



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

**SCHWEIZERISCHE RADIO- UND FERNSEHGESELLSCHAFT
SRG v. SWITZERLAND**

(Application no. 34124/06)

JUDGMENT

STRASBOURG

21 June 2012

FINAL

21/09/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President*,

Karel Jungwiert,

Mark Villiger,

Ann Power-Forde,

Angelika Nußberger,

Helen Keller,

André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 15 May 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 34124/06) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Swiss company, *Schweizerische Radio- und Fernsehgesellschaft SRG* (“the applicant company”) on 14 August 2006.

2. The applicant company was represented by Mr R. Mayr von Baldegg, a lawyer practising in Lucerne. The Swiss Government (“the Government”) were represented by their Agent, Mr F. Schürmann, head of the European Law and International Human Rights Protection Section, Federal Office of Justice.

3. Relying on Article 10 of the Convention, the applicant company complained about the authorities’ refusal to authorise it to film an interview with a prisoner inside the prison where she was serving a sentence for murder.

4. On 14 May 2008, the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company is a private-law radio and television broadcasting corporation based in Zurich.

6. On 12 August 2004 it applied for authorisation to enter Hindelbank Prison (Canton of Bern) in order to film a sort of portrait (“*eine Art Portrait*”) of A., a female prisoner serving a sentence for murder. The idea was to broadcast the film of the interview in the “*Rundschau*” programme, in a feature about the trial of another person accused in the same murder case. It argued that the interview with A., who had consented to it, was a subject of public interest given that, even after her conviction, her case continued to attract a great deal of media attention. “*Rundschau*” is a weekly Swiss television programme covering political and economic questions. Created in 1968, it is one of the longest-running programmes on Swiss television, and is currently aired on Wednesday evenings.

7. By a decision of 31 August 2004, the prison refused to authorise the filming, for reasons of peace, order and security in the prison, and equal treatment of prisoners.

8. On 27 September 2004 the applicant company lodged an appeal against that decision, explaining that the intention was “to film general shots of A. inside the prison and an interview with her” (“*allgemeine Aufnahmen der Insassin im Gefängnis sowie ein Interview mit ihr*”).

9. The appeal was rejected by the Bern Canton Department of Police and Military Affairs on 16 February 2005.

10. On 21 March 2005 the applicant company challenged that decision. It argued that there was no danger of disturbing peace and order or threatening security in the prison as it had no intention of filming the technical installations on the site or inside the different buildings. Nor was the presence of a single cameraman and a female journalist likely to disturb the smooth functioning of the establishment or represent a security risk, especially as the filming should not last more than two or three hours and could take place at a time when the other prisoners were working. In any event the precise practical arrangements for the filming had yet to be finalised.

11. By a decision of 1 July 2005 the Administrative Court of the Canton of Bern rejected the appeal. Like the lower court, without denying the considerable media interest generated by A.’s case in Switzerland, it rejected the appeal on the basis of section 5 of the order relating to the Criminal Code and section 48 of the law of the Canton of Bern on the execution of penalties and measures (see paragraph 18 below). It indicated that Article 16 § 3 of the Federal Constitution (paragraph 16 below)

authorised access only to generally accessible sources. It considered that while representatives of the media were ordinarily allowed to visit prisons, the organisational and supervisory effort required for a television film crew was well beyond what might reasonably be expected of the prison authorities. It also considered that there was nothing to stop the applicant company from broadcasting a programme about A.'s case using just an audio recording or a simple interview. It reasoned that for the purposes of a news programme on this particular theme ("*Sachinformation*"), pictures of the prisoner were not necessary.

12. The applicant company lodged a public-law appeal and an administrative-law appeal with the Federal Court, for violation of its freedom of expression and information. It submitted that there was considerable public interest in the murder trial in Switzerland. Considering that the use of modern, light equipment would have limited any disruption of the smooth functioning of the prison, it argued that the court below had given insufficient reasons for the technical and security grounds on which its request to film in the prison had been refused. The filming could have taken place in the room set aside for prison visits, which could have been closed to the other prisoners. It also alleged that the principle of equal treatment had been breached, in so far as it had been placed at a disadvantage compared with other media.

