Bundesverwaltungsgericht

Decision of 10 July 2018 - BVerwG 2 WDB 2.18

ECLI:DE:BVerwG:2018:100718B2WDB2.18.0

Headnote

The immunity of a Member of the European Parliament establishes a procedural impediment to conducting a disciplinary proceeding in the military disciplinary and complaints courts. This also applies to proceedings initiated prior to the acquisition of membership ("legacy" proceedings).

Sources of law

Basic Law	GG, *Grundgesetz*	articles 46 (1) and (2), 103 (3)
Military Disciplinary Code	WDO, *Wehrdisziplinarordnung*	section 108 (3) first and second sentences, (4)
Members of the European Parliament Act	EuAbgG, *Europaabgeordnetengesetz*	section 5
Protocol on the Privileges and Immunities of the European Communities, annexed to the Treaty establishing a Single Council and a Single Commission of the European Communities, of 8 April 1965		articles 9, 10 first sentence (a) and (b)
Rules of Procedure of the German Bundestag	GO-BT, *Geschäftsordnung des Deutschen Bundestages*	section 107 Annex 6

Summary of the facts

In a bill of accusation (*Anschuldigungsschrift*) dated 1 March 2017, the office of the Disciplinary Attorney for the Armed Forces (*Wehrdisziplinaranwaltschaft*) charged a reserve captain with a disciplinary offence. The charges stemmed from the years 2010 and 2011, and had already been examined by the criminal courts and resulted in final and binding convictions for incitement to hatred. This misconduct was also supposed to result in deprivation of his military rank. The *Bundeswehr* disciplinary and complaints court (*Truppendienstgericht*) suspended its disciplinary proceedings *inter alia* because the defendant had in the meantime become a Member of the European Parliament and could not be prosecuted at present owing to that status. The Federal Administrative Court rejected the complaint by the office of the Disciplinary Attorney for the Armed Forces against the suspension of the disciplinary proceedings.

Reasons (abridged)

4 The complaint, which was lodged in due time and form, is without merit, because the lower court was ultimately correct in finding a procedural impediment.

5 The definition of a procedural impediment under section 108 (3) first sentence and (4) of the Military Disciplinary Code (WDO, *Wehrdisziplinarordnung*) includes all circumstances that act by law to oppose the further pursuit of a court's disciplinary proceeding (Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), decision of 16 July 2014 - 2 WDB 5.13 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 150, 162 para. 9 with further references). Accordingly, the immunity of a Member of the European Parliament generally opposes conducting a disciplinary proceeding in the courts having jurisdiction over military disciplinary offences and complaints by members of the armed forces (hereinafter military disciplinary and complaints courts) until the Parliament consents to the proceeding. Insofar as this Senate adopted a different legal opinion in its judgment of 23 April 1985 (2 WD 42.84, BVerwGE 83, 1 et seqq.), it no longer adheres to that ruling.

6 1. The former soldier enjoys immunity as a Member of the European Parliament for the parliamentary term from 2014 to 2019. Under section 5 first sentence of the Act on the Legal Status of Members of the European Parliament from the Federal Republic of Germany (EuAbgG, *Europaabgeordnetengesetz* of 6 April 1979 <Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 413>, last amended by the Act of 11 July 2014 <BGBl. I p. 906>) the indemnity and immunity of Members of the European Parliament are determined by articles 9 and 10 of the Protocol on the Privileges and Immunities of the European Communities, annexed to the Treaty establishing a Single Council and a Single Commission of the European Communities, of 8 April 1965 (BGBl. II p. 1453, 1482, hereinafter the Protocol). However, article 9 of the Protocol offers Members of the European Parliament protection from prosecution in the sense of an absolute immunity only with reference to expressions of opinion that take place "in the performance of their duties"; in this respect, the connection between the opinion expressed and parliamentary duties must be direct and obvious (see Court of Justice of the European Union (CJEU), judgments of 6 September 2011 - C-163/10 [ECLI:EU:C:2011:543], Patriciello - para. 35 and of 21 October 2008 - C-200/07 and C-201/07 [ECLI:EU:C:2008:579], Marra - para. 44). Such a connection is absent when the expressions of opinion adduced as charges in a disciplinary proceeding - as is the case here - took place years before the person took office as a Member of the European Parliament. Under article 10 first sentence (a) of the Protocol, during the sessions of the European Parliament, its Members shall furthermore enjoy, in the territory of their own State, the immunities accorded to members of their parliament. Consequently, for the duration of the session, the national immunity provisions are additionally applicable to Members of the European Parliament. Thus, the relative immunity under article 46 (2) of the Basic Law (GG, *Grundgesetz*) also applies to a Member of the European Parliament. Similarly to a Member of the German Bundestag, during a session the Member can be called to account for a

