

BGE 20000406_24699_94 vom 6. April 2000

Bundesgericht (BGE), 2000-04-06, FR

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Volltext

Bundesgericht (BGE) EGMR 06.04.2000 20000406_24699_94 (Verein gegen Tierfabriken (VgT) gegen Schweiz) Tribunal fédéral (ATF) CEDH 06.04.2000 20000406_24699_94 (Verein gegen Tierfabriken (VgT) gegen Schweiz) Tribunale federale (DTF) CEDU 06.04.2000 20000406_24699_94 (Verein gegen Tierfabriken (VgT) gegen Schweiz)

Urteilstopf 24699/94 Verein gegen Tierfabriken (VgT) gegen Schweiz Entscheid über die Zulassung no. 24699/94, 06 avril 2000 Sachverhalt SECOND SECTION DECISION AS TO THE ADMISSIBILITY OF Application no. 24699/94 by

VgT Verein gegen Tierfabriken against Switzerland The European Court of Human Rights (Second Section), sitting on 6 April 2000 as a Chamber composed of Mr C.L. Rozakis, President, Mr L. Wildhaber Mr B. Conforti, Mr P. Lorenzen, Mrs M.

Tsatsa-Nikolovska, Mr A.B. Baka, Mr E. Levits, judges, and Mr E. Fribergh, Section Registrar, Having regard to the above application introduced with the European Commission of Human Rights on 13 July 1994 and registered on 27 July 1994, Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court, Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant association, Having deliberated, decides as follows: THE FACTS The applicant association is a registered association in Switzerland. Its aim is the protection of animals, with particular emphasis on animal experiments and industrial animal production. Before the Court it is represented by Mr L.A. Minelli, a lawyer practising in Forch in Switzerland. The facts of the case, as submitted by the parties, may be summarised as follows. As a reaction to various television commercials of the meat industry, the applicant association prepared a television commercial lasting 55 seconds and consisting of two scenes. The first scene of the film shows a sow building a nest for her piglets in the forest. Soft orchestrated music is played in the background, and the accompanying voice refers, inter alia, to the sense of family which sows have. The second scene shows a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The accompanying voice states, inter alia, that the rearing of pigs in such circumstances resembles concentration camps, and that the animals are pumped full with medicaments. The film concludes with the exhortation: "eat less meat, for the sake of your health, the animals, and the environment!". On 3 January 1994 the applicant association sent this film on a video-cassette to the Commercial Television Company (AG für das Werbefernsehen) which organises the broadcasting of commercials on Swiss national television. These commercials are broadcast in between different programmes at various times during the day. On 10 January 1994 the Commercial Television Company informed the applicant association that it would not broadcast the commercial in view of their "clear political character". The Company pointed out that it would be possible as an alternative in a film to emphasise an adequate rearing of animals and to inform viewers that they were free to inquire into the origin of the meat which they

were buying. By letter of 10 January 1994 the applicant association, referring to censorship, requested a decision against which it could file an appeal. On 13 January 1994 the Commercial Television Company replied that it was not an official authority giving decisions which could be contested. On the other hand, it would be willing to convene a meeting to discuss other possibilities in the presence of a legal adviser. By letter of 14 January 1994 the applicant association stated that it was not prepared to accept changes to its commercial. It requested a statement of the reasons for the decision and information as to the supervisory authority where an appeal could be filed. The Commercial Television Company declined the applicant association's requests on 24 January 1994, while confirming that the commercial at issue breached Section 14 of the Radio and Television Ordinance (Radio- und Fernsehverordnung) which prohibits "religious and political propaganda". On 4 February 1994 the applicant association filed an appeal with the Independent Radio and Television Appeal Board (Unabhängige Beschwerdeinstanz für Radio und Fernsehen), complaining of the refusal to broadcast the commercial. The latter informed the applicant association on 10 February 1994 that it could only deal with appeals complaining about programmes which had already been broadcast, though it transmitted the complaint to the Federal Office of Communication (Bundesamt für Kommunikation). The Office informed the applicant association on 25 April 1994 that within the framework of the broadcasting provisions the Commercial Television Company was free to purchase commercials and choose their contractual partners as they wished. On 6 July 1994 the applicant association filed a complaint which the Federal Department for Transport and Energy (Eidgenössisches Verkehrs- und Energiewirtschafts-departement) dismissed on 22 May 1996. The applicant association's administrative law appeal (Verwaltungsgerichts-beschwerde) was dismissed by the Federal Court (Bundesgericht) on 20 August 1997. The Court noted, with reference to Article 13 of the Convention, that the Federal Office for Communication should have afforded the applicant association formally the opportunity to institute complaint proceedings which, if necessary, could have remedied the matter. As the case was ready for decision, the Federal Court itself undertook the decision. It then balanced the various issues at stake. In respect of the applicant association's complaint under Article 10 of the Convention, the Court referred to Section 18 § 5 of the Federal Radio and Television Act according to which "Religious and political commercials are forbidden ..." The purpose of this prohibition was to ensure the independence of the broadcaster; to prevent financially powerful groups from obtaining a competitive advantage; to spare the political process from undue commercial influence; to provide for a certain equality of opportunity between the different forces of society; and to support the press which was free to publish political advertisements. The Court observed that the applicant association had other means of disseminating its political ideas, for instance in foreign programmes broadcast into Switzerland, or in the cinema and the press. The Commercial Television Company had offered the applicant association other possibilities and was also willing to convene a meeting to discuss them with the applicant association in the presence of a legal adviser. In respect of the applicant association's complaint about discrimination the Court found that the applicant association was complaining of two situations which were not comparable with each other. Promotions by the meat industry were economic in nature in that they aimed at increasing the turnover and were not related to animal protection. On the other hand, the applicant association's commercial, exhorting reduced meat consumption and partly containing shocking pictures, was directed against industrial animal production. COMPLAINTS The applicant association complains under