13. In a judgment of 29 November 2005 the Federal Court rejected the administrative-law appeal. It accepted that prison visits were important because contact with their families helped detainees to prepare and facilitate their social rehabilitation, but that did not give rise to any entitlement to film inside a prison.

14. In a judgment of 6 February 2006, served on the applicant company on 16 February 2006, the Federal Court also rejected the public-law appeal. It upheld the decision of the lower court according to which Article 16 § 3 of the Federal Constitution guaranteed access only to information that was generally accessible. It considered that the same must apply to Article 10 of the Convention. It added that giving the applicant company access to the prison might infringe the other prisoners' personality rights. As to the applicant company's argument that giving some media access to the prison but not television crews amounted to discriminatory treatment, it held that the principle of equal treatment did not apply to the present case, as television productions bore no comparison with audio recordings or simple interviews.

15. It appears from the Government's observations that when A., who has always protested her innocence, was convicted it caused quite a public stir. The "*Appel-Au-Peuple*" organisation, for example, which takes various kinds of action in connection with alleged miscarriages of justice, allegedly made threats against the federal judges in charge of the case, which exceptionally led to their replacement for the revision proceedings initiated

by A. The leader of the movement even staged a sixty-day hunger strike for A. He apparently spent whole days outside the Federal Court and allegedly took sympathisers along with him to the home of a federal judge, outside which he camped all night in a deckchair.

II. RELEVANT DOMESTIC LAW

16. Article 16 of the Federal Constitution reads as follows:

“Freedom of expression and of information

1. Freedom of expression and of information is guaranteed.
2. Every person has the right freely to form, express, and impart their opinions.
3. Every person has the right freely to receive information, to gather it from generally accessible sources and to disseminate it. »

17. The relevant part of Article 5 of the Order of 13 November 1973 on the Criminal Code reads as follows (unofficial translation provided by the Court):

“Visits and correspondence

Visits and correspondence may be restricted only in so far as the smooth operation of the establishment requires. The prison management may impose tighter restrictions if the circumstances of the case so require.

Contact between the detainee and his or her family shall be facilitated as far as possible.

Visits and correspondence shall be authorised only under surveillance. The prison management may decide not to monitor visits and correspondence if the detainee is considered to be trustworthy.

The management may, in the general context of the establishment, authorise free contact between the detainees and clergymen, doctors, defence lawyers, notaries, guardians and people performing comparable functions.

...”

18. Section 9.6 of the law of the Canton of Bern of 25 June 2003, on the execution of sentences and measures, regulates detainees’ contact with the outside world as follows:

“Article 48 – Principles

1. The detainees may have contact with people outside the establishment. As a general rule they shall personally bear the resulting costs.

2. Contacts with the outside world may be supervised and limited, or even prohibited, where abuse or a threat to security and order is to be feared or where they are in contradiction with the purpose of the execution of the sentence.

...”

19. Article 71 of the Swiss Code of Criminal Procedure of 5 October 2007 reads as follows:

“Article 71 – Audio and video recording

1. It is not permitted to make video or audio recordings within the court building or to make such recordings of procedural acts carried out outside the court building.

2. Persons infringing the foregoing paragraph may be liable to a fixed penalty fine in accordance with Article 64 paragraph 1. Unauthorised recordings may be confiscated.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

20. The applicant company complained about the authorities’ refusal to allow it to film, inside a prison, an interview with a detainee serving a sentence for murder. The company alleged that as a result of that refusal it had not been able to broadcast the interview as planned in the “*Rundschau*” programme about the trial of a person accused in the same murder case. It considered that this was a violation of its right to freedom of expression within the meaning of Article 10 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

21. The Government disagreed.

A. Admissibility

22. The first question that arises is the applicability of Article 10 in the present case. The Court considers that the applicant company was prevented from doing preparatory work on a television programme. According to its case-law, this preparatory phase prior to broadcasting a programme falls within the scope of Article 10 (see, for example, *Dammann v. Switzerland*, no. 77551/01, § 28, 25 April 2006, and *Gsell v. Switzerland*, no. 12675/05, 8 October 2009).

23. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a) The applicant company

24. The applicant company argued that the measure in issue was based on the law of the Canton of Bern on the execution of penalties and measures, whereas that law did not regulate contacts between detainees and the media.

25. It considered that the authorities had based their assertion that the interference pursued legitimate aims mainly on reasons of a specific technical and economic nature relating to the internal functioning of the prison, rather than on any pertinent reasons of public safety or order within the meaning of Article 10 § 2.

26. As to whether the measure concerned was necessary in democratic society, the applicant company submitted that the Federal Court had not sufficiently examined whether there had been a violation of Article 10. It had merely commented that the applicant company could have applied to make an audio recording, or to conduct an ordinary interview. According to the applicant company, that reasoning ignored the importance of the impact of the moving picture ("*bewegte Bild*") which television offered.

27. The applicant company further submitted that the Federal Court had wrongly assumed that the company intended to film other prisoners, or third parties, whose personality rights might be infringed as a result. However, its intention had only been to interview A. concerning the imminent trial of a person accused in a case related to her own conviction. The applicant company had always kept an open mind about the terms and conditions of the filming, and had never ruled out the possibility of filming the interview in the visiting room.

28. The applicant company also considered that the domestic courts had failed to allow for modern-day technologies that made it possible to limit the impact of a television production on the shooting location and the people there. All that was needed to film the interview was access to the prison for one journalist with a hand-held camcorder (*“Handycam mit Display Bildschirm”*), possibly accompanied by a technician. The efforts required to make an audio recording or publish a written interview with a photograph would have had a comparable impact as far as the other detainees were concerned.

29. The applicant company considered that the domestic courts had failed to take into account the extent of public interest in the proposed programme about A., who had been a focus of media attention at the time, and to weigh the different interests in issue.

30. For all these reasons, the applicant company considered that there had been a violation of Article 10.

b) The Government

31. For the Government the refusal to authorise the applicant company to film A. in general and to interview her had not interfered with the applicant company’s freedom of expression.

32. In any event, were the Court to find otherwise the Government were convinced that the interference would be justified in respect of the provisions of Article 10 § 2, for the following reasons.

33. In terms of the legal basis for the measure in issue, the Government explained that the provisions regulating contact between detainees and people outside the prison were also applicable to contact between outsiders and detainees. Article 48, paragraph 2 of the law of the Canton of Bern on the execution of penalties and measures provided for contact to be limited or even prohibited if any abuse or threat to security and order was to be feared or where it was in contradiction with the purpose of the sentence. Although it left it to the discretion of the prison authorities to apply this measure, the law was sufficiently foreseeable in so far as it provided for the possibility, and the conditions, of restrictions on access. The measure in question was therefore prescribed by law within the meaning of Article 10 § 2.

34. The Government pointed out that Hindelbank prison had based its decision of 31 August 2004 on the need to maintain peace, order and security in the prison, and to treat all detainees equally. Order and security in the prison served to guarantee the safety of the detainees, as well as to protect the rights of others. These motives matched some of the legitimate aims listed in Article 10 § 2.

35. As to whether the measure was necessary in a democratic society, the Government considered that in spite of the limited means and staff at their disposal prisons had to take care of their inmates, cater for their needs and prepare their social rehabilitation, which was the purpose of their

sentence. Their first concern was maintaining order and security in the prison. In this connection the Government pointed out that after initially requesting authorisation to film shots of A. in general in the prison and an interview with her, it was only before the Federal Court that the applicant company had stated that it did not rule out filming in a specific place, such as the visiting room.

