CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 53440/99
by Hans Ulrich HERTEL
against Switzerland

The European Court of Human Rights (Third Section), sitting on 17 January 2002 as a Chamber composed of

Mr G. RESS, *President*,
Mr L. WILDHABER,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 28 September 1999 and registered on 15 December 1999,

Having deliberated, decides as follows:

THE FACTS

The applicant, Hans Ulrich Hertel, is a Swiss national with a degree in technical sciences from the Zurich Federal Institute of Technology. He is retired and lives in Wattenwil in the Canton of Bern. Before the Court he is represented by Mr R. Schaller , a lawyer practising in Geneva.

A. The circumstances of the case

The circumstances of the case, as submitted by the applicant, may be summarised as follows.

1. Application no. 25181/94 and the Court's judgment of 25 August 1998

The applicant carried out research, together with a technical adviser, at the Lausanne Federal Institute of Technology, on the effects on human beings of the consumption of food prepared in microwave ovens. In a research paper dated June 1991, entitled "Comparative study of the effects on human beings of food prepared by conventional means and in microwave ovens", it was concluded:

> "The measurable effects on human beings of food treated with microwaves, as opposed to food not so treated, include changes in the blood which appear to indicate the initial stage of a pathological process such as occurs at the start of a cancerous condition."

Subsequently, in issue no. 19 (January-March 1992) of the quarterly *Journal Franz Weber*, in which the applicant was mentioned as a member of the editorial staff, there appeared an article by René d'Ombresson entitled "Microwave ovens: a health hazard. Irrefutable scientific evidence". The cover page depicted a Reaper (*Sensemann*) holding out one hand towards a microwave oven. The introductory paragraphs to the article stated, *inter alia*:

> "Off to the scrap heap and the rubbish dumps with microwave ovens! The treatment to which they subject food is so pernicious that it causes a change in the blood of whoever eats it and this leads to anaemia and a precancerous condition. These are the findings of a rigorous study carried out by a professor of the EPLF [Lausanne Federal Institute of Technology] and an independent researcher, who were determined to answer once and for all the crucial question: are microwave ovens harmful or not? Here is a simplified summary of the study, followed by the study itself for those who are not put off by figures and scientific demonstrations. We were anxious to publish both these, albeit at the risk of repetition, so that the findings should be available to the widest possible public."

On 7 August 1992 the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances (MHEA) applied to the Commercial Court (*Handelsgericht*) of the Canton of Bern for an injunction under the

Unfair Competition Act (UCA; *Bundesgesetz über den unlauteren Wettbewerb*), seeking to have Mr Hertel prohibited, on pain of penalties, from stating that food prepared in microwave ovens is a danger to health and leads to changes in the blood of those who consume it, that it causes a pathological disorder and that it presents a pattern that could be seen as the beginning of carcinogenic process. In a judgment of 19 March 1993 the Commercial Court allowed the application. The injunction was confirmed by the Federal Court (*Bundesgericht*) in a judgment dated 25 February 1994 which concluded:

> "There can be no question of the UCA having been applied in breach of the Federal Constitution or the European Convention. Statutes must, in particular, define fundamental rights and other, conflicting duties of the State so that these two concerns of constitutional law may be taken into consideration to the greatest possible extent ... The smooth operation of competition and economic freedom, freedom of expression, scientific freedom and freedom of the press must be guaranteed as well as possible, but at the same time limited so that the various constitutional objectives may be reconciled in practice. ... Anyone claiming scientific freedom is therefore wholly free to expound his knowledge in the academic sphere but, where competition is concerned, he may not claim to have the truth on his side where the opinion he is putting forward is disputed. An opinion which has not been confirmed scientifically must in particular not be misused as a disguised form of positive or negative advertising of one's own work or the work of others. In the present case, that is all the more true as the Commercial Court expressly left the applicant free to base his proposition on new scientific findings. The appeal must therefore be dismissed..."

On 13 September 1994 the applicant lodged with the European Commission of Human Rights application no. 25181/94 in which he complained that the ban imposed on him by the Swiss courts under the UCA had infringed Article 10 of the Convention. He also raised complaints under Articles 6 § 1 and 8 of the Convention. On 27 November 1996, the Commission declared the case admissible. In its report of 9 April 1997 it found that there had been a breach of Article 10 and that no separate issue arose under Article 6 § 1 or Article 8 of the Convention.

