



Defamation verdict violated Swiss NGO's free-speech rights amid debate on minaret referendum

In today's Chamber judgment¹ in the case of [GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland](#) (application no. 18597/13) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned a complaint by a non-governmental organisation that its right to freedom of expression had been infringed because the domestic courts had found that it had defamed a politician by classifying his remarks at a speech during a campaign ahead of a 2009 referendum on banning minarets in Switzerland as “verbal racism”.

The Court found in particular that the context of the debate at the time of the referendum – including other criticisms of the referendum itself by human rights bodies – meant that the organisation's use of the words “verbal racism” had not been without factual foundation. The penalty imposed on the organisation might also have had a chilling effect on its freedom of expression. Overall, in reviewing the circumstances submitted for their assessment, the domestic courts had not given due consideration to the principles and criteria laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression, thereby overstepping their room for manoeuvre (“margin of appreciation”).

Principal facts

The applicant, GRA Stiftung Gegen Rassismus Und Antisemitismus (The GRA Foundation against Racism and Anti-Semitism), is a non-governmental organisation which is registered in Switzerland. It promotes tolerance and condemns racially motivated discrimination.

In November 2009 it reported on a meeting held in the town of Frauenfeld by the youth wing of the Swiss People's Party, which was held in the run up to a referendum on banning the building of minarets.

After the meeting, the applicant organisation posted an entry on its website in a section called “Chronology – Verbal racism”. It cited the party's own report of a speech at the meeting by B.K., the head of the local youth branch of the Swiss People's Party. He was quoted as saying that it was time to stop the expansion of Islam, that “the Swiss guiding culture, based on Christianity, cannot allow itself to be replaced by other cultures”, and that the prohibition of minarets would be an expression of the preservation of national identity. The minaret ban was approved in the referendum the same month, leading to a constitutional amendment to implement the result.

In August 2010 B.K. took GRA Stiftung to court over the entry on its website by filing a claim for protection of his personality rights. He applied for an order that the organisation had to withdraw the entry and for it to be replaced with the court's judgment. The organisation argued that the entry

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

was a value judgment which could only infringe personality rights if it was unnecessarily hurtful and insulting.

The district court dismissed B.K.'s claim in March 2011 on the grounds that the Internet article had been justified as it had related to a political discussion about a matter of public interest. The judgment was reversed on appeal in November of the same year as the appellate court held that the words "verbal racism" were a mixed value judgment, which could infringe personality rights if based on untruths. It found that B.K.'s speech had not been racist and ordered the organisation to remove the article and replace it with the court's judgment. GRA Stiftung appealed to the Federal Supreme Court, arguing that any interference with B.K.'s personality rights had been justified. One of the organisation's main aims was to inform the public about racist behaviour. To fulfil its role of watchdog it published articles and interviews concerning current events relating to racism and anti-Semitism.

The Federal Supreme Court dismissed the organisation's appeal in August 2012. It found that B.K.'s comments could not be described as verbally racist and that the mixed value judgment which had infringed his personality rights had not been justified by any overriding interest. Even B.K.'s involvement in a political debate, which meant he had to accept a reduced level of protection for personality rights, did not justify disseminating untruths or publishing value judgments that were not based on facts.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicant organisation complained about the domestic court's finding of an infringement of B.K.'s personality rights. It argued, among other things, that the Federal Supreme Court had been wrong to find that the expression "verbal racism" was a mixed value judgment which had required proof.

The application was lodged with the European Court of Human Rights on 13 March 2013.

Judgment was given by a Chamber of seven judges, composed as follows:

Helena Jäderblom (Sweden), *President*,
Branko Lubarda (Serbia),
Helen Keller (Switzerland),
Pere Pastor Vilanova (Andorra),
Alena Poláčková (Slovakia),
Georgios A. Serghides (Cyprus),
Jolien Schukking (the Netherlands),

and also Stephen Phillips, *Section Registrar*.

Decision of the Court

Article 10

The Court noted that the case concerned a conflict between GRA Stiftung's right to freedom of expression and B.K.'s right to respect for his private life. It had to examine whether the domestic courts had weighed up the rights of both parties in line with its case-law and whether the reasons for the defamation verdict against the application organisation were relevant and sufficient.

It first stated that both the organisation's article and B.K.'s speech had been part of an intense public debate about the minaret ban referendum. In addition, B.K., as a person active in politics and one who had been speaking as a proponent of the ban, had had to show a higher degree of tolerance towards potential criticism by people or organisations with opposing views.

Thirdly, it noted that there was a distinction between statements of fact, which could be proved, and value judgments, which could not. If the domestic authorities found that there had been a value judgment then an interference with any rights depended on whether there had been a sufficient factual basis for the statement. If there was not, a value judgment could prove excessive. It was necessary to look at the circumstances of the case and the general tone of the remarks.

The Court examined B.K.'s remarks in the context of reports by various rights bodies, including the European Commission against Racism and Intolerance (ECRI) and the United Nations Committee on the Elimination of Racial Discrimination, which had described the minaret ban initiative as discriminatory, xenophobic or racist. Classifying B.K.'s speech as "verbal racism" had therefore not been devoid of a factual basis.

The GRA Stiftung organisation had also never suggested that B.K.'s statements could be classified as criminal under domestic legislation on racial discrimination and its actions had not amounted to a gratuitous personal attack on B.K. or an insult.

The Court examined the nature and severity of the sanction imposed on the organisation, which meant it had had to remove the article, publish the appeal court's ruling and pay approximately 7,000 Swiss francs in costs, including those incurred by B.K. Though mild, the penalty could have had a "chilling effect" on the organisation's freedom of expression.

Overall, the Court found that the domestic courts had not given due consideration to the principles and criteria laid down in its case-law when balancing the right to respect for private life and the right to freedom of expression and had therefore exceeded the room for manoeuvre afforded to them.

Just satisfaction (Article 41)

The Court held that Switzerland was to pay the applicant organisation 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 30,000 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.