

**Niedersächsisches
Oberverwaltungsgericht**

Beschluss

[Lower Saxony - Higher Administrative Court – decision]

10 ME 48/19

3 B 709(19

In the administrative case

Mr. Christoph Glanz,
Oldenburg

- Applicant and complainant -

Court of attorney:
Lawyers Ahmed Abed,
Berlin, Germany

against

City of Oldenburg - Legal Office -
represented by the Lord Mayor,
Schlossplatz 25-26, 26122 Oldenburg, Germany

- Defendant and respondent -

because of
Provision of event rooms
- Appeal in the proceedings for interim relief -

the Higher Administrative Court of Lower Saxony - 10th Senate - decided on 27 March 2019:

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Following an appeal by the applicant, the order of the
Administrative Court of Oldenburg - 3rd Chamber - of 21
March 2019 is amended.

By way of interim measures, the defendant shall be required to pay to the applicant for two events, namely for a lecture by Professor Paech entitled "Apart-heid, Settler Colonialism and Freedom of Opinion" followed by a discussion and presentation of the BDS-Initiative Oldenburg (60 seats) on Wednesday, 27 March 2019, from 17:00 to 21:00,

and for another lecture by Christoph Glanz entitled "Human Rights Work in Oldenburg in Danger?" followed by a discussion and the presentation of the BDS initiative Oldenburg (60 seats) on Friday, 29 March 2019, from 6 p.m. to 10 p.m.,

to make available urban spaces in accordance with the General Terms and Conditions of Business and Use for the Use of Spaces in Buildings of the City of Oldenburg dated 15 August 2017.

In addition, the applicant's application for interim measures is rejected.

Orders the applicant to pay 1/3 and the defendant to pay 2/3 of the costs of the proceedings at first instance and of the proceedings at first instance.

The value of the subject-matter of the appeal proceedings shall be EUR 5 000

Reasons

The applicant's appeal against the application, which is admissible pursuant to § 146 (1) VwGO
The conclusion of the court of venraltungen is partially successful.

The applicant is entitled to the use of one of the opponent's premises to hold the planned events in accordance with § 30 NKomVG [Lower Saxony Municipal Constitution Law].

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In this respect, he has a claim to an order pursuant to § 123 (3) VwGo i.v.m. § 920 para. 2 ZPO (Code of Civil Procedure).

According to § 30 para. 1 NKomVG, the residents are entitled to use the public facilities of the municipality within the framework of the existing regulations and are obliged to bear the burdens of the municipality. As the restriction "within the framework of the existing rules" already shows, this right does

not exist without limits. A limitation of the entitlement to admission results primarily from the purpose of the institution as expressed in the dedication (Wefelmeier in Niedersächsisches Kommunalverfassungsgesetz, Kommentar, Stand: Dezember 2018, § 30 Rn. 1a).

According to the articles of association of the respondent for the use of premises in buildings of the City of Oldenburg dated 19 June 2017, residents have, in principle, access to the public premises of the city (§ 1 (1) of the articles of association). However, a limitation of the purpose of the dedication can be found in § 2 para. 3 of the statutes, according to which the premises are not given to residents or legal persons who, on the basis of their statutes or objectives, do not stand up for the free democratic constitution. In such a case, there may also be an infringement of higher-ranking law - for example, an infringement of Article 1 (1) of the Basic Law, if the planned event has racist content, for example - which also restricts the right of use under Section 30 (1) of the NKomVG (Wefelmeier in Niedersächsisches Kommunalverfassungsgesetz, Kommentar, Status: December 2018, Section 30 marginal 1a).

The Administrative Court has correctly pointed out that in the case of an interim injunction which - as here - anticipates the main action, strict requirements must be placed on the assessment of the prospects of success of the application for legal protection. It fails, however, to recognize the distribution of the burden of proof and presentation in so far as it believes that the applicant has not succeeded in convincing the public that he or the BDS initiative stands up for the free democratic fundamental order.

The applicant has shown that it is a resident of the city of Oldenburg and thus entitled under Section 30 NKomVG. The applicant is - as explained above - also entitled, according to the above-mentioned usage statutes of the respondent, to use urban spaces for the events planned by him.

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According to the findings of the Administrative Court, the rooms requested by it are actually available on the dates requested by the applicant (page 12 above of the order impression).

However, for the claim-destroying determination that the applicant or the BDS initiative and the persons expected to participate in the events (insofar as § 2 (3) of the statutes should also refer to this group of persons) do not vouch for the free democratic constitution, the applicant, but the respondent, is not obliged to present evidence and burden of proof in accordance with general rules on the burden of proof. In addition, it would be an unacceptable impediment to the freedom of expression protected by Article 5 (1) of the Basic Law. If the person who wants to express his opinion in the context of an event in urban areas would be obliged to provide proof beforehand - possibly not possible at all - that he stands up for the free democratic basic order. On the contrary, in the present case the respondent has to demonstrate the opposite by presenting suitable evidence which strongly shakes the assumption that the applicant stands up for the liberal-democratic constitution.

The Administrative Court ultimately considered that question to be open. It has stated in this connection that it cannot be established to a sufficient extent that the concept of the BDS campaign and its objectives are not anti-Semitic and thus do not violate Article 1 (1) of the Basic Law and that the applicant, as organiser, vouches for the free democratic constitution. According to the statements of the Land government and the Federal Government used by the Administrative Court, however, there are some arguments in favour of the contrary assumption, because according to them the BDS campaign cannot be generally described as anti-Semitic because of its heterogeneity and because there are no

findings that would allow the Federal Office for the Protection of the Constitution to observe this campaign (pages 16 and 17 of the printed decision).

In any case, it cannot be ascertained from the summary examination only possible in the present procedure that the applicant or the BDS campaign and the persons participating in the events do not vouch for the free democratic basic order. Thus, the restriction of § 2 (3) of the opponent's statute of use of 19 June 2017 does not apply here and the applicant is consequently entitled to have the events planned by him held in urban areas.

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However, the applicant is not entitled to have the events organised at the municipal cultural centre PFL. To that extent, his application for an interim injunction must be rejected in the absence of a claim to an injunction.

Under the first sentence of Section 2(5) of the abovementioned statutes of use of the defendant, the municipal cultural centre PFL may be transferred to the defendant for the purpose of organising events only if the event has a cultural, social, charitable or educational purpose. The events planned by the applicant do not correspond to this - permissibly - limited purpose of dedication. According to their contents, these are political events which are not covered by the purpose of the dedication (cf. also § 2 para. 5 sentence 3 of the statutes). If book reviews have taken place in the past at the Kultuzentrum (pages 18 and 19 of the resolution print), these have been cultural events, even if the books have had political content, so that the applicant also has no claim under Article 3 (1) of the Basic Law in connection with a surrender practice that may possibly deviate from the usage statutes.

The decision on costs for the first instance proceedings and the appeal proceedings is based on § 155.1 sentence 1 VwGO, the determination of the value in dispute is based on SS 47.1 sentence 1, 53.2 no. 1, 52.2 GKG, whereby a reduction of the catch-all value pursuant to § 52.2 GKG does not take place because the requested interim injunction anticipates or would have anticipated the main action.

This resolution is incontestable (§ 152 para. 1 VwGO, § 68 para. 1 sentence 5 in conjunction with § 66 para. 3 sentence 3 GKG).

Malinowski Ohrmann Dr. Teppenrien

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