European Court of Human Rights : Gachechiladze v. Georgia

IRIS 2021-8:1/23

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The European Court of Human Rights (ECtHR) found a violation of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), on account of the administrative-offence proceedings and the resulting sanctions for disseminating images on social media and on the packaging of condoms deemed by the domestic courts in Georgia to be unethical advertising. The ECtHR found no demonstration of the existence of a pressing social need to interfere with the advertising and it considered the prioritisation of views on ethics of the members of the Georgian Orthodox Church unacceptable in the balancing of various values protected under the ECHR and the Constitution of Georgia.

The applicant, Ms Ani Gachechiladze, is the producer of condoms under the brand name Aiisa (which means “that thing”). The designs of the condom packaging varied and included depictions of popular fictional characters, former and current historical and political figures, references to political events and religion, various objects such as lollipops, quotes from literature and music, popular slogans, wordplay, designs expressing support of the LGBT community and satirical images. The condoms were sold online and via vending machines. After a complaint by the chairman of the conservative civil-political movement “Kartuli Idea” [Georgian Idea], that Aiisa had used designs which were insulting to the religious feelings of Georgians, an administrative procedure was initiated against Ms Gachechiladze.

In 2018 the Tbilisi City Court delivered a decision finding that four disputed designs constituted unethical advertising as they breached public morals. It ordered Ms Gachechiladze to pay a fine of approximately EUR 165 and to cease using and disseminating the relevant designs on the products and on social media, and to issue a product recall in respect of the products already distributed. The Tbilisi Court of Appeal, sitting as a court of final instance, confirmed this judgment. It emphasized that Ms Gachechiladze should have been aware that the depiction of figures and religious symbols on items of a sexual nature, such as condoms, are perceived in Georgia as an insult to religion, religious symbols and monuments. As each of the four advertisements at issue were found to be insulting actions in conflict with public morals, they fell within the definition of “unethical advertising” under the Advertising Act. The interference with Ms

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Gachechiladze right was considered necessary in a democratic society from the perspective of Article 10 ECHR.

In its judgment of 22 July 2021 the ECtHR disagreed with most of the findings by the Georgian courts. The ECtHR does not accept the wide margin of appreciation claimed by the Georgian authorities on the basis that it concerned commercial speech. The ECtHR is of the opinion that the applicant's brand also appears to have been aimed at initiating and/or contributing to a public debate concerning various issues of general interest. In particular, the declared objective of the brand, expressed at the time of its launch, was to shatter stereotypes, and "to aid a proper understanding of sex and sexuality". Furthermore, several designs used by the brand also appear to have been a social as well as political commentary on various events or issues. In such circumstances, the margin of appreciation afforded to the domestic courts is necessarily narrower compared to situations concerning solely commercial speech (see also IRIS 2018-3/4).

After evaluating each of the four advertisements at issue, the ECtHR concluded that at least with regard to three of the four disputed designs the reasons adduced by the domestic courts were not relevant and sufficient to justify an interference under Article 10(2) ECHR. The ECtHR accepted the finding by the domestic courts that one of the designed advertisements could be seen as a gratuitous insult to the object of veneration for Georgians following the Orthodox Christian faith. But the ECtHR in principle disagreed with the apparent implication in the domestic courts' decisions that the views on ethics of the members of the Georgian Orthodox Church took precedence in the balancing of various values protected under the ECHR and the Constitution of Georgia. The ECtHR reiterated that in a pluralist democratic society those who choose to exercise the freedom to manifest their religion must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (see also IRIS 1995-1/1 and IRIS 2005-10/3). As the ECtHR found that the interference against at least three of the four disputed designs was not necessary in a democratic society, it concluded unanimously to the finding of a violation of Article 10 ECHR.

European Court of Human Rights, Fifth Section, in the case of Gachechiladze v. Georgia, Application no. 2591/19, 22 July 2021

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