36. According to the Government, contact with the media was not risk-free for an inexperienced person. The risk was all the greater where television was concerned, as the person filmed was highly exposed. Because of the particular situation in which people serving prison sentences found themselves, such exposure was particularly delicate and it was difficult to rule out the possibility of exploitation of their vulnerability by the media, albeit unintentional. The Government added that while it was important that there should be written and spoken contact with the outside world, television as a platform could be incompatible with the purpose of the sentence.

37. The Government also alleged that even with modern, light equipment the work of a television crew would generally attract interest, especially in the closed environment of a prison. In addition to preparing the location of the filming and accompanying the detainee in question and the television crew, the prison staff would have had to maintain peace and order among the other detainees before, during and after the filming.

38. The Government added that the media were free to interview detainees about their personal situation in writing, or make audio recordings, and the restriction in question only concerned the audiovisual media. However, the social importance of the aim of the prison sentence, namely social rehabilitation, the difficulty in achieving it and the vulnerability of the detainee were interests that weighed heavier in the balance than the freedom of the media to disseminate information in film form rather than any other form. The measure had therefore been proportionate to the aim pursued.

39. The Government also explained that the conviction of A., who had always protested her innocence, had stirred considerable public interest. One only had to recall the action taken by the "*Appel-Au-Peuple*" organisation to see that (paragraph 15 above). The Government considered that in these circumstances a television programme featuring A. was likely to have major repercussions because of the particular impact filmed news had. The programme might have shed doubts on the legitimacy of A.'s conviction, which was final. The Government concluded that as a related trial had been scheduled to take place in October 2004, the decision not to authorise the filming of the sequences concerned had been justified.

40. For all these reasons the Government considered that even if the Court found that the measure in issue had interfered with the applicant

company's freedom of expression, it could not be considered unreasonable, disproportionate or arbitrary.

2. The Court's assessment

a) Whether there was interference

41. The applicant company is a private radio and television broadcasting company. The Court considers that the refusal to authorise it to film inside a prison to prepare a television programme and interview one of the detainees constitutes an interference in the exercise of its freedom of expression.

b) Whether the interference was justified

42. Such interference is at variance with Article 10 unless it meets the requirements of the second paragraph of that provision. It therefore remains to be determined whether it was "prescribed by law", pursued one or more of the legitimate aims listed in that paragraph and was "necessary in a democratic society" to achieve that aim.

i. "Prescribed by law"

43. The applicant company submitted that the law of the Canton of Bern on the execution of penalties and measures, which served as a legal basis in the present case, did not regulate contacts between detainees and the media.

44. The Court reiterates that the law cannot provide for every eventuality in modern life and society. The law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, for example, *Rekvenyi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III, and *The Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 49, Series A no. 30).

45. The Court notes that the domestic courts and the Government based themselves on Article 48 of the law of the Canton of Bern on the execution of penalties and measures, which provided for contacts to be supervised limited or even prohibited if any abuse or threat to security and order was to be feared or where they were in contradiction with the purpose of the sentence.

46. In the present case the respondent State cannot be blamed for not having passed a law specifically regulating contacts between detainees and the media. Furthermore, there is nothing arbitrary about the domestic courts' finding, as confirmed by the Government, that Article 48, paragraph 2, of the law of the Canton of Bern on the execution of penalties and measures also applied, reciprocally, to contacts between outsiders (in the present case the applicant company) and detainees.

47. That being so, the Court is of the opinion that the interference had a sufficient legal basis for the purposes of paragraph 2 of Article 10.

ii. Legitimate aims

48. According to the Government, the measure in issue pursued the legitimate aims of order and security in the prison, which in turn served to guarantee detainees' safety; therefore protecting the rights of others was also an aim.

49. The Court agrees with the Government in considering that the measure in issue pursued several of the aims listed in paragraph 2 of Article 10, namely "preventing disorder" and "protecting the rights of others".

iii. "Necessary in a democratic society"

50. The main question in the present case is whether the measure in issue was necessary in a democratic society.

a) General principles

51. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 78, 7 February 2012).

