



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

FIFTH SECTION

**CASE OF VEREIN GEGEN TIERFABRIKEN SCHWEIZ (VgT)
v. SWITZERLAND**

(Application no. 32772/02)

JUDGMENT

STRASBOURG

4 October 2007

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
30/06/2009**

This judgment may be subject to editorial revision.

In the case of Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland,

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

Mrs S. BOTOCHAROVA, *President*,

Mr L. WILDHABER,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr J. BORREGO BORREGO,

Mrs R. JAEGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 11 September 2007,

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

PROCEDURE

1. The case originated in an application (no. 32772/02) 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 an association registered in Switzerland, Verein gegen Tierfabriken Schweiz (VgT) (“the applicant association”), on 25 July 2002.

2. The applicant association was represented by Mr R.W. Rempfler, a lawyer practising in St Gall. The Swiss Government (“the Government”) were represented by their Agent, Mr P. Boillat, Deputy Director of the Federal Office of Justice, and subsequently by Mr F. Schürmann, head of the Human Rights and Council of Europe Section of the Federal Office of Justice.

3. On 18 January 2005 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Application no. 24699/94 and the Court's judgment of 28 June 2001

4. The applicant association is dedicated to animal protection, campaigning in particular against animal experiments and battery farming.

5. In response to various advertisements produced by the meat industry, the applicant association made a television commercial lasting fifty-five seconds, consisting of two scenes.

The first scene showed a sow building a shelter for her piglets in the forest. With soft music playing in the background, the voiceover referred, among other things, to the pigs' sense of family. The second scene showed a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The voiceover compared the conditions in which pigs were reared to concentration camps, and added that the animals were pumped full of medicines. The film concluded with the exhortation: "Eat less meat, for the sake of your health, the animals and the environment!"

6. Permission to broadcast the commercial on the channels of the Swiss Radio and Television Company (*Schweizerische Radio- und Fernsehgesellschaft*) was refused on 24 January 1994 by the company responsible for television advertising (the Commercial Television Company (*AG für das Werbefernsehen*), now called Publisuisse SA) and, at final instance, by the Federal Court, which dismissed an administrative-law appeal by the applicant association on 20 August 1997.

In respect of the applicant association's complaint under Article 10 of the Convention, the Federal Court found that the prohibition of political advertising laid down in section 18(5) of the Federal Radio and Television Act pursued various aims; in particular, it was designed to prevent financially powerful groups from obtaining a competitive political advantage, to protect the formation of public opinion from undue commercial influence, to bring about a certain equality of opportunity among the different forces of society, and to contribute towards the independence of radio and television broadcasters in editorial matters.

7. On 13 July 1994 the applicant association lodged an application with the European Commission of Human Rights under former Article 25 of the Convention.

8. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

9. In a decision of 6 April 2000 the Court declared the application partly admissible.

10. In a judgment of 28 June 2001 the Court held that the refusal by the relevant Swiss authorities to broadcast the commercial in question infringed the right to freedom of expression guaranteed by Article 10 of the Convention (see *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI).

The Court found that the measure taken had been “prescribed by law” and had pursued a legitimate aim for the purposes of Article 10 § 2.

As to whether the measure had been “necessary in a democratic society” within the meaning of that provision, the Court noted, in particular, that it had not been established that the applicant association itself constituted a powerful financial group pursuing the aim of restricting the broadcaster’s independence, unduly influencing public opinion or endangering equality of opportunity among the different forces of society. On the contrary, it had simply intended to participate in an ongoing general debate on the protection and rearing of animals. Accordingly, in the Court’s opinion, the authorities had not demonstrated in a “relevant and sufficient” manner why the grounds generally advanced in support of the prohibition of political advertising could also serve to justify the interference in the particular circumstances of the case (*ibid.*, § 75).

The Court also found that there had been no violation of Articles 13 and 14 of the Convention. As to the application of Article 41, it ordered Switzerland to pay 20,000 Swiss francs (CHF – approximately 12,160 euros (EUR) today) for costs and expenses. However, it made no award to the applicant association for non-pecuniary damage.

B. Subsequent proceedings before the Swiss authorities

11. Subsequently, the applicant association again applied to Publisuisse SA for permission to broadcast an amended version of the commercial. In a letter of 30 November 2001 Publisuisse SA refused the application.

