



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

Information Note on the Court's case-law 120

June 2009

Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)
[GC] - 32772/02

Judgment 30.6.2009 [GC]

Article 10

Article 10-1

Freedom of expression

Continued prohibition of the broadcasting of a commercial on television despite European Court's finding of an infringement of freedom of expression: *violation*

Facts: The applicant is an animal-protection association. In a judgment of 28 June 2001 on a previous application (24699/94), the European Court of Human Rights found a violation of Article 10 because of the Swiss authorities' refusal to allow a television commercial expressing opposition to battery livestock rearing methods to be broadcast. In reliance upon the Court's judgment, the applicant association applied to the Swiss Federal Court for an order revising its judgment prohibiting the broadcasting of the commercial. In 2002 the Federal Court rejected that application on the ground that the applicant had not provided a sufficient explanation of the nature of "the amendment of the judgment and the redress being sought" or sufficiently shown that it still had an interest in broadcasting the commercial in its original version of eight years previously. The applicant association then lodged the present application with the Court to challenge that decision. The Committee of Ministers of the Council of Europe, which is responsible for supervising execution of the Court's judgments, was not informed of these developments. In 2003, unaware of the Federal Court's decision in 2002, it concluded its examination of the applicant association's initial application after noting that the applicant association was entitled to request the revision of the Federal Court's initial judgment banning the commercial.

In the meantime, the applicant association again applied to the Swiss authorities for permission to broadcast the commercial with an additional comment. This fresh request was refused. An appeal against that decision was dismissed by the Federal Office of Communication in 2003.

In a Chamber judgment of 4 October 2007 the European Court held, by five votes to two, that there had been a violation of Article 10 (see Information Note 101).

Law: (a) *Admissibility:* (i) Exhaustion of domestic remedies – Domestic remedies had been exhausted since in its judgment of 2002 dismissing the applicant association's application to reopen the proceedings, the Federal Court had ruled, albeit briefly, on the merits of the case.

Conclusion: preliminary objection dismissed (fifteen votes to two).

(ii) Jurisdiction *ratione materiae* – The Committee of Ministers’ supervising role in the sphere of execution of the Court’s judgments did not mean that measures taken by a respondent State to remedy a violation found by the Court could not raise a new issue undecided by the judgment. In dismissing the application to reopen the proceedings, the Federal Court had relied on new grounds, namely the alleged loss of interest in having the commercial broadcast after an important lapse of time. By comparison, the initial refusal to allow the commercial to be broadcast had been based on the prohibition of political advertising. Furthermore, the Committee of Ministers had not been informed of the Federal Court’s judgment when it decided to end its supervision of the execution of the Court’s judgment of 2001. Therefore, the refusal to reopen the proceedings had constituted a new fact capable of giving rise to a fresh violation of Article 10. Otherwise, if the Court were unable to examine it, it would escape all scrutiny under the Convention.

Conclusion: preliminary objection dismissed (eleven votes to six).

(b) *Merits:* The reopening of proceedings at the domestic level was not an end in itself, but a key means that could be used for the full and proper execution of the Court’s judgments. However, the reopening procedure also had to afford the authorities of the respondent State the opportunity to abide by the conclusions and the spirit of the Court judgment being executed, while complying with the procedural safeguards in the Convention. In view of the importance of the execution of its judgments in the Convention system and having regard to the fair balance that had to be struck between the general interest of the community and the interests of the individual, the Court had to ascertain whether the respondent State had a positive obligation to take the necessary measures to allow the television commercial in issue to be broadcast following the Court’s finding of a violation of Article 10. The commercial in question related to consumer health and to animal and environmental protection and was in the public interest. The public interest in dissemination of a publication did not necessarily decrease with the passing of time. The Court agreed with the Chamber that the Federal Court’s approach had been overly formalistic and that the applicant association alone had been competent at that stage to judge whether there was still any purpose in broadcasting the commercial. Moreover, the Federal Court had not offered 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. Nor had it shown that after the Court’s judgment of 2001 the circumstances had changed to such an extent as to cast doubt on the validity of the grounds on which the Court had found a violation of Article 10. The Court also rejected the argument that the applicant association had alternative options for broadcasting the commercial in issue, for example via private and regional channels, since that would require third parties, or the association itself, to assume a responsibility that fell to the national authorities alone: that of taking appropriate action on a judgment of the Court. The principle imposing a duty on the Contracting States to organise their judicial systems in such a way that their courts could meet the requirements of the Convention also applied to the execution of the Court’s judgments. Accordingly, it was immaterial to argue, as the Government had done, that the Federal Court could not in any event have ordered that the commercial be broadcast and that the applicant association should have instituted civil proceedings. In sum, the Swiss authorities had failed to comply with their positive obligation under Article 10 of the Convention.

Conclusion: violation (eleven votes to six).