52. The Court reiterates that, under Article 10 of the Convention, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression guaranteed under that provision is necessary (see *Tammer v. Estonia*, no. 41205/98, § 60, ECHR 2001-I, and *Axel Springer AG*, cited above, § 85).

53. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court (see *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 38, ECHR 2004-X, and *Axel Springer AG*, cited above, § 86). In exercising its supervisory function, the Court's task is not to take

the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see *Petrenco v. Moldova*, no. 20928/05, § 54, 30 March 2010; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 41, 21 September 2010; *Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010, and *Axel Springer AG*, cited above, 86).

54. The Court must therefore carefully examine the reasons given by the domestic courts in the light of these principles. However, the Court's supervision is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention (see *The Sunday Times (no.1)*, cited above, § 59, Series A no. 30). The Court must convince itself that the interference in issue, as well as the reasons given by the domestic courts to justify it, corresponded to a "pressing social need". Were that not the case the protection afforded by the Convention in this regard would be devoid of purpose, as its provisions are intended to guarantee rights that are practical and effective. This principle must also be respected when assessing an interference with the right to freedom of expression (see *Stoll v. Switzerland* [GC], no. 69698/01, § 128, ECHR 2007-V).

55. The Court must examine the interference in issue in the light of the case as a whole in order to determine whether it was "proportionate to the legitimate aim pursued" and, in particular, whether the reasons adduced by the national authorities to justify it were "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see *Stoll*, cited above, § 101, and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II).

β) Application of these principles to the present case

56. The Court must examine the interests in issue in the present case. Concerning the applicant company's interest in being allowed to film the interview inside the prison, it notes that the domestic courts admitted that the on-going murder case attracted a considerable amount of interest in Switzerland. There is therefore no doubt that a report about A., who had been convicted in the same murder case and had always protested her innocence, would have attracted public interest, especially if it included an interview filmed in the prison where she was serving her sentence. The fact that the sequences in question were to be shown in "*Rundschau*", a current affairs programme with a serious reputation, shows how much interest there was in the subject at the origin of the applicant company's request (see,

mutatis mutandis, *Monnat v. Switzerland*, no. 73604/01, § 68, ECHR 2006-X, and *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, § 34). That being so, as what was at stake was freedom of expression in the context of a television programme raising a matter of major public concern, the Swiss authorities had only a limited margin of appreciation in determining whether there was a “pressing social need” to take the measure in question. Consequently, the Court will examine in scrupulous detail whether that measure was proportionate to the legitimate aim pursued under Article 10 § 2 (see *Monnat* cited above, § 61, and *Radio France and Others v. France*, no. 53984/00, ECHR 2004-II, § 34). In particular it must examine whether the reasons adduced by the national authorities to justify the interference with the applicant’s freedom of expression were sufficient and whether they gave convincing, well-substantiated reasons to justify their decisions.

57. As regards the respondent party’s interest in preventing the applicant company from filming the prisoner inside the prison, the domestic authorities considered that allowing the film crew access might infringe the personality rights of other detainees, and that the effort of organisation and supervision necessary for this type of filming went well beyond what might reasonably be expected of the prison authorities.

58. The Court accepts that there are reasons which might, at first glance, make the rejection of the applicant company’s request appear necessary in a democratic society, such as the presumption of innocence of the person whose trial was imminent, or the interests of the proper administration of justice. It is not persuaded, however, that the domestic authorities gave sufficient consideration to whether the refusal of permission to film inside the prison, for reasons concerning the security and rights of the other detainees, was effectively necessary in practice in the present case.

59. In this connection, in its appeal of 27 September 2004 the applicant company explained that its intention was to film general shots of the prisoner and an interview with her; then, in its appeal of 21 March 2005, it said that it did not intend to film the technical installations on the site or inside the different buildings. It also explained that the filming should not last more than two or three hours and could take place at a time when the other prisoners were working. Lastly, in its appeals before the Federal Court, it suggested that the interview could be filmed in the prison’s visiting room, which could be closed to the other detainees for the purpose. The domestic authorities do not appear to have taken any notice whatsoever of these arguments. In such conditions the argument concerning the potential effects of the filming on the other detainees’ private lives appears neither relevant nor sufficient to justify the interference with the applicant company’s freedom of expression.