12. On 1 December 2001, on the basis of the Court’s judgment, the applicant association applied to the Federal Court for the final judgment given at domestic level to be reviewed, in accordance with section 139a of the former Federal Judicature Act (see “Relevant domestic law and practice”, paragraph 19 below).

13. In their respective observations of 10 January and 15 February 2002, which were duly transmitted to the applicant association, the Federal Department of Environment, Transport, Energy and Communication and the Swiss Radio and Television Company submitted that the application to reopen the proceedings should be dismissed.

14. In a judgment of 29 April 2002 the Federal Court dismissed the application to reopen the proceedings. It held that the applicant association

had not provided a sufficient explanation of the nature of “the amendment of the judgment and the redress being sought”, a formal requirement imposed by section 140 of the former Federal Judicature Act (see “Relevant domestic law and practice”, paragraph 20 below). It observed, in particular, that the applicant association had been unable to show how redress was possible only through the reopening of the proceedings. It further noted that the association had not sufficiently shown that it still had an interest in broadcasting the original commercial, which now appeared out of date almost eight years after it was initially intended to have been broadcast. Lastly, the Federal Court considered that the fact that Publisuisse SA, the competent authority in such matters, had again refused to sign an agreement to broadcast an amended version of the commercial should have formed the subject of separate proceedings.

15. On 3 March 2003 the Federal Office of Communication dismissed an appeal by the applicant association against Publisuisse SA’s decision of 30 November 2001 refusing permission to broadcast the amended version of the commercial.

C. Resolution of the Committee of Ministers of the Council of Europe of 22 July 2003

16. The Committee of Ministers of the Council of Europe, which had not been informed either by the applicant association or by the Swiss Government that the Federal Court had dismissed the application for review, concluded its examination of application no. 24699/94 on 22 July 2003 by adopting Resolution ResDH(2003)125, the relevant parts of which read:

“... Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 46, paragraph 2, of the Convention; ...

Whereas during the examination of the case by the Committee of Ministers, the government of the respondent state gave the Committee information about the measures taken preventing new violations of the same kind as that found in the present judgment; this information appears in the appendix to this resolution; ...

Declares, after having taken note of the information supplied by the Government of Switzerland, that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case.

Appendix to Resolution ResDH(2003)125: Information provided by the Government of Switzerland during the examination of the VGT Verein gegen Tierfabriken case by the Committee of Ministers

As regards individual measures, the judgment was transmitted to the applicant, who was entitled to request the revision of the Federal Court’s judgment of 20 August 1997.

Concerning general measures, the judgment has been sent out to the Federal Office of Communication, the Federal Department for Environment, Transport, Energy, and Communication and to the Federal Court.

In addition, the Court's judgment has been published in the journal *Jurisprudence des autorités administratives de la Confédération* n.65/IV(2001), and can be consulted on the following website: ... The judgment has also been mentioned in the Federal Council Annual report on the Swiss activities at the Council of Europe in 2001, which has been published in the *Feuille fédérale* n.8/2002.

The Government of Switzerland considers that, given the information mentioned above, there will no longer exist a risk of a repetition of the violation found in the present case and, consequently, Switzerland has satisfied its obligations under Article 46 § 1 of the Convention."

17. In a letter of 12 December 2003 the applicant association informed the Council of Europe's Directorate General of Human Rights of the Federal Court's refusal to review the judgment of 20 August 1997 following the Court's finding of a violation of Article 10.

18. On 12 January 2005 the Council of Europe's Directorate General of Human Rights informed the applicant association that it did not consider it advisable to conduct a fresh examination of the matter alongside the Court's consideration of the application lodged in July 2002 in the present case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Sections 136 et seq. of the former Federal Judicature Act, which was in force until 31 January 2006, concerned, *inter alia*, the review of judgments of the Federal Court. Section 139a provided:

"Breach of the European Convention on Human Rights

1. A decision of the Federal Court or of a lower court may be reviewed if the European Court of Human Rights or the Committee of Ministers of the Council of Europe has granted an individual application on account of a breach of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms and its Protocols, and redress is possible only through such a review.

2. If the Federal Court determines that a review is called for, but a lower court has jurisdiction, it shall refer the case to the lower court to reopen proceedings in the matter.

3. The cantonal court shall then also decide on the request for a review if cantonal law does not envisage such a ground for the reopening of proceedings."