The case was referred to the Court which, in its judgment of 25 August 1998, considered that the measure was "prescribed by law" and pursued a legitimate aim as required by Article 10 § 2 of the Convention. In respect of the question whether the measure was "necessary in a democratic society" within the meaning of this provision, the Court held, *inter alia*:

> "48. The Court observes that the applicant did no more than send a copy of his research paper to the *Journal Franz Weber*. He had nothing to do with the editing of issue no. 19 of that periodical or in the choice of its illustration, of which he became aware only after its publication. That is clear from Mr Weber's statement of 14 April 1992 (see paragraph 18 above) and was not called into question by either the Commercial Court of the Canton of Bern or by the Federal Court. Both courts held that the applicant's liability derived from the fact that in sending his paper to the *Journal Franz Weber* he had accepted its being used in a simplified and exaggerated manner – as, given the periodical concerned, it had been foreseeable that it would be – and that, consequently, he had identified himself with the article in issue ...

As regards the content of issue no. 19 relating to microwave ovens, the applicant was thus neither author nor co-author of the title on the cover page ..., the editorial column (attributed to Franz Weber ...) or of pages 3 to 10 (attributed to René d'Ombresson ...). The only parts that can be attributed to him are, with the exception of the titles and sub-titles appearing on them, pages 5 to 10, which contain an extract of the research paper ... The Court notes that nowhere it is expressly proposed that microwave ovens be destroyed or boycotted or their use banned and that the applicant did not repeat the statements he made in 1989 and which had been published in issue no. 8 (April/May/June 1989) of the *Journal Franz Weber*. In addition and above all, the applicant's views on the harmful effects on human health of the consumption of food prepared in microwave ovens are expressed in far less categorical terms than the Government intimated; that is to be seen in particular from the repeated use of the conditional mood and the choice of non-affirmative expressions. In that regard, the last lines from the extract, in which the applicant's conclusions from his experiments are summarised, are particularly striking. Thus, although it is stated that the results obtained "show changes which bear witness to pathogenic disorders", as regards any cancerous effects it is explained that the results present a pattern which "might" correspond to the beginning of a cancerous development and which "deserves attention"; likewise, there is no assertion that the consumption of irradiated food is harmful for man as a result of the induction of indirect radiation through food, but merely a suggestion that it "might" be ...

...

50. It will be seen from the foregoing that Mr Hertel played no part in the choice of the illustration for issue no. 19 of the *Journal Franz Weber*, that those statements that were definitely attributable to him were on the whole qualified and that there is nothing to suggest that they had any substantial impact on the interests of the members of the MHEA. In spite of all that, the Swiss courts prohibited the applicant from stating that food prepared in microwave ovens was a danger to health and led to changes in the blood of those consuming it that indicated a pathological disorder and presented a pattern that could be seen as the beginning of a carcinogenic process, and from using the image of death in association with microwave ovens.

The Court cannot help but note a disparity between that measure and the behaviour it was intended to rectify. That disparity creates an impression of imbalance that is materialised by the scope of the injunction in question. In that regard, although it is true that the injunction applies only to specific statements, it nonetheless remains the case that those statements related to the very substance of the applicant's views. The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.

The fact that the Swiss courts expressly reserved Mr Hertel's freedom to pursue his research does not in any way alter that finding. As to presenting the results outside the "economic sphere", it is not transparently obvious from the courts' decisions that he was given such a possibility; it may be that the wide scope of the UCA would prevent those reservations being seen as providing a significant reduction in the extent of the interference in question.

Furthermore, if the applicant fails to comply with the injunction he runs the risk of a penalty, which could include imprisonment.

51. In the light of the foregoing, the measure in issue cannot be considered as "necessary" "in a democratic society". Consequently, there has been a violation of Article 10" (see Reports of Judgments and Decisions 1998-VI, pp. 2330-2332).

The Court considered that it was unnecessary to examine the complaints under Articles 6 § 1 and 8 of the Convention. It also held that the Swiss Government was to pay to the applicant CHF 40,000 for costs and expenses.