60. The same applies to the need to maintain order and security in the prison. The Court notes that neither the domestic authorities nor the

Government have indicated in what respect order or security in the prison might have been effectively disturbed in practice by the proposed production, especially if the filming had taken place in the confined area proposed by the applicant company.

61. The Court is not unaware that the domestic authorities are the best placed to determine which measures should be taken to guarantee security and order in prison establishments. However, the refusal in this case, which was absolute, appears particularly hard to justify with regard to Article 10. Indeed, in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned (see, *mutatis mutandis*, *Glor v. Switzerland*, no. 13444/04, § 94, 30 April 2009; see also, along the same lines, *Women On Waves and Others v. Portugal*, no. 31276/05, § 41, 3 February 2009). The Government submitted that the applicant company had initially asked for permission to film A. inside the prison in general and an interview with her, and had not suggested the possibility of filming in a specific place until its appeal to Federal Court. In the light of the evidence mentioned by the applicant company, however, the Court does not share that approach. It notes in this connection that in its appeal of 21 March 2005 the applicant company added that the precise practical arrangements for the filming had yet to be finalised. In spite of that remark, which can be seen as a sign of flexibility on the part of the applicant company, its request was purely and simply rejected by the authorities. Regard being had to the principle drawn from the *Glor* judgment cited above, and without wishing to speculate about the outcome of such negotiations, the competent authorities should have allowed the applicant company to submit practical proposals to make sure the filming could go ahead without disturbing the smooth functioning of the prison or order and security there. As to the Government's affirmation that the applicant company had only stated its willingness to film the interview in a specific place in its appeal to the Federal Court, it is important to note that that court rejected this argument on the merits, not because it was submitted out of time.

62. Both before the domestic authorities and before the Court, the applicant company mentioned technical means which, nowadays, in the fast-developing world of television broadcasting, made it possible to limit the impact of filming on places and people. The Court does not consider unfounded the applicant company's argument that the presence on site of one cameraman and one journalist was unlikely to disturb the functioning of the prison or to constitute a security risk. In any event, in order to ensure that the measure they took was compatible with freedom of expression, the domestic authorities should have examined this technical aspect of the applicant company's request.

63. Another reason given by the Government to justify the interference with the applicant company's freedom of expression was its duty to protect A. from excessive exposure, or even exploitation of her vulnerability by the applicant company. The Court cannot accept this argument, noting that A., who incidentally is not a party to the present proceedings, gave her agreement to the interview and there is no evidence in the present case that she was in any way incapable of giving her informed consent. Nor does it appear that this argument was raised before or by the domestic authorities.

64. Lastly, the Court points out that the administrative court observed that there was nothing to prevent the applicant company from airing a programme about the case of the prisoner concerned using an audio recording or a straightforward interview. According to the court a current affairs programme about the prisoner could have been made without the need for film footage of her in prison. The Government share that opinion. However, the Court is unconvinced by this argument. Without having to comment on the merits of the argument, it reiterates that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. It is therefore not for the national courts or indeed for the Court to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists (on the question of freedom of the press, see, among other authorities and *mutatis mutandis*, *Jersild*, cited above, § 31, and *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, § 48). So the fact that a telephone interview with A. was included in the applicant company's "*Schweiz aktuell*" programme on 19 August 2004, available on its internet site, is not in itself relevant as it used different techniques and means, had a less direct impact on viewers and was broadcast in a different programme. Consequently, the airing of that interview by no means remedied the interference caused by the refusal of authorisation to film inside the prison, which is the only subject in issue here.