20. Section 140 of the Act provided:

“Application for review

The application for review must indicate, with supporting evidence, the ground relied on for the reopening of proceedings and whether it has been raised in due time; it must also state the nature of the amendment of the judgment and the redress being sought.”

21. On 2 March 1999, on the basis of that provision, the Federal Court granted, at least in part, an application for review of one of its judgments, after the Court had found a violation in the case of *Hertel v. Switzerland* (judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI). It held:

“... The judgment of the European Court of Human Rights may afford the applicant satisfaction and, through the award of CHF 40,000, financial compensation for the cost of the proceedings. But it does not remove the restrictions imposed on the applicant by the Commercial Court and confirmed by the Federal Court in its judgment of 25 February 1994. These restrictions may be upheld only within the bounds of necessity as defined by the European Court. Since those restrictions may be lifted or limited only by means of an appeal to the Federal Court, the requirement of section 139a of the Federal Judiciary Act is met ...”

22. Section 122 of the Federal Court Act of 17 June 2005, in force since 1 January 2007, reproduces section 139a of the former Federal Judiciary Act. It provides:

“Breach of the European Convention on Human Rights

An application for review of a judgment of the Federal Court on account of a violation of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (ECHR) may be submitted if the following conditions are satisfied:

- (a) the European Court of Human Rights, in a final judgment, has found a violation of the ECHR or its Protocols;
- (b) compensation cannot remedy the effects of the violation;
- (c) the review is necessary to remedy the effects of the violation.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

Admissibility

23. The applicant association submitted that, since it had not had the opportunity to comment on the observations of either the Federal Department of Environment, Transport, Energy and Communication or the Swiss Radio and Television Company, it had been denied the right to a fair hearing within the meaning of Article 6 § 1 of the Convention, the relevant parts of which provide:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

24. The Court considers that this complaint raises the issue of the applicability *ratione materiae* of Article 6 to the proceedings complained of. It is clear from its case-law that this Article is not applicable to proceedings concerning an application for a retrial or for the reopening of civil proceedings (see *Sablon v. Belgium*, no. 36445/97, § 86, 10 April 2001). The Court sees no reason why this reasoning should not also be applied to an application to reopen proceedings after it has found a violation of the Convention (see, in relation to a criminal case, *Franz Fischer v. Austria* (dec.), no. 27569/02, ECHR 2003-VI). It therefore considers that the complaint under Article 6 is incompatible *ratione materiae* with the provisions of the Convention.

25. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be declared inadmissible in accordance with Article 35 § 4.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant association alleged that the continued prohibition on broadcasting the television commercial in issue, after the Court had found a violation of its freedom of expression, constituted interference infringing its freedom of expression under Article 10 of the Convention, which provides:

“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.”

A. Admissibility

1. *Preliminary objection of failure to exhaust domestic remedies*

(a) The parties’ submissions

27. The Swiss Government submitted that if a broadcaster refused to broadcast a commercial on the ground that it constituted unlawful advertising, the party intending to sign the agreement with it could request the supervisory authority, namely the Federal Office of Communication, to give a decision clarifying the matter. An appeal against that decision could subsequently be lodged with the Federal Department of Environment, Transport, Energy and Communication and, in the final instance, the Federal Court.

28. The Government pointed out that in the present case the applicant association had applied to Publisuisse SA for permission to broadcast the commercial together with a commentary which referred to the Court’s judgment and contained remarks about the conduct of the Swiss Radio and Television Company and the Swiss authorities. After permission had been refused by Publisuisse SA, the applicant association had applied to the Federal Office of Communication, which had observed that it was not empowered to force Publisuisse SA to broadcast the commercial.

The respondent Government were persuaded that an administrative-law appeal could have been lodged against the Federal Office of Communication’s decision of 3 March 2003.

29. In the event of a refusal by Publisuisse SA, the party intending to sign an agreement with it could also bring an action in the civil courts, even without first applying to the Federal Office of Communication, where, for example, it alleged a breach of the Cartels Act or of the general principles of private law, such as the protection of personality rights or the prohibition of immoral conduct. The Government submitted that, since the applicant association had not availed itself of those remedies, it had not exhausted domestic remedies for the purposes of Article 35 § 1 of the Convention.