punishable offence only with the permission of the Member's assembly, the European Parliament (BVerwG, judgment of 23 April 1985 - 2 WD 42.84 - BVerwGE 83, 1 <3>). The "session" within the meaning of article 10 first sentence of the Protocol normally encompasses the whole year, even if the European Parliament is not in fact sitting, so that this results in continuous immunity for the full term of office (see CJEU, judgment of 10 July 1986 - 149/85 [ECLI:EU:C:1986:310], Wybot/Faure - para. 17 et seqq. (...)).

7 2. This temporally undiminished, continuous immunity also applies in the present case. Court disciplinary proceedings under the Military Disciplinary Code fall within the material scope of article 46 (2) GG, because their aim is to procure the imposition of a punitive sanction by the state. Consequently, ("legacy") disciplinary proceedings initiated prior to the Member's taking office likewise cannot continue without the Parliament's permission. No such permission has been obtained from the European Parliament.

8 a) According to the wording of the provision, the protection of article 46 (2) GG always applies if a Member is to be called to account for a punishable offence. In addition to proceedings under the Code of Criminal Procedure, the provision also embraces court disciplinary proceedings under the Military Disciplinary Code. Even in common parlance, "called to account" refers not only to the defendant in criminal proceedings, but also to the defendant in a court disciplinary proceeding. It is true that since the Act Reorganising Military Disciplinary Law (WDNeuOG, *Gesetz zur Neuordnung des Wehrdisziplinarrechts*) of 21 August 1972 (BGBl. I p. 1481) entered into force, the Military Disciplinary Code - WDO - refers to the sanctions that are possible in its proceedings as "measures" ("*Maßnahmen*") (see sections 22 and 58 WDO as amended), and no longer as "disciplinary sanctions" ("*Disziplinarstrafen*") as in the WDO in its version of 15 March 1957 (BGBl. I p. 189). Notwithstanding the change in terminology, however, the sanctions of the Military Disciplinary Code still constitute a condemnatory response to culpable conduct (Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*), decision of 11 June 1969 - 2 BvR 518/66 - Rulings of the Federal Constitutional Court (BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*) 26, 186 <204>; BVerwG, judgment of 23 April 1985 - 2 WD 42.84 - BVerwGE 83, 1 <4>). That the constitutional term "punishable" in article 46 (2) GG is not limited to criminal sanctions is already evident from the simple fact that the constitutional legislature - as for example in article 103 (3) GG - can express such a limitation with such wording as "under the general criminal laws" (...). Article 46 (2) GG does not employ such wording. Therefore a "punishment" means not just the criminal sanction imposed in a proceeding under the Code of Criminal Procedure, but any imposition of a threatened detriment as a response of the public powers to prior conduct (...), and thus also a disciplinary measure (see already, BVerfG, decision of 21 September 1976 - 2 BvR 350/75 - BVerfGE 42, 312 <328>; ...).

9 b) A historical interpretation also argues in favour of a broad reading of article 46 (2) GG. Even its predecessor provisions article 31 (1) of the 1871 Constitution of the German Empire (RV, *Reichsverfassung*) and article 37 (1) of the Weimar Constitution (WRV, *Weimarer Reichsverfassung*) - included disciplinary measures (see Imperial Court of Justice (RG, *Reichsgericht*), judgment of 16 April 1892 - 1578/92 – Rulings of the Imperial Court of Justice in Criminal Matters (RGSt, *Entscheidungen des Reichsgerichts in Strafsachen*) 23, 184 <193>, (...)). There is no indication that the constitutional legislature intended to make any changes in this respect. As the state's practice in the past and present has continuously been founded on the assumption that disciplinary proceedings are covered by the immunity provisions, and provides ways for suspending immunity for the purpose of conducting disciplinary proceedings (see Annex 6 part A no. 9 to section 107 (2) of the Rules of Procedure of the German Bundestag (GO-BT, *Geschäftsordnung des Deutschen Bundestages*) (...)), there is also no cause to assume that a change has taken place in this respect in the constitutional understanding of article 46 (2) GG.

