European Court of Human Rights: GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland

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In a case against Switzerland, the European Court of Human Rights (ECtHR) strongly emphasised the right of a non-governmental organisation (NGO) to use robust language on its website to criticise a politician, and to label his discourse as racist speech. The NGO had posted a blog post during the heated political debate on the referendum on banning the construction of minarets in Switzerland, in which it referred to B.K., the president of a local branch of the Young Swiss People's Party (JSVP). In a public speech, B.K. had said that the Swiss guiding culture ("schweizerische Leitkultur") was based on Christianity and that minarets, as a symbolic sign of another culture, should not be tolerated. It was this speech and this reasoning that the NGO GRA Stiftung gegen Rassismus und Antisemitismus qualified as "verbal racism" on a blog post.

B.K. filed a claim with the District Court for the protection of his personality rights, requesting that the blog post be removed from the NGO's website and that the text be replaced with the court's judgment. After the District Court had dismissed his request, the High Court found the blog post at issue insulting, while considering that B.K.'s speech itself had not been racist. It therefore ordered that the impugned article be removed from the NGO's website and be replaced with the High Court's judgment. This judgment was confirmed by the Federal Supreme Court finding that the speech by B.K. did not deserve to be qualified as "verbal racism" as B.K. had only defended his own beliefs and culture, which did not result in a blanket denigration of the followers of Islam or show fundamental contempt for Muslims. The Federal Supreme Court also explained that although political debate on important issues for society deserved a solid and broad right of freedom of expression, this could not justify the dissemination of untruths nor the publication of value judgments that did not appear to be justified with regard to the underlying facts.

The ECtHR, however, did not agree with the Swiss Courts' findings and came to the conclusion that the interference with the rights of GRA Stiftung gegen Rassismus und Antisemitismus amounted to a violation of the NGO's right to freedom of expression under Article 10 ECHR. While the ECtHR accepted that the interference was prescribed by law, and that the interference pursued the legitimate aim of protecting the reputation and rights of others, it found that the interference with the NGO's rights not necessary in a democratic society. When

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examining the necessity of an interference in a democratic society in cases where the interests of the "protection of the reputation or rights of others" bring Article 8 ECHR into play, the ECtHR verified whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely freedom of expression protected by Article 10 and the right to respect for private life enshrined in Article 8. The ECtHR repeated that "where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts". The ECtHR had, on earlier occasions, identified a number of criteria which may come into play in the context of balancing the competing rights at issue. The relevant criteria thus defined include: contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; and the content, form and consequences of the publication. The ECtHR recalled that it had previously accepted that when an NGO drew attention to matters of public interest, it was exercising a "public watchdog" role of similar importance to that of the press and may be characterised as a social "watchdog" warranting similar protection under the ECHR as that afforded to the press.

According to the ECtHR, there was no doubt that B.K.'s speech and the NGO's blog post concerned a very sensitive topic of "intense public debate in Switzerland" at the material time, while B.K. had willingly exposed himself to public scrutiny by stating his political views. Therefore, he had to show a higher degree of tolerance towards potential criticism of his statements by persons or organisations which did not share his views. According to the ECtHR, it could not be said that classifying B.K.'s speech as "verbal racism", when it supported an initiative which had already been described by various organisations as discriminatory, xenophobic or racist, could be regarded as devoid of any factual basis. Nor could the impugned description be understood as a gratuitous personal attack on, or an insult to B.K. The NGO's blog post did not refer to his private or family life, but to the manner in which his political speech had been perceived. In view of the foregoing, the impugned categorisation of B.K.'s statement as "verbal racism" on the NGO's website could hardly be said to have had harmful consequences for his private or professional life. The ECtHR particularly disagreed with the Swiss authorities' argument that describing someone's words as "verbal racism" could be associated by the average reader with an accusation of an offence punishable under Swiss criminal law. The ECtHR observed that the NGO had never suggested that B.K.'s statements fell within the scope of the criminal offence of racial discrimination under Article 261bis of the Swiss Criminal Code, and it referred to the NGO's argument stressing the need to be able to describe an individual's statement as racist without necessarily implying criminal liability. As for the nature of the interference (the order to remove the impugned article from the NGO's website, to publish the conclusion of the second-instance court,

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the payment of CHF 3 335 plus tax in court fees and the reimbursement of B.K.'s legal costs amounting to CHF 3 830), the ECtHR was of the opinion that it may have had a "chilling effect" on the exercise of the NGO's freedom of expression "as it may have discouraged it from pursuing its statutory aims and criticising political statements and policies in the future".

In the light of all of the above-mentioned considerations, the ECtHR considered that the arguments advanced by the Swiss Government with regard to the protection of B.K.'s personality rights, although relevant, could not be regarded as sufficient to justify the interference at issue. The domestic courts did not give due consideration to the principles and criteria laid down by the Court's case law for balancing the right to respect for private life and the right to freedom of expression. Therefore, the ECtHR unanimously found that there had been a violation of Article 10 ECHR. The applicant NGO is to receive EUR 35 000 from the Swiss Government in respect of non-pecuniary damages and to cover the costs and expenses incurred both at domestic level and for the proceedings before the ECtHR.

Judgment by the European Court of Human Rights, Third Section, case of GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland, Application no. 18597/13, 9 January 2018

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