30. The applicant association contested the Government’s argument that it had failed to exhaust domestic remedies. It pointed out that in its judgment of 29 April 2002 the Federal Court had stated that appeals against

decisions of the Federal Office of Communication could be lodged with the Federal Department of Environment, Transport, Energy and Communication where the proceedings concerned cartels. In the applicant association's submission, it followed by converse implication that no such appeal could have been lodged against the Office's decision of 3 March 2003, since the proceedings had concerned a broadcasting licence.

(b) The Court's assessment

31. The Court considers it necessary to emphasise at the outset that the applicant association's complaints before it relate solely to the prohibition on broadcasting the original version of the commercial in issue. No consideration should be given to the refusal by Publisuisse SA, the competent authority in such matters, to sign an agreement to broadcast an amended version of the commercial, an issue which, according to the Federal Court, should have been the subject of separate proceedings.

32. In so far as the complaint concerning the Federal Court's judgment of 29 April 2002 may be construed as an allegation of fresh interference with the applicant association's freedom of expression, the Court would reiterate the principle that a complaint to be submitted to it must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Ankerl v. Switzerland*, judgment of 23 October 1996, *Reports* 1996-V, p. 1565, § 34).

33. In the present case the Court observes that the Federal Court found that the applicant association's application to reopen the proceedings was insufficiently substantiated and that it had thus failed to comply with the formal requirements for using this legal remedy, in accordance with section 140 of the former Federal Judicature Act. The Federal Court held that in support of its application, the applicant association had not indicated any grounds for reopening the proceedings or the nature of the amendment of the judgment and the redress being sought. Accordingly, there might on the face of it be cause to doubt whether the association satisfied the exhaustion requirement.

34. The Court observes that the applicant association's application to reopen the proceedings was worded in a very cursory fashion barely satisfying the requirements of section 140 of the former Federal Judicature Act. Nevertheless, since the Federal Court, after stating the grounds for declaring the request inadmissible, concluded that the applicant association had not sufficiently shown that it still had an interest in broadcasting the original version of the commercial, the Court considers, in the light of its case-law, that this complaint cannot be dismissed for failure to exhaust domestic remedies, seeing that the Federal Court ruled on the merits of the case, albeit briefly (see, *mutatis mutandis*, *Huber v. Switzerland*, no. 12794/87, Commission decision of 9 July 1988, *Decisions and Reports*

57, p. 259; *Chammas v. Switzerland*, no. 35438/97, Commission decision of 30 May 1997; *Jamal-Aldin v. Switzerland*, no. 19959/92, Commission decision of 23 May 1996; *Thaler v. Austria* (dec.), no. 58141/00, 15 September 2003; *Voggenreiter v. Germany* (dec.), no. 47169/99, 28 November 2002; and *Atik v. Germany* (dec.), no. 67500/01, 13 May 2004), in finding it probable that the association no longer had any interest in having the original version of the commercial shown on television.

35. It follows that the complaint under Article 10 cannot be dismissed for failure to exhaust domestic remedies.

2. Preliminary objection of incompatibility *ratione materiae* of the complaint

(a) The parties' submissions

36. The Swiss Government submitted that the complaint under Article 10 should be dismissed as being incompatible *ratione materiae* with the Convention, within the meaning of Article 35 § 3.

37. They pointed out in that connection that the Court had held in its judgment of 28 June 2001 that the refusal to broadcast the commercial in issue had interfered with the applicant association's right to freedom of expression and that such interference had not been necessary in a democratic society. It was not disputed that the Government had paid the applicant association the sum of CHF 20,000 by way of just satisfaction, under Article 41 of the Convention.

38. The respondent Government further noted that the applicant association had been able to apply to the Federal Court for a review of that court's judgment of 20 August 1997. In their submission, it was clear from the actual wording of Resolution ResDH(2003)125 that the Committee of Ministers had not considered it essential to ascertain the outcome of the application to reopen the proceedings before adopting the resolution in which it had conclusively ended the examination of the case at international level. On that point, the Swiss Government emphasised that section 139a of the former Federal Judicature Act (see "Relevant domestic law and practice" above) conferred on applicants the right to apply for review of a judgment but on no account the right to have the judgment amended, still less in the manner they wished. It was for the Federal Court alone to rule on those two aspects.