65. In conclusion, the Court accepts that the domestic authorities are better placed than it is to say whether, and to what extent, access to a prison – a closed environment under surveillance – is compatible with order and security in the prison. However, in view of the importance of the media in a democratic society and of the reduced margin of appreciation the domestic authorities have in respect of a television programme on a subject of considerable public interest, the Court considers that the need for restrictions on freedom of expression must be convincingly established and that the reasons given by the domestic authorities to justify them must appear "relevant and sufficient". In the present case, considering the rather summary reasoning put forward by the domestic authorities and the absence in their decisions of any real balancing of the interests in issue, in the Court's opinion the domestic authorities have failed to demonstrate

convincingly that the refusal of permission to film inside the prison, which was an absolute refusal, was strictly proportionate to the aims pursued and thus met a “pressing social need” within the meaning of the case-law cited above.

66. Having regard to all of the above, the Court considers that the measure in dispute in the present case was not necessary in a democratic society.

67. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

69. In its application form of 14 August 2006 the applicant company asked the Court to award it an equitable sum for the costs incurred in the domestic proceedings and the proceedings before the Court. It was invited to be more specific and to substantiate its claim, but has failed to do so. Accordingly, pursuant to Rule 60 §§ 2 and 3 of the Rules of Court, the Court considers that no award should be made under this head.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by five votes to two, that there has been a violation of Article 10 of the Convention;
3. *Dismisses*, unanimously, the claim for just satisfaction.

Done in French, and notified in writing on 21 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Nußberger and Keller is annexed to this judgment.

D.S.
C.W.

JOINT DISSENTING OPINION OF JUDGES NUSSBERGER AND KELLER

1. This case concerns media access to prisons and the acceptability of restrictions on the freedom of the media to publish information about people serving prison sentences.

2. We agree with the majority of the Chamber on the basic principle that prison should not be a world unto itself, closed to the press and the media. However, the Convention explicitly states that national security and public safety may justify any restriction necessary in a democratic society.

3. The majority of the Chamber saw a violation of Article 10 of the Convention in the insufficient reasoning for the Swiss authorities' decisions (I). That finding is based on the existence of a narrow margin of appreciation (II) and on an examination of proportionality that gave precedence to the interests of the applicant company (III).

I. Insufficient reasoning

4. Obviously, access for journalists and cameramen to prisons raises problems with regard to national security and public safety. The majority of the Chamber acknowledged and emphasised that the domestic authorities are best placed to assess the risks. They nevertheless found a violation of the Convention, especially because the reasons adduced by the Swiss authorities were not sufficiently substantiated and did not explain "in what respect order or security in the prison might have been effectively disturbed in practice by the proposed production" (§ 60). The fact that this argument was thrice repeated (§§ 58, 62 and 65) shows the decisive importance of the lack of sufficient reasoning in the final judgment. While it is true that any decision of the domestic authorities restricting the human rights protected by the Convention must be explained and justified in a manner people can understand, we do not share the position of the majority on this point for the following reasons.

5. In the present case the refusal of a filmed interview with the prisoner was neither summary nor superficial, but was based entirely on pertinent arguments (§§ 35-39). It is self-evident that an interview inside a prison poses security problems. We are therefore not convinced that detailed explanations were necessary in this connection. The Swiss authorities did not simply settle for reproducing stereotyped reasons: they pointed out that the organisational and supervisory efforts required for a television film crew were well beyond what might reasonably be expected of the prison authorities (§ 11). We fail to see what additional information might have been considered necessary. Even if more details about the security system had been given, the Court could not have substituted its opinion for that of the domestic authorities concerning the risks involved, especially as the

domestic authorities alone would be responsible in the event of an escape or of disorder in the prison.

6. Also, the argument that filming for television in a prison would have exposed a detainee in a particularly delicate manner and that it was difficult to rule out the possibility of exploitation is convincing (§ 36). The authorities are responsible for all the detainees in their care.

7. Lastly, in the present case the argument that filming might have interfered with the proper administration of justice and with the presumption of innocence of a person who was about to stand trial at the time of the prison authorities' refusal is equally pertinent (see *Craxi v. Italy*, no. 34896/97, § 98). The refusal of the domestic authorities is perfectly in keeping with the general ban under Swiss law on audio or video recordings of court hearings (see, in particular, Article 71 § 19 of the Swiss Code of Criminal Procedure).

