factor, the Court found the interference was prescribed by law under Article 188 of the Austrian Criminal Code.

II. For the second factor, the Court held that the interference did pursue the aim of preventing disorder by safeguarding religious peace. The Court concluded that interference protected religious feelings, which corresponded with the protection of the rights of others under Article 10 ¶ 2.

III. For the third factor "necessity in a democratic society" the court affirmed the Austrian Regional Criminal Court's conclusion that the presenting of objects of religious worship in a provocative way capable of offending the followers of that religion could be conceived as a "malicious violation of the spirit of tolerance," which is essential for democratic society. (¶ 53). In arriving at that conclusion, the Court first highlighted the parallel necessity of freedom of expression for a democratic society. Article 10, the court noted, provided little scope for the restriction of freedom of expression with respect to political speech or debate on questions of public interest.

However, the Court also found that the duties and responsibilities outlined in Article 10 ¶ 2 can justify the restriction of the freedom of expression in a case where such expressions are likely to incite religious intolerance. According to the court, the incitement of religious intolerance, which is a violation of Article 9, is not protected by Article 10. Therefore, the Court cited previous cases in which it delegated authority to EU Member States' courts with respect to the necessary restriction of freedoms for safeguarding a democratic society.

As a result, the Court held that the Austrian courts were in a better position to evaluate the context of the applicant's statements and whether those statements were likely to disturb the country's religious peace. An example, the opinion outlined the distinction between the Austrian domestic court's treatment of the applicant's statements as "value judgments," as opposed to factual statements. (¶ 54). The Austrian court had found that the applicant's seminars subjectively labelled Muhammad with pedophilia, and she did not neutralize this subjectivity with sufficient historical background. The Court agreed with the Austrian court's conclusion that such statements are value judgments, and they should thus not be permitted under Article 10. The Court explained that Article 10 does not apply when packing "incriminating statements into the wrapping of an otherwise acceptable expression of opinion." (¶ 55). Because these value judgments exceed the "permissible limits of freedom of expression," the Court affirmed the Austrian Regional Criminal Court's conviction of the applicant.

¶

### Decision Excerpts

"Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment." (¶ 42)

"As paragraph 2 of Article 10 recognises, however, the exercise of the freedom of expression carries with it duties and responsibilities. Amongst them, in a context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane." (¶ 43)

"The Court endorses the Regional Court's statement in its judgment of 15 February 2011, that 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." (¶ 53)

Copyright © 2015 [www.GlobalHealthRights.org](http://www.GlobalHealthRights.org)