39. The Government also noted that several general measures which had had a direct impact on the applicant association's own situation had been taken. For example, the dissemination of the Court's judgment among the federal authorities had led them to adopt a restrictive interpretation of the prohibition of all forms of "political" advertising in section 18(5) of the Federal Radio and Television Act. The Independent Complaints Authority for Radio and Television, for example, had held that an advertisement

broadcast in January 2003 concerning asylum policy was compatible with that provision (they cited the Authority's decision no. b.467 of 27 June 2003, ground 4).

40. In view of the foregoing, the Swiss Government contended that there was no link between the potential amendment of the Federal Court's judgment of 20 August 1997 and the possibility of broadcasting the commercial today. It could not therefore be maintained that the Federal Court's judgment of 22 April 2002 raised a new issue that had not been determined in the Court's judgment of 28 June 2001. Since the Committee of Ministers had discharged its duty in adopting Resolution ResDH(2003)125, the application in the present case should, the Government submitted, be declared inadmissible as being incompatible *ratione materiae* with the provisions of the Convention.

41. The applicant association did not comment on the Government's argument that the application was incompatible *ratione materiae* with the Convention.

(b) The Court's assessment

42. Relying on Article 10, the applicant association complained about the Federal Court's judgment of 29 April 2002 refusing his application to reopen the proceedings and hence maintaining the prohibition on broadcasting the television commercial in issue.

43. In examining whether Article 10 is applicable to the present case, the Court must determine whether the case concerns a fresh interference with the rights protected by that Article or the execution of the Court's judgment of 28 June 2001 for the purposes of Article 46 of the Convention. In the latter event, this complaint should be dismissed as being incompatible *ratione materiae* with the provisions of the Convention and its Protocols.

44. The Court considers that the complaint raises questions of law which are sufficiently complex and new that they should not be resolved at the admissibility stage (see, *mutatis mutandis*, *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 18 et seq., ECHR 2001-VII).

45. Accordingly, this complaint cannot be declared inadmissible as being incompatible *ratione materiae* with the provisions of the Convention. The Court notes, moreover, that that no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. The Court's jurisdiction *ratione materiae*

1. Principles established by the Court in comparable cases

46. The Court reiterates at the outset that findings of a violation in its judgments are essentially declaratory (see *Marckx v. Belgium*, judgment of

13 June 1979, Series A no. 31, p. 25, § 58; *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX; and *Krčmář and Others v. the Czech Republic* (dec.), no. 69190/01, 30 March 2004) and that, by Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34).

47. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Broniowski v. Poland* [GC], no. 31443/96, §192, ECHR 2004-V; *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 43, 24 October 2002); *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Sejdovic v. Italy* [GC], no. 56581/00, § 119, ECHR 2006-II), the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see *Giuseppina and Orestina Procaccini v. Italy* [GC], no. 65075/01, § 123, 29 March 2006; *Sejdovic*, cited above, § 127; *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII; and *Piersack v. Belgium* (Article 50), judgment of 26 October 1984, Series A no. 85, p. 16, § 12).

48. However, the Court would also reiterate that, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta*, cited above, § 249, and *Lyons and Others*, cited above). For its part, the Court cannot assume any role in this dialogue. It notes in particular that the Convention does not give it jurisdiction to direct a State to open a new trial or to quash a conviction (see *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, p. 57, § 47, and *Pelladoah v. the Netherlands*, judgment of 20 September 1994, Series A no. 297-B, p. 36, § 44). It follows that it cannot find a State to be in breach of the Convention on account of its failure to take either of these courses of action when faced with the execution of one of its judgments.

49. The specific remedial measures, if any, required of a respondent State in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be

determined in the light of the Court's judgment in that case, and with due regard to the Court's case-law as cited above (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV, and *Sejdovic*, cited above, § 126 *in fine*). The Court has held, for example, that where an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see *Sejdovic*, cited above, § 126).

50. However, this is not to say that measures taken by a respondent State in the post-judgment phase to afford redress to an applicant for the violation or violations found fall outside the jurisdiction of the Court (see *Lyons and Others*, cited above), seeing that there is nothing to prevent it from examining a subsequent application raising a new issue undecided by the judgment (see the following judgments: *Mehemi v. France* (no. 2), no. 53470/99, § 43, ECHR 2003-IV; *Pailot v. France*, 22 April 1998, *Reports* 1998-II, p. 802, § 57; *Leterme v. France*, 29 April 1998, *Reports* 1998-III; and *Rando v. Italy*, no. 38498/97, § 17, 15 February 2000). In other words, the Court may entertain a complaint that a retrial at domestic level by way of implementation of one of its judgments gives rise to a new breach of the Convention (see *Lyons and Others*, cited above, and *Hertel v. Switzerland* (dec.), no. 53440/99, ECHR 2002-I).