10 c) Nor does anything else proceed from a comparison of subsections 1 and 2 of article 46 GG. Although the first sentence of article 46 (1) GG does distinguish between court proceedings and disciplinary actions with respect to indemnity, one cannot deduce from this that the provision likewise differentiates between criminal and disciplinary proceedings with respect to immunity, and excludes the latter. The first sentence of subsection 1 prohibits court proceedings and disciplinary actions and other forms of calling to account, and subsection 2 uses the broad phrase of calling a Member to account. Subsection 2 specifically does not restrict whether this is to take place through criminal or disciplinary channels. The broad term "called to account" furthermore says nothing about whether the impending sanction is to be considered a "punishment".

11 d) The spirit and purpose of the immunity provision argue that disciplinary measures are to be included within the constitutional concept of "punishment". Provisions for immunity serve to protect the parliament, and find their justification in the principle of representation (BVerfG, judgment of 17 December 2001 - 2 BvE 2/00 - BVerfGE 104, 310 <328 et seq.>). This is intended to ensure that the parliamentary work of a body assembled by the will of the people can proceed unimpeded, with the participation of all representatives. Immunity also protects against representatives' being hindered in their parliamentary work by interference from other powers of the state. The dangers that article 46 (2) GG is intended to protect against, in the interest of the functional viability of a parliamentary democracy, may appear rather unlikely in a democratic state under the rule of law. But that does not render the provision under article 46 (2) GG obsolete, nor does it justify a narrow reading that conflicts with the provision's purpose (...). However, investigations in a disciplinary proceeding in the military disciplinary and complaints court may impede the exercise of a parliamentary mandate in the same way as investigations by the public prosecutor's office in a criminal proceeding. The punitive sanctions impending in a disciplinary proceeding in the military disciplinary and complaints court frequently affect the person concerned just as massively. In particular, demotions, discharge from the service, or denial of a pension can often have a more lasting effect on the reputation and long-term livelihood of the person concerned than would criminal sanctions in similar matters. But if disciplinary sanctions have effects of a comparably radical nature to criminal sanctions, they are equally capable of impeding a representative from performing his or her office. If steps according to military disciplinary law are taken without adequate grounds, and a *fumus persecutionis* arises (see General Court, decision of 17 January 2013 - T-346/11 and T-347/11 [ECLI:EU:T:2013:23] - para. 104, 116 et seqq.), the threats to the principle of representation are therefore comparable.

12 It is true that there are differences between criminal and disciplinary proceedings, particularly in the purposes of sanctions. Criminal law is intended to protect the fundamental values of community life, demonstrate the inviolability of the legal system to the legal community, and thus enhance the population's willingness to abide by the law (BVerfG, judgment of 21 June 1977 - 1 BvL 14/76 - BVerfGE 45, 187 <253 et seqq.> on criminal proceedings); but military disciplinary law pursues the goal of restoring and safeguarding the integrity, reputation and discipline of the *Bundeswehr* (BVerwG, judgment of 11 June 2008 - 2 WD 11.07 - (...) para. 23 with further references). These differences in objectives, however, are without significance because, to safeguard the interests protected by the immunity provisions, one must focus solely on the effect of the sanction, and of the threat of a sanction, on the representative's freedom of decision. However, both legal regimes have the trait in common that through the threat or imposition of a sanction, they are intended to influence the (future) conduct of the person subject to such law, and that even the first steps in a criminal or disciplinary proceeding touch on a parliamentarian's reputation, and thus also the work of parliament. Therefore, the representative needs the protection of the immunity provision in both cases. As proceedings that were already initiated before becoming a member of parliament may adversely affect the protective purposes of the immunity provisions, article 46 (2) GG also covers "legacy" proceedings (...).

13 e) European Union law does not impose a narrower understanding of the immunity provisions. Article 10 first sentence (a) of the Protocol expressly refers to national provisions in their own State for the further immunity of Members of the European Parliament, and thus in fundamental terms does not raise any claim of its own to prescribe the extent of immunity (see CJEU, judgment of 6 September 2011 - C-163/10 - para. 25). Nor does any narrower protection proceed from article 10 first sentence (b) of the Protocol, which also precludes legal proceedings against Members of the European Parliament in the territory of any other Member State. On the contrary, this provision is intended to expand Members' protection.(...)