2. Federal Court's judgment of 2 March 1999

On 20 October 1998 the applicant applied to the Federal Court for the reopening and annulment of its judgment of 25 February 1994 and the reimbursement by the MHEA of his court and legal costs. In its judgment of 2 March 1999 (served on 1 April 1999) the Federal Court held as follows:

"2. The appellant relied on Article 139a of the Federal Judiciary Act (FJA; *Bundesgesetz über die Organisation der Bundesrechtspflege*). According to this provision, review of a judgment of the Federal Court or a lower court is admissible if the European Court of Human Rights or the Committee of Ministers of the Council of Europe has found a breach of the European Convention on Human Rights and redress is possible only through such review. The first requirement has clearly been met. The second remains to be considered. It may be regarded as satisfied if and insofar as the judgment of the European Court and the compensation awarded are not sufficient to make good the situation in relation to the Convention (cf. Federal Court Judgment [FCJ] 123 I 283, § 3 p. 286 *et seq*.).

3. In pursuance of Article 50 of the Convention, the European Court awarded the appellant compensation of CHF 40,000 for the costs incurred in proceedings before the Commercial Court, the Federal Court, the Commission of Human Rights and the European Court. No scope remains for further compensation claims by the applicant in relation to the same proceedings (cf FCJ 123 I 283, § 3b/bb p. 287 *et seq*.). On the contrary, the Court's award constitutes sufficient compensation. Accordingly, the grounds provided for in Article 139a clearly do not apply. The applicant's claims for reimbursement of court costs, lawyer's fees and counsel's costs in previous proceedings must be rejected.

4. However, the applicant primarily seeks the lifting of the restrictions imposed on him. The question here, too, is whether and to what extent, with regard to compensation for the breach of the Convention, a modification of the Federal Court's judgment of 25 February 1994 is necessary.

a) According to Article 10 of the Convention, everyone is entitled to freedom of expression. This right may be restricted only to the extent that it is prescribed by law, serves a legitimate purpose and is necessary in a democratic society (Article 10 § 2 of the Convention). The European Court regards the UCA (...) as a sufficient statutory basis for the restriction imposed on the applicant. It finds also that there is no doubt that the restriction is intended to protect the rights of others and so serves a legitimate purpose. But it concludes that the applicant's freedom of expression has been restricted to a greater extent than is necessary in a democratic society. In this connection, the Court deals thoroughly with the content of Journal Franz Weber

No. 19. It finds that the applicant is responsible, as author or co-author, neither for the title on the front page, nor for Franz Weber's editorial column, nor René d'Ombresson's article on pages 3-10. Nor did the applicant participate in the choice of illustrations. Only the extract from the research paper on pages 5-10 could be attributed to him, not including the title and sub-titles. Nowhere in this extract was it expressly suggested that microwave ovens should be banned, destroyed or boycotted. In particular, the applicant's view that the consumption of food prepared in microwave ovens is harmful to human health was much more moderately expressed than the Swiss authorities assumed. This impression was conveyed by the repeated use of the subjunctive and the choice of non-affirmative language. In this respect, the last lines of the extract, drawing conclusions, were particularly enlightening: the tests showed "changes which bore witness to pathogenic disorders"; but they showed a pattern which "might" reflect the beginning of a carcinogenic process and "deserved attention". Similarly, it was not stated that the consumption of irradiated food was harmful to human beings by subjecting them to indirect radiation, but merely surmised that this "might" be the case. Nor did the European Court find any evidence that the applicant's statements in Journal Franz Weber No. 19 had substantially impaired the interests of the respondent's members.

Having regard to these circumstances, the European Court concludes that the extent of the restrictions imposed by the Swiss courts is disproportionate to the behaviour they were intended to rectify. The restrictions had the effect of partially censoring the applicant's work and severely limiting his opportunity for publicly defending a point of view which had its place in the current debate. The fact that it was a minority view and apparently lacking in any rational foundation mattered little. In an area where there was no certain proof, it was particularly exceptionable to restrict freedom of expression to the reproduction of generally accepted ideas.

b) 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 Article 139a FJA is met.

However, it remains to be determined in what respect and to what extent the restrictions are to be limited in order to comply with Article 10 of the Convention. In this connection, it must first be noted that the European Court found the restrictions disproportionate only insofar as they were intended as a response to the research paper published in Journal Franz Weber No. 19, which paper the Court found sufficiently moderate and whose impact on the respondent's members it found insufficiently proved. In its appraisal of the actual circumstances, the European Court also took the view that only the text of the research paper could be attributed to the applicant and that he could not be held responsible for the titles, sub-titles and other texts by other authors which the periodical contained, nor for the illustrations. It follows that to prohibit the applicant from publishing texts of comparable moderation to the aforementioned research paper, even on competition-related grounds, would violate Article 10 of the Convention.