2. Application of the above principles in the instant case

51. It must therefore be determined whether the Federal Court's judgment of 29 April 2002 constitutes a fresh interference with the applicant association's freedom of expression that may be examined on the merits by the Court.

52. The Court considers it useful to point out that the present case is not a "typical" one involving the reopening of criminal proceedings following a finding of a violation of Article 6 of the Convention (see, for example, the cases of *Sejdovic*, *Lyons and Others* and *Krčmář and Others*, all cited above), but relates to the refusal to reconsider the prohibition on broadcasting a television commercial, and hence to Article 10 of the Convention. In that respect it is comparable to the case of *Hertel* (dec.) cited above. It should be noted, however, that in the *Hertel* case the Federal Court granted the applicant's application to reopen the proceedings, lifting to a significant extent the restrictions on his freedom of expression. The Committee of Ministers, moreover, concluded the procedure before it by means of a final resolution that took due account of the amendments to the Federal Court judgment held by the Court to have infringed Article 10.

In view of these significant differences, the Court must consider whether its approach in the *Hertel* decision (cited above), which entailed examining whether the allegations of a fresh violation of Article 10 were well-founded rather than declaring them inadmissible as being incompatible *ratione*

materiae with the Convention or its Protocols, is also feasible in the present case.

53. With regard to the measures taken by the Swiss Government in order to discharge their obligations under Article 46 § 2 of the Convention, it is not disputed that they paid the sums which the Court had awarded the applicant association for costs and expenses under Article 41 in its judgment. It is also clear from Resolution ResDH(2003)125 of 22 July 2002 that the Court's judgment was disseminated among the appropriate authorities and published in the journal *Jurisprudence des autorités administratives de la Confédération* and on the Internet (see paragraph 16 above).

54. It should also be noted that the Committee of Ministers concluded its examination of application no. 24699/94 by noting the possibility of an application for review before the Federal Court, in other words without awaiting the outcome of that procedure, which was available under Swiss law (see the Appendix to the Resolution in paragraph 16 above).

55. The Court further reiterates that the Convention is intended to guarantee rights that are not theoretical or illusory but practical and effective (see, *mutatis mutandis*, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33, and *Bianchi v. Switzerland*, no. 7548/04, § 84, 22 June 2006).

It is true that the Convention does not require the States Parties to institute procedures for the fresh examination of a case following a finding of a violation by the Court (see *Saïdi*, cited above, p. 57, § 47, and *Pelladoah*, cited above, p. 36, § 44). The Court would nevertheless emphasise that the availability of such a procedure in Swiss law may be regarded as an important aspect of the execution of its judgments and demonstrates a Contracting State's commitment to the Convention and the case-law to which it has given rise (see, *mutatis mutandis*, *Barberà, Messegue and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, p. 56, § 15, and *Lyons and Others*, cited above).

However, its availability in domestic law is not sufficient in itself. The domestic court concerned, namely the Federal Court, must in addition apply the Convention and the Court's case-law directly (see also, *mutatis mutandis*, regarding the right of access to a court and the effectiveness required of an ordinary appeal or an appeal on points of law, *Delcourt v. Belgium*, judgment of 17 January 1970, Series A no. 11, pp. 13-15, §§ 25 et seq.). This appears especially important in the present case since the Committee of Ministers closed the procedure for supervising execution of the Court's judgment by simply referring to the availability of the remedy of an application for review, without awaiting its outcome. It is clear that a reference to a remedy which proves incapable of affording effective and practical redress where a Convention violation has been found will deprive

applicants of their right to have the effects of the violation redressed as far as possible.

56. Lastly, it follows from a grammatical interpretation of section 139a of the former Federal Judicature Act (see “Relevant domestic law and practice”, paragraph 19 above) that an application to the Federal Court for reopening of the proceedings is a subsidiary means of redress, seeing that this provision states that such an application will be admissible where “... redress is possible only through such a review”.

