European Court of Human Rights: *Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA v. Switzerland*

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Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy

In a case about a TV commercial in support of animal protection, the European Court of Human Rights (ECtHR) accepted that broadcasters can be required to provide an outlet for critical opinions, even if the message is presented in a provocative manner. The ECtHR found that the obligation imposed on a nationwide public service broadcaster and on an advertising sales company to run a disputed commercial did not amount to a disproportionate interference with their right to freedom of expression as protected by Article 10 of the European Convention on Human Rights (ECHR).

The two applicants in this case are the Schweizerische Radio- und Fernsehgesellschaft (SSR), a private-law association which provides nationwide public service radio and television broadcasts, and publisuisse SA (now: Admeira SA), an advertising sales company in which SSR held a 99.8% stake. The dispute was about a TV commercial booked by the Verein gegen Tierfabriken (VgT), an association which is active in the areas of animal and consumer protection (see also IRIS 2001-7/2 and IRIS 2009-10/2). A first commercial with the text “What the other media do not mention” was broadcast, while the SSR refused to broadcast a modified version with the message: "What Swiss Television does not mention" (*Was das Schweizer Fernsehen totschweigt*). The SSR motivated the refusal on the grounds that it was damaging to its commercial interests and image. VgT filed a complaint with the Independent Complaints Authority for Radio and Television (ICA) against the SSR, alleging that the refusal to broadcast the amended version of the commercial amounted to a form of censorship. The AIEP rejected that complaint. The Federal Supreme Court, however, found in favour of VgT, holding that the refusal to broadcast the commercial amounted to a restriction on VgT’s right to freedom of information. Although the commercial was unusual as it attacked the SSR directly, the mere fear that it could damage the SSR’s reputation was not sufficient to justify a refusal to broadcast it. The Supreme Court argued that, as a privileged holder of a franchise concession from the Swiss Confederation, and as the recipient of public funding through the audiovisual licence fee, the SSR did not enjoy the same freedom as a private company, even though it was bound to advertisers through private-law contracts; and although the SSR was entitled to full autonomy with regard to editorial choices in its programming, this was not the case with regard to advertising. The Supreme Court also stated that criticism should be accepted, not only of public authorities,

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but also of individuals or private companies which were performing a task on behalf of the state (see also IRIS 2014-2/7).

Relying on Article 10 ECHR, the SSR and publisuisse SA complained about having been obliged to broadcast a commercial, which, in their view, was damaging to their reputation. The ECtHR referred to Article 35, section 2 of the Swiss Constitution, which states that any person who performs a task on behalf of the state is required to respect fundamental rights and to contribute to implementing them. It finds this obligation particularly applicable where a private company is granted a licence for a task falling within the public service field. The ECtHR is of the opinion that the interference with the applicants' rights had been intended to guarantee the pluralism that is necessary for the functioning of a democratic society and the protection of the rights of others. Most importantly, the ECtHR focusses on the question of whether the obligation to broadcast the disputed commercial was a proportionate interference with the rights of SSR and publisuisse SA. It notes that the advertisement at issue fell outside the regular commercial context of promoting the purchase of a particular product, as it was part of a multimedia campaign through which VgT was seeking to raise awareness of its website and of the information regarding animal protection to be found on it. VgT also wanted to make it clear that the media, and in particular the SSR, had shown no interest in the subject of animal protection. Hence VgT was allowed to draw attention to this issue in the exercise of its right to freedom of expression and its participation in a debate of public interest. The ECtHR also mentions the role of the audiovisual media in a democratic society; because of their power to convey messages through sound and images, the audiovisual media have a more immediate and powerful effect than the print-based media, while the function of television as a familiar source of entertainment in the intimacy of the viewer's home further reinforced its impact. Furthermore, the ECtHR finds that the mere fear that the advertisement could damage the SSR's reputation was not sufficient to justify a refusal to run it, since freedom of expression allows for the criticism not only of public authorities, but also of individuals or private companies which are performing a task on behalf of the state. Given its particular position in the Swiss media landscape, the SSR is required to accept critical opinions and to provide an outlet for them on its broadcasting channels, even if this involves information or ideas that offend, shock or disturb: such are the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society. Furthermore, although the commercial was presented in a very provocative manner, it was clearly unrelated to the programming schedules offered by the SSR. Having the VgT commercial broadcast via other private or foreign channels was not a valid alternative option for VgT, as these other channels could not reach the same audience in Switzerland as the SSR. Therefore, the ECtHR concluded that the obligation imposed on the SSR and publisuisse SA to run the disputed commercial had not amounted to a disproportionate interference with their right to freedom of expression, and that it had therefore been "necessary in a democratic society." Unanimously, the ECtHR found no

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violation of Article 10 ECHR.

Arrêt de la Cour européenne des droits de l'homme, troisième section, rendu le 22 décembre 2020 dans l'affaire Schweizerische Radio- und Fernsehgesellschaft et publisuisse SA c. Suisse, requête n° 41723/14

Jusgment of the European Court of Human Rights (Third Section), of the 22nd December 2020, on the case Schweizerische Radio- Und Fernsehgesellschaft and Publisuisse Sa v. Switzerland, application no. 41723/14

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