On the other hand, according to the European Court's view of the law, it may be assumed that prohibiting the applicant from making competition-oriented statements alleging scientifically proven health-impairing effects of food prepared in microwave ovens, without any mention of current differences of opinion, can only be reconciled with Article 10 of the Convention if there are tangible signs that such statements will be made and are of a nature substantially to impair the competitive position of the respondent's members (cf. FCJ 116 II 357, § 2a p. 359, with references). However, these requirements are satisfied: In its judgment of 19 March 1993, the Commercial Court found as to the facts that the applicant had never disavowed the publication in Journal Franz Weber No. 19 but had simply stated in court that he did not agree 100% with René d'Ombresson's introduction and conclusions; he had said that he liked the image of the Reaper; he stood by his conclusions and intended to continue seeking to have them debated in the mass media; behind his scientific attitude was an ideological one; at the trial he had maintained his earlier statements and declared: "These microwave products cause cancer, there is now no longer any doubt about that" and "I will continue to go my scientific way". These are concrete indications that there is reason to fear that the applicant will make statements contrary to fair competition, disseminating alleged scientifically proven findings of health impairment by microwave ovens; in view of the applicant's professed liking for the image of the Reaper, there is also a danger of this or some other death symbol being used to illustrate such statements. It is self-evident that such statements, if aimed at wider sections of the population, are of a nature to substantially impair the competitive position of the respondent's members. This is all the more true if the statements are further illustrated by death symbols. Under Article 9 § 1.a UCA, the respondent is entitled to be protected by appropriate restrictions against unlawful impairment of competition.

c) A complete lifting of the restrictions imposed on the applicant is therefore neither necessary nor appropriate. It must be made clear that the applicant is prohibited only from making statements directed at the general public in which health-impairing effects of microwaved food are presented, without mention of current differences of opinion, as scientifically proven. The prohibition of the use in publications or public lectures of the Reaper or any similar death symbol must be maintained on the basis of the detailed grounds stated in the judgment of 25 February 1994. Lastly, the basis for the respondent's claim lies not in an actual violation but in the threat of violations (Article 9 § 1.a UCA). That such a threat exists, having regard to the applicant's behaviour and statements, is beyond doubt.

The applicant shall not otherwise be prevented from taking part in the current debate on the health effects of food prepared in microwave ovens. He is free to express his views, provided that he does not do so in statements addressed to the general public in such a way as to convey the false impression that they reflect scientifically proven findings. It is not a question of censoring the applicant's work, but of preventing inaccurate, misleading or unnecessarily damaging and therefore unfair statements of a nature to influence competition and to impair the competitive position of the respondent's members (Articles 2 and 3 (a) UCA).

5. The applicant's appeal is only partially successful. He achieves clarification of the scope of the restrictions imposed by the Commercial Court and confirmed by the Federal Court in its judgment of 25 February 1994, but is unsuccessful both in his application for rejection of the complaint and in his claim for reimbursement of court and lawyer's fees from the previous proceedings. This outcome justifies a proportional

apportionment of court fees and parties' costs arising from the appeal proceedings ... Of the court fee of CHF 5,000, CHF 3,500 is charged to the applicant and CHF 1,500 to the respondent; the applicant shall also be required to pay the respondent party compensation of CHF 2,500.

The material amendment of the judgment on the facts of 25 February 1994, constituting partial acceptance of the appeal, is confined to clarification of the scope of the restrictions imposed on the applicant. The respondent's entitlement to protection is unaffected. That being so, there is no justification for re-apportioning court fees and party costs from the Commercial Court proceedings and the appeal proceedings before the Federal Court, especially as the European Court of Human Rights has already awarded the applicant compensation under Article 50 of the Convention for costs incurred in those proceedings (cf para. 3 above).