It has to be noted in the present case that in its judgment of 28 June 2001 the Court did not make any award to the applicant association in respect of non-pecuniary damage. In the absence of any claim by the association under that head, it did not even express the opinion that the finding of a violation of Article 10 could be regarded as constituting adequate and sufficient redress for the non-pecuniary damage it had sustained. Accordingly, reopening of the proceedings before the Federal Court with a view to obtaining *restitutio in integrum* – the ideal form of reparation in international law – would have enabled the effects of the violation found by the Court to be redressed as far as possible (see, to similar effect, *Pisano*, cited above, § 43; *Scozzari and Giunta*, cited above, § 249; and *Sejdovic*, cited above, § 119; see also, for a practical example of the application of the relevant Swiss law, *Hertel* (dec.), cited above, in which the applicant had the general prohibition on disseminating his views lifted following his application to the Federal Court for a review (see “Relevant domestic law and practice”, paragraph 21 above).

57. The Court is also mindful of the fact that the application to reopen the proceedings in the present case was worded in a very cursory fashion barely satisfying the requirements of section 140 (see “Relevant domestic law and practice”, paragraph 20 above). Nevertheless, the Federal Court’s findings as to the applicant association’s interest in broadcasting the commercial, while brief, were capable of giving rise to a fresh interference with the applicant association’s freedom of expression.

58. The Court therefore considers that the complaint under Article 10 concerning the Federal Court’s refusal to review its judgment of 20 August 1997 must be regarded as raising a new issue that was not determined in the Court’s judgment of 28 June 2001, and is accordingly compatible *ratione materiae* with the provisions of the Convention and its Protocols.

It remains to be determined whether the refusal amounts to a fresh violation of Article 10.

C. Merits

1. *Whether there was interference*

59. In view of the foregoing, the refusal to reconsider the prohibition on broadcasting the television commercial in issue constitutes, in the Court's view, fresh interference by public authority with the exercise of rights protected by Article 10 § 1. Such interference will infringe Article 10 unless it satisfies the requirements of paragraph 2 of that provision.

2. *Whether the interference was justified*

(a) Legal basis for the interference and legitimate aims pursued

60. As to whether the interference was justified under Article 10 § 2, the Court observes that in its previous judgment of 28 June 2001 it held that the interference had been "prescribed by law", having been based on section 18(5) of the Federal Radio and Television Act, and had also pursued the legitimate aim of "protection of the ... rights of others".

The Court does not consider it necessary to determine whether those factors also justified the interference resulting from the Federal Court's judgment of 29 April 2002, seeing that the fresh refusal to broadcast the commercial, as upheld in that judgment, was not "necessary in a democratic society" for the following reasons.

(b) "Necessary in a democratic society"

(i) *General principles*

61. The fundamental principles relating to this question are well established in the Court's case-law and have been summarised as follows (see, for example, *Hertel*, cited above, pp. 2329-30, § 46; *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31; and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II):

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. 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 pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of

appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘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 ...”

(ii) Application of the above principles in the instant case

62. In its judgment of 28 June 2001 the Court found that the measure in issue was not “necessary in a democratic society”, among other reasons because the authorities had not demonstrated in a “relevant and sufficient” manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of the applicant association’s case (see *VgT Verein gegen Tierfabriken*, cited above, § 75).

In the instant case the Federal Court refused the applicant association’s application to reopen the proceedings on the ground that the association had not provided a sufficient explanation of the nature of “the amendment of the judgment and the redress being sought”, as it was formally required to do by section 140 of the former Federal Judicature Act (see paragraph 20 above).

However, the Court considers that that approach is overly formalistic, seeing that it followed from the circumstances of the case as a whole that the association’s application necessarily concerned the broadcasting of the commercial in question, which had been prohibited by the Federal Court itself on 20 August 1997.

Furthermore, the Federal Court nevertheless added that the applicant association had not sufficiently shown that it still had an interest in broadcasting the original version of the commercial. In doing so, it effectively took the place of the applicant association in deciding whether there was still any purpose in broadcasting the commercial. However, it failed to give its own 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.

63. Accordingly, the Court, while conscious of the Swiss authorities' margin of appreciation in the matter (see *VgT Verein gegen Tierfabriken*, cited above, § 67), is not satisfied that the Federal Court applied domestic law in conformity with the principles embodied in Article 10 of the Convention. That being so, the reasons given by the Swiss Federal Court, having regard to the case as a whole and to the interest of a democratic society in ensuring and maintaining freedom of expression in matters of indisputable public interest, were not "relevant and sufficient" to justify the interference in issue.