Article 10 of the Convention that the refusal to broadcast its commercial did not meet the conditions laid down in Article 10 § 2. There was no legal basis for the interference, no aim to justify it, and the measure was unnecessary, given the urgency of discussing the exploitation of animals as fellow creatures. Under Article 13 of the Convention the applicant association complains that it had no effective remedy at its disposal to complain about the refusal to broadcast its commercial. Furthermore, the applicant association complains under Article 14 of the Convention of discrimination in that the meat industry is regularly permitted to broadcast commercials. Finally, the applicant association complains that in the proceedings before the Federal Court it did not have an oral hearing as required by Article 6 of the Convention.

Erwägungen THE LAW 1. The applicant association complains under Article 10 of the Convention of the refusal to broadcast its commercial. There was no legal basis for the interference at issue and no aim to justify it. Given the necessity of a discussion on the exploitation of animals, the measure was unnecessary in a democratic society. Article 10 of the Convention states: "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 association, 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 Government submit at the outset that the applicant association, by introducing its application without having filed an administrative law appeal with the Federal Court, in fact abused its right to petition within the meaning of Article 35 § 3 of the Convention. Article 10 of the Convention is inapplicable to the present case in that it does not give the right in principle to an "antenna" in order to broadcast one's own ideas. Such a right would imply an interference with third parties' rights, and would oblige a State to decide which information should be disseminated. Even if Article 10 was applicable, there would be no interference with the rights of this provision since, as the Federal Court pointed out in its decision of 20 August 1997, the applicant association had different possibilities at its disposal to disseminate the information. Indeed, the Commercial Television Company had not completely refused broadcasting the commercial. Finally, and subsidiarily, the Government submit that the Swiss authorities cannot be made responsible for the refusal of the Commercial Television Company. The applicant association replies that the present case is not about a right to broadcast, it concerns the equal treatment of applicants in respect of access to the time provided by the broadcasting company for commercials. It concerns in particular the question whether advertising directed against the consumption of meat amounts to "political advertising" and whether the prohibition to advertise complies with Article 10 of the Convention. In the meantime, a local Zurich television station, Telezüri, has also refused to broadcast the commercials. The applicant association asked the Swiss Federal Railways to carry posters stating "Eat vegetarian today - for the sake of our health and for the sake of the animals involved." The posters were put up in the railway carriages, but later removed in view of their political content. In any event, a television commercial creates completely different visual impressions than a written description. The Court considers, in the light of

the parties' submissions, that the complaint raises serious issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established. 2. The applicant association complains under Article 13 of the Convention that it had no effective remedy at its disposal to complain about the refusal to broadcast its commercial. The Government submit that the Federal Court as the highest domestic instance dealt with the applicant association's complaint. The applicant association replies that as long as the Commercial Television Company may decide whether or not it wishes to conclude a contract with the applicant association, an appeal lodged with the Federal Court can never result in the appellant's favour and must, therefore, be regarded as ineffective. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

3. Under Article 14 of the Convention the applicant association complains of discrimination in that the meat industry is regularly permitted to broadcast commercials. The Government submit that since the facts of the case do not concern Article 10 of the Convention, Article 14 is inapplicable. In any event, Swiss authorities cannot be made responsible for the acts of a private company. Subsidiarily, the Government submit that the situations complained of were not comparable. Any other conclusion would imply that for every commercial propagating one product, another commercial for another product would have to be broadcast. The difficulties would be even greater in the political area. The applicant association points out that the system of commercial advertising in Switzerland readily permits the broadcasting of contrasting advertisements. The object of the present application is not to oblige Swiss television to act of its own motion to broadcast advertising aimed at canvassing support for a point of view. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established. 4. The applicant association complains that in the proceedings before the Federal Court it did not have an oral hearing as required by Article 6 § 1 of the Convention. The Government submit that the applicant association failed to request an oral hearing. The applicant association replies that the Federal Court should have granted this right on its own accord. The Court recalls that the applicant association could be expected to apply to the Federal Court for an oral hearing if it attached importance to it (see the *Schuler-Zgraggen v. Switzerland* judgment of 24 June 1993, Series A no. 263, p. 20, § 58.) As it did not do so, it may reasonably be considered as having waived its right to a hearing in the Federal Court. This complaint is, therefore, manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. **Entscheid** For these reasons, the Court, unanimously, **DECLARES ADMISSIBLE** , without prejudging the merits, the complaints of the applicant association under Article 10 of the Convention as to the refusal to broadcast its commercial; under Article 13 of the Convention as to a lack of an effective remedy; and under Article 14 of the Convention as to discrimination in respect of other commercials; and **DECLARES INADMISSIBLE** the remainder of the application. Erik

Fribergh Christos Rozakis Registrar President

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