The Federal Court therefore finds as follows:

1. The application for review is partially accepted, § 1 of the Federal Court judgment of 25 February 1994 is annulled and replaced as follows:

"1. The appeal is partially allowed, insofar as it is admissible, and § 1 of the judgment of 19 March 1993 of Bern Commercial Court is amended as follows:

1. The defendant is prohibited, subject to the penalties provided for in Art 292 of the Code of Criminal Procedure and Art 403 of the Code of Civil Procedure (imprisonment or fine up to CHF 5,000; detention or, in serious cases, imprisonment of up to one year), from making statements addressed to the general public alleging that it is scientifically proven that food prepared in microwave ovens, without reference to current differences of opinion (*verboten, in Verlautbarungen, die an weitere Bevölkerungskreise gerichtet sind, ohne Hinweis auf den herrschenden Meinungsstreit als wissenschaftlich gesichert darzustellen, dass im Mikrowellenherd zubereitete Speisen ...*), is harmful to health and causes changes in the blood of persons who consume it, indicating a pathological disorder and showing a pattern that could be seen as the beginning of a carcinogenic process.

The remainder of the Commercial Court's judgment is confirmed."

2. The further applications for review are rejected.

3. The court fee of CHF 5,000 is apportioned in the amounts of CHF 3,500 to the applicant and CHF 1,500 to the respondent.

4. The applicant shall pay the respondent CHF 2,500 in costs.

5. This judgment shall be communicated in writing to the parties and to the Bern Cantonal Commercial Court."

3. Resolution of the Committee of Ministers of the Council of Europe of 2 October 2000

On 2 October 2000 the Committee of Ministers adopted at the 721st meeting of the Ministers' Deputies the following resolution:

"Resolution ResDH(2000)122 concerning the judgment of the European Court of Human Rights of 25 August 1998 in the case of Hertel against Switzerland

The Committee of Ministers, under the terms of former Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"),

Having regard to the judgment of the European Court of Human Rights in the Hertel case delivered on 25 August 1998 and transmitted the same day to the Committee of Ministers;

Recalling that the case originated in an application (No. 25181/94) against Switzerland, lodged with the European Commission of Human Rights on 13 September 1994 under former Article 25 of the Convention by Mr Hans Ulrich Hertel, a Swiss national, and that the Commission declared admissible the applicant's complaints that Articles 10, 8 and 6, paragraph 1, of the Convention had been breached on account of the fact that he had been prohibited from publishing his research results about the hazardous effects of microwave ovens on human health;

Recalling that the case was brought before the Court by the applicant on 29 May 1997 and thereafter by the Commission and the Government of the Switzerland on 3 June and 15 July 1997 respectively;

Whereas in its judgment of 25 August 1998 the Court:

- held, by six votes to three, that there had been a violation of Article 10 of the Convention;

- held, unanimously, that it was unnecessary to consider the complaints under Article 6, paragraph 1 and Article 8 of the Convention;

- held, by eight votes to one, that the Government of the respondent State was to pay the applicant, within three months, 40 000 Swiss francs in respect of costs and expenses and that simple interest at an annual rate of 5% would be payable on this sum from the expiry of the above-mentioned three months until settlement;

- dismissed, unanimously, the remainder of the claim for just satisfaction;

Having regard to the Rules adopted by the Committee of Ministers concerning the application of former Article 54 of the Convention;

Having invited the Government of the respondent State to inform it of the measures which had been taken in consequence of the judgment of 25 August 1998, having regard to Switzerland's obligation under Article 53 of the Convention to abide by it;

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;

Having satisfied itself that on 20 October 1998, within the time-limit set, the Government of the respondent State paid the applicant the sum provided for in the judgment of 25 August 1998;

Having noted that the applicant has brought before the European Court of Human Rights a new application (No. 53440/99) concerning the restrictions still applicable after the retrial judgment (*arrêt en révision*) by the Federal Court of 2 March 1999 (see notably the appended information submitted by the Government) and that the Court remains competent to assess the compatibility with the Convention of such restrictions,

Considers that it is not necessary, in the circumstances of the present case, that the Committee of Ministers itself continue to examine this last issue, in the context of the present execution control procedure,

Declares, in the light of the above considerations and having taken note of the information supplied by the Government of the Switzerland, that it has exercised its functions under former Article 54 of the Convention in this case.

Appendix to Resolution ResDH(2000)122

Information provided by the Government of Switzerland during the examination of the Hertel case by the Committee of Ministers

The Hertel judgment of 25 August 1998 was brought to the attention of the Federal Court and excerpts were published notably in the « Journal des tribunaux – Droit européen » (No. 52, October 1998, pages 188-190).