8. All these factors taken into account by the domestic authorities were presented in a pertinent and comprehensible manner (see, concerning supervision criteria, *Handyside v. the United Kingdom*, 7 December 1976, no 5493/72, § 50 *in fine*). Of course other details or points could always have been added. It is legitimate, however, for the reasons given by the domestic authorities for their decisions to be reasonably succinct. European supervision should be limited to ensuring that the reasons adduced are relevant and convincing and all the important considerations have been taken into account. What matters is whether the result of the courts' analysis is reasonable and justifiable *vis-à-vis* the Convention. The form of the reasoning, however, may vary from one legal culture to another, in keeping with the well-established traditions of the highest courts of the Council of Europe's member States. In our opinion it is not the Court's role to judge the exhaustiveness or the wording of the reasons given by the domestic authorities. This is why, in our opinion, the majority was wrong to find that insufficient reasoning was given for the decisions in issue.

II. Margin of appreciation

9. The majority's assessment is based on the assumption that the domestic authorities had only a limited margin of appreciation in determining whether there was a pressing social need (§ 56). In the present case – as in many cases of restrictions on freedom of expression – there were various conflicting interests involved. A fair balance had to be struck between the applicant company's right to freedom of the press, the rights of the potential television viewers and the interests of society in general, without losing sight of the rights of the prisoner, the rights of her fellow prisoners and those of the accused person whose trial was imminent.

10. This delicate exercise was carried out before the Court, where only the applicant company and the respondent State were represented as parties

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to the proceedings. However, the domestic authorities are clearly better placed to examine the overall picture where such multiple conflicting interests are in issue. For this reason we are not convinced that the margin of appreciation should be very narrow in such a case.

III. Proportionality

11. The characterisation of the multiple conflicting interests in issue also has an impact on the balancing of those interests in the present case, which the majority did not fully take into account. In our opinion the Court's case-law in the cases of *Von Hannover v. Germany (no. 1)*, 24 June 2004, no. 59320/00, §§ 59 et seq., and *Von Hannover v. Germany (no. 2)*, 7 February 2012, §§ 109 et seq., nos. 40660/08 and 60641/08, emphasising the need to distinguish between satisfying public curiosity and contributing to a debate of general interest, should have been transposed to the present case.

In the present case, the applicant company's project did both of the above: on the one hand it contributed to the social debate on the proper functioning of the justice system, bearing in mind the action taken by the "*Appel-Au-Peuple*" organisation, which combats alleged miscarriages of justice; and on the other hand, an interview with a high-profile convict serving a prison sentence for murder was intended, by its very nature, to cater for a certain "voyeurism", a purpose to which very little weight should be accorded.

12. Nor did the majority take into account the fact that the authorities did not ban the interview outright. Indeed, on 19 August 2004 a telephone interview with the prisoner was broadcast in the "*Schweiz aktuell*" current affairs programme and posted on the internet. The majority rightly pointed out that the media are free to decide what technique of reporting should be adopted in a given case (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Stoll v. Switzerland* [GC], no. 69698/01, § 146, ECHR 2007-V). However, such considerations cannot be taken into account in assessing the proportionality of a restrictive measure. In the present case the domestic authorities simply refused to allow an audiovisual recording which would have meant filming inside a prison. As to the proportionality of the refusal, allowance should be made for the fact that the added value of film footage of the prisoner would have served more to satisfy people's curiosity than to contribute to a general interest debate.

13. Lastly, all the media – whether considered serious or otherwise – should have the same access to prisons, provided that the public interest prevails in practice. In our opinion, and unlike what the majority suggested (§ 56), it is not for the Court to decide whether the media are serious, as long as they contribute to a public interest debate. In other words, the

“serious” reputation of the “*Rundschau*” programme had nothing to do with the issue of the proportionality of the interference.

For the above reasons we are unable to agree with the position of the majority in this case.