European Court of Human Rights: Case of Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland

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After two earlier judgments by the European Court of Human Rights, the Grand Chamber of the Court again held that there has been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights on account of the continued prohibition on broadcasting on Swiss Television a commercial by an animal rights association. In response to various advertisements produced by the meat industry, Verein gegen Tierfabriken Schweiz (VgT) made a television commercial expressing criticism of battery pig-farming, including a scene showing a noisy hall with pigs in small pens. The advertisement concluded with the exhortation: “Eat less meat, for the sake of your health, the animals and the environment!” Permission to broadcast the commercial was refused on 24 January 1994 by the Commercial Television Company and at final instance by the Federal Court, which dismissed an administrative law appeal by VgT on 20 August 1997. The commercial was considered to be political advertising, prohibited under the Swiss Broadcasting Act. VgT lodged an application with the European Court of Human Rights, which in a judgment of 28 June 2001 (see IRIS 2001-7: 2) held that the Swiss authorities’ refusal to broadcast the commercial in question was a breach of freedom of expression. According to the European Court, VgT had simply intended to participate in an ongoing general debate on the protection and rearing of animals and the Swiss authorities had not demonstrated in a relevant and sufficient manner why the grounds generally advanced in support of the prohibition on political advertising could also serve to justify interference in the particular circumstances of the case. The Court found a violation of Article 10 of the Convention and awarded VgT CHF 20,000 (approximately EUR 13,300 at the time) in costs and expenses.

On 1 December 2001, on the basis of the European Court’s judgment, VgT applied to the Swiss Federal Court for a review of the final domestic judgment prohibiting the commercial from being broadcast. In a judgment of 29 April 2002 the Federal Court however dismissed the application, holding among other things that VgT had not demonstrated that there was still any purpose in broadcasting the commercial. As the Committee of Ministers of the Council of Europe, which is responsible for supervising the execution of the European Court’s judgments, had not been informed that the Federal Court had dismissed VgT’s application for a review, it adopted a final resolution regarding the case in July 2003, referring to the possibility of applying to the Federal Court to reopen the proceedings.

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In July 2002, VgT lodged an application with the European Court concerning the Federal Court's refusal of its request to reopen the proceedings and the continued prohibition on broadcasting its television commercial. In a Chamber judgment of 4 October 2007, the European Court held by five votes to two that there had been a violation of Article 10. On 31 March 2008, the panel of the Grand Chamber accepted a request by the Swiss Government for the case to be referred to the Grand Chamber under Article 43 of the Convention. The Swiss government argued inter alia that the application by VgT was inadmissible, as it concerned a subject - execution of the Court's judgments - which, by virtue of Article 46, fell within the exclusive jurisdiction of the Committee of Ministers of the Council of Europe. The Grand Chamber of the European Court reiterated that the findings of the European Court of a violation were essentially declaratory and that it was the Committee of Ministers' task to supervise execution. The Committee of Ministers' role in that sphere did not mean, however, that measures taken by a respondent State to remedy a violation found by the Court could not raise a new issue and thus form the subject of a new application. In the present case, the Federal Court's judgment of 29 April 2002 refusing to reopen the proceedings had been based on new grounds and therefore constituted new information of which the Committee of Ministers had not been informed and which would escape all scrutiny under the Convention if the Court were unable to examine it. Accordingly, the Government's preliminary objection on that account was dismissed.

On the merits of the case, the Court firstly noted that the refusal of VgT's application to reopen the proceedings following the Court's judgment of 28 June 2001 constituted fresh interference with the exercise of its rights under Article 10 para. 1. The Court emphasized that freedom of expression is one of the preconditions for a functioning democracy and that genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but could also require positive measures. In the present case, Switzerland had been under an obligation to execute the Court's judgment of 28 June 2001 in good faith, abiding by both its conclusions and its spirit. In view of this, the reopening of domestic proceedings had admittedly been a significant means of ensuring the full and proper execution of the Court's judgment, but could certainly not be seen as an end in itself, especially since the Federal Court dismissed the application of VgT on overly formalistic grounds. Moreover, by deciding that VgT had not sufficiently shown that it still had an interest in broadcasting the commercial, the Federal Court did not offer an explanation of how the public debate on battery farming had changed or become less topical since 1994, when the commercial was initially meant to have been broadcast. Nor did it show that after the European Court's judgment of 28 June 2001 the circumstances had changed to such an extent as to cast doubt on the validity of the grounds on which the Court had found a violation of Article 10. The European Court also rejected the argument that VgT had alternative options for broadcasting the commercial in issue, for example via private and regional channels, since that would require third parties, or VgT itself, to assume a responsibility that falls to the national

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authorities alone: that of taking appropriate action on a judgment of the European Court. Finally the argument that the broadcasting of the commercial might be seen as unpleasant, in particular by consumers or meat traders and producers, could not justify its continued prohibition, as freedom of expression is also applicable to “information” or “ideas” that offend, shock or disturb. Such are indeed the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society”. In the absence of any new grounds that could justify continuing the prohibition from the standpoint of Article 10, the Swiss authorities had been under an obligation to authorise the broadcasting of the commercial, without taking the place of VgT in judging whether the debate in question was still a matter of public interest. The Court therefore held by 11 votes to six that there had been a violation of Article 10. Under Article 41 (just satisfaction) of the Convention the Court awarded VgT EUR 4,000 in costs and expenses.

Judgment by the European Court of Human Rights (Grand Chamber), case of Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland, Application no. 32772/02 of 30 June 2009

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