In order to erase the consequences of the violation found by the European Court of Human Rights, the applicant filed an application for retrial before the Swiss Federal Court in conformity with Article 139.a.1 of the Swiss Federal law on judicial organisation, providing for review of judicial proceedings in order to give effect to judgments from the Strasbourg Court. In its judgment of 2 March 1999, the Federal Court took note of the violation of the applicant's freedom of expression found by the European Court of Human Rights and, accordingly, modified the challenged decision by clarifying its content and softening the scope of the restrictions imposed on Mr Hertel.

As a result, it has now been clarified that the restrictions to the applicant's freedom to express himself on the harmful effects of microwave ovens only apply in case the applicant would address a large public, stating that the harmful effects of microwave ovens on human health are a scientifically proven fact without referring to the controversial nature of the issue. The Government of Switzerland considers that the Federal Court judgment has remedied the violation of Article 10, as regards the applicant's situation.

The Government also considers that these measures will prevent in the future the risk of new violations similar to the one found in this case and that Switzerland has thus fulfilled its obligations under Article 53 in this case."

B. Relevant domestic law

1. Unfair Competition Act

The Unfair Competition Act (UCA) states in Sections 1, 2 and 3(a) as follows:

Section 1

"This Act is intended to guarantee, in the interests of all the parties concerned, fair, undistorted competition."

Section 2

"Any conduct [*Verhalten*] or commercial practice [*Geschäftsgebaren*] shall be unfair and illegal if it is deceptive or in any other way offends the principle of good faith and if it affects relations between competitors or between suppliers and customers."

Section 3

"A person acts unfairly if, in particular,

(a) he denigrates others or the goods, work, services, prices or business of others by making inaccurate, misleading or unnecessarily wounding statements;

..."

2. Federal Judiciary Act

Articles 136 et seq. of the Federal Judiciary Act (FJA) concern, *inter alia*, the reopening of proceedings. Section 139a, entitled "Breach of the European Convention on Human Rights" states as follows:

"1. The reopening of a decision of the Federal Court or of a lower instance shall be admissible if the European Court of Human Rights or the Committee of Ministers of the Council of Europe have upheld an individual application on account of a breach of the Convention of 4.11.1950 for the Protection of Human Rights and Fundamental Freedoms and its Protocols, and if compensation is only possible by means of reopening.

2. If the Federal Court determines that reopening is called for, though a lower instance is competent, it shall refer to the lower instance to reopen proceedings on the matter.

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

COMPLAINTS

1. The applicant complains under Articles 8 and 10 of the Convention of the injunction which limits his freedom of information, in particular that he is not allowed to "make statements addressed to the general public, without reference to current differences of opinion, alleging that [the dangers of microwave ovens are] scientifically proved". He also complains of the prohibition to use the Reaper as a symbol, though he recalls, with reference to § 48 of the Court's judgment cited above, that he was actually not responsible for its use in the issue no. 10 of the *Journal Franz Weber*.

The applicant reiterates the complaints raised in his application no. 25181/94, in particular that the injunction lacked a legal basis and a legitimate aim and was disproportionate. In his view, it cannot be made a condition for the limitation of the freedom of information under Article 10 of the Convention that his publications are "addressed to the general public". Moreover, it is in fact ridiculing the Court's previous judgment if henceforth he must refer, in his publications, to "current differences of opinion".

2. Under Article 6 § 1 of the Convention the applicant complains that he did not have the opportunity to comment on the modification of the injunction, as expressed in the Federal Court's judgment of 2 March 1999. Furthermore, the Federal Court did not conduct an oral hearing.

THE LAW

1. Under Article 10 of the Convention the applicant complains of the injunction imposed on him by the Federal Court in its judgment of 2 March 1999. Article 10 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."

The Court notes that the injunction prohibits the applicant, under pain of punishment, from making statements to the general public that the dangers of microwave ovens are scientifically proved without referring to current differences of opinion; and from depicting the Reaper as a symbol. In the Court's opinion, the injunction constitutes an interference by a public authority with the applicant's rights under Article 10 § 1 of the Convention. The Court must, therefore, examine whether such interference was justified under Article 10 § 2.

The Court recalls its previous judgment according to which the injunction at issue, based on Sections 2 and 3(a) of the UCA, was "prescribed by law" within the meaning of Article 10 § 2 of the Convention (*ibid*., pp. 2325-2327). Moreover, it pursued a legitimate aim in that it served the "protection of the ... rights of others" within the meaning of that provision (*ibid*., pp. 2327-2328).