64. There has therefore been a violation of Article 10.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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."

66. The applicant association did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to make any award on that account.

FOR THESE REASONS, THE COURT

1. *Declares inadmissible*, unanimously, the complaint under Article 6 § 1 of the Convention;
2. *Dismisses* unanimously the Government's preliminary objection of failure to exhaust domestic remedies in respect of the complaint under Article 10 of the Convention;
3. *Joins to the merits* unanimously the Government's argument as to the application of Article 10 of the Convention and, accordingly, *declares admissible* the complaint under that Article;
4. *Holds* by five votes to two that Article 10 of the Convention is applicable in the present case;
5. *Holds* by five votes to two that there has been a violation of Article 10 of the Convention.

Done in French, and notified in writing on 4 October 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Snejana BOTOUCHAROVA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mrs Jaeger joined by Mr Borrego Borrego is annexed to this judgment.

S.B.
C.W.

DISSENTING OPINION OF JUDGE JAEGER JOINED BY JUDGE BORREGO BORREGO

1. I voted against finding a violation in the present case.

2. The applicant association never claimed compensation for non-pecuniary damage, either in its previous application (no. 24699/94) or in the present one. It simply sought a finding of a violation and the reimbursement of its costs. In Resolution ResDH(2003)125 of 22 July 2003 the Committee of Ministers declared that it was satisfied by the measures taken by the respondent State, namely publication of the judgment and the reimbursement of costs and expenses, with the additional possibility of reopening the proceedings as provided by domestic law.

3. The applicant association achieved nothing in having the proceedings reopened in the Federal Court.

However, the Convention does not require the States Parties to institute procedures for the fresh examination of a case following a finding of a violation by the Court, as the majority accept (see *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, p. 57, § 46, and *Pelladoah v. the Netherlands*, judgment of 20 September 1994, Series A no. 297-B, p. 36, § 44). The reopening of the proceedings in the Federal Court is merely a subsidiary means of redress, irrespective of the outcome of that procedure. An unfavourable outcome for the applicant cannot be regarded as any less compatible with the Convention than the absence of such a procedure (*argumentum a maiore ad minus*). Moreover, in the instant case it should be noted that the Committee of Ministers discharged the duty assigned to it by Article 46 § 2 of the Convention in adopting Resolution ResDH(2003)125. In such circumstances, the Court is not competent to consider the same case again.

4. Even assuming that the Court is competent in this respect, I cannot see how the Federal Court could have violated Article 10 through a somewhat formalistic interpretation of sections 139a and 140 of the former Federal Judicature Act. Provided that the conditions for reopening the proceedings are satisfied, the courts are only bound not to repeat the violation already found. Thus, the Swiss courts were required to refrain from using the political argument because the Court had found it not to be relevant and sufficient.

However, Article 10 does not impose specific procedural obligations in the application of general provisions on procedure. In particular, the courts may at any time require there to be a continuing interest in legal protection. The presence of such an interest was in fact questionable because the applicant association had at the same time attempted to reach a new agreement with Publisuisse SA to broadcast an amended version of the commercial in issue, thereby accepting that the commercial now appeared out of date almost eight years after it was initially intended to have been

broadcast. In my opinion, reopening of proceedings is not an ideal means of reparation in international law since it often does not allow the effects of a violation found by the Court to be redressed as far as possible (contrary to what the majority state in paragraph 56 of the judgment). While this might be true in the case of procedural defects, it is more or less inadequate in respect of the violation of Article 10.

5. In so far as the right of expression is used to take part in a political discussion – whether by means of writing, cartoons, films or speeches – the scope and effect of any initiative depend to a great extent on the actual circumstances, especially the receptiveness or sensitivity of the audience to which the message is addressed. As time goes by, the relevance of the message decreases, as do the awareness and receptiveness of the groups being targeted. After some eight years, the message may need updating in form and content or may even be totally outdated.

Anyone who wishes to take part in a debate and is not allowed to raise his voice until eight years later will hardly be satisfied. For these reasons I disagree with the majority's finding in paragraph 56 of the judgment that in cases of this kind, reopening of the proceedings may possibly result in *restitutio in integrum*. I consider this to be inconsistent with the temporal implications inherent in freedom of expression.