There remains the question whether the interference was "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. In this respect, the Court set out in its previous judgment the relevant principles as follows:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for 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 – as the Court has already said above – 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 margin 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.

As regards the authorities' margin of appreciation, this is particularly essential in commercial matters, though in cases such as the present one it is necessary to reduce the extent of the margin of appreciation since what is at stake is not a given individual's purely commercial statements, but his participation in a debate affecting the general interest. In this respect, the Court found in its previous judgment that the Swiss authorities had some margin of appreciation to decide whether there was a "pressing social need" to impose the injunction at issue on the applicant (*ibid*., pp. 2329-2330).

In examining whether in the present case the measures in issue are proportionate to the aim pursued, the Court must balance the applicant's freedom of expression against the need to protect the rights of the members of the MHEA.

In balancing the various interests, the Court must first consider the seriousness of the interference with the applicant's rights. It recalls that the applicant's previous injunction generally prohibited him from publishing his views, with the exception of scientific research. In its judgment, the Court found that such a measure "related to the very substance of the applicant's views. The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied" (*ibid*., p. 2332, § 50).

The present case differs in that the injunction at issue, resulting from the Federal Court's judgment of 2 March 1999, no longer prevents the applicant from generally disseminating his views. On the contrary, he enjoys complete freedom in making any statement on the dangerous effects of the use of microwave ovens. The only limitation is that, when making such statements to the general public, he cannot refer to scientifically proven results without also referring "to current differences of opinion".

In the Court's opinion, this limitation of the applicant's rights under Article 10 of the Convention remains a minor one and no longer substantially affects his ability to put forward his views in public.

It is true that the injunction at issue continues to prohibit the applicant from employing the Reaper as a symbol. However, the Court notes that the applicant himself has submitted before the Court, with reference to paragraph 48 of its previous judgment cited above, that he was actually not responsible for the use of this symbol in issue no. 10 of the *Journal Franz Weber*. It follows that also in this respect the limitation of the applicant's rights under Article 10 remains a minor one.

The Court will next examine the interests of the MCEA. It considers that the association has a legitimate interest in maintaining fair competition. In view thereof it does not appear unreasonable to hold, as the Federal Court did in its judgment of 2 March 1999, that the obligation to refer "to current differences of opinion" serves to prevent inaccurate, misleading or unnecessarily damaging and therefore unfair statements of the competitive position of the MCEA.

Having regard to the comparatively minor limitations of the applicant's rights under Article 10 of the Convention, to the margin of appreciation left to the domestic authorities in such cases, and to the care with which the Federal Court balanced the various interests in its judgment of 2 March 1999, the Court finds that the interference with the applicant's rights under Article 10 of the Convention was proportionate to the aims pursued and could, therefore, reasonably be considered "necessary in a democratic society" within the meaning of § 2 of this provision.

Insofar as the applicant also relies, in respect of these complaints, on Article 8 of the Convention, the Court finds no issue under this provision.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

2. The applicant further complains of the unfairness of the proceedings before the Federal Court. He relies on Article 6 § 1 of the Convention which states, insofar as relevant:

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

The Court need not examine whether this provision was applicable to the proceedings at issue, since the complaints are in any event inadmissible for the following reasons:

Insofar as the applicant complains that he did not have an oral hearing before the Federal Court, the Court notes that he failed to raise such a request in his application to the Federal Court for the reopening of the proceedings of 20 October 1998. The applicant may, therefore, be considered as having waived his right to a public hearing in that court (see the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 20, § 58).

Insofar as the applicant complains that he did not have the opportunity to comment on the new injunction pronounced in the Federal Court's judgment of 2 March 1999, the Court recalls that the concept of a fair trial implies in principle the right for the parties to proceedings to have knowledge of and comment on all evidence adduced or observations filed (see the Lobo Machado v. Portugal and Vermeulen v. Belgium judgments of 20 February 1996, Reports 1996-I, p. 206, § 31, and p. 234. § 33,

respectively). In the present case, the Court has satisfied itself that the applicant had the possibility, in his request of 20 October 1998 for reopening proceedings, to comment on all aspects of the case and in particular to discuss all the implications of the Court's judgment of 25 August 1998 on the injunction which had been imposed on him.

It follows that the remainder of the application is also manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Georg RESS
President