

## EUROPEAN COMMISSION OF HUMAN RIGHTS

## SECOND CHAMBER

Application No. 25181/94

H. U. H.

against

Switzerland

## REPORT OF THE COMMISSION

(adopted on 9 April 1997)

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I. INTRODUCTION	
1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.	
A. The application	
2. The applicant, a Swiss citizen, is an engineer residing in Wattenwil in Switzerland. He is represented before the Commission by Mr R. Schaller, a lawyer practising in Geneva.	
3. The application is directed against Switzerland. The respondent Government are represented by Mr Ph. Boillat, Head of the European Law and International Affairs Section of the Federal Office of Justice, Agent.	
4. The case concerns the applicant's complaints that he was prohibited from publishing his research results about the hazardous effects on health of microwave ovens. He also complains about the unfairness of the proceedings. The applicant invokes Articles 6, 8 and 10 of the Convention.	
B. The proceedings	
5. The application was introduced on 13 September 1994 and registered on 19 September 1994.	
6. On 16 January 1996 the Commission (Second Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.	
7. The Government's observations were submitted on 2 April 1996. The applicant replied on 19 June 1996 after an extension of the time-limit fixed for this purpose.	
8. On 27 November 1996 the Commission declared the application admissible.	
9. The text of the Commission's decision on admissibility was sent to the parties on 10 December 1996 and they were invited to submit such further information or observations on the merits as they wished. However, no further submissions were made.	
10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.	
C. The present Report	
11. The present Report has been drawn up by the Commission (Second	

Chamber) in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

Mrs. G.H. THUNE, President  
 MM. S. TRECHSEL  
 J.-C. GEUS  
 G. JÖRUNDSSON  
 A. GÖZÜBÜYÜK  
 J.-C. SOYER  
 H. DANELIUS  
 F. MARTINEZ  
 M.A. NOWICKI  
 I. CABRAL BARRETO  
 J. MUCHA  
 D. SVÁBY  
 P. LORENZEN  
 E. BIELIUNAS  
 E.A. ALKEMA

12. The text of this Report was adopted on 9 April 1997 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. The Commission's decision on the admissibility of the application is annexed hereto.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

## II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

16. The applicant undertakes environmental biological research in his own laboratory. One research project concerned food prepared in microwave ovens.

17. In spring 1991, he published, together with B., a professor at the Swiss Federal Institute of Technology in Lausanne, a research report with the title "Comparative investigations on the effects on human beings of food prepared by conventional means and in microwave ovens". The report contained the following results:

<Translation>

"Food which has been heated up, or thawed out, or cooked, in a microwave oven (milk and vegetables) caused in the blood of the test persons some significant changes such as: the reduction of all haemoglobin values, and an increase of haematocrits, leucocytes and of cholesteric values, in particular of the DL and LL portions. As regards lymphocytes, a more pronounced decrease in the short term was apparent, particularly in the case of vegetables prepared in the microwave oven, than in all other

variants.

On the basis of the luminosity of luminous bacteria, a significant relation was apparent between the absorption by the radiated food of technical microwave energy and the luminosity which was subsequently measured in the blood serum of the test persons. It can be concluded therefrom that this technical energy was inductively transmitted via the food to the human being; a process which is determined according to physical laws and which is confirmed by statements in literature.

The measured effects of microwaves via food on human beings demonstrate, as opposed to unirradiated food, changes in the blood which indicate the commencement of a pathological process, as also found when cancerous growth is initiated."

18. In 1992 a number of journals and magazines referred to the applicant's report either fully or in part, for instance "Raum & Zeit" and "Vita Sana Magazin".

19. The "Journal Franz Weber" had on the cover page the text "Microwaves: Danger scientifically proven" and displayed a reaper (Sensemann) carrying a microwave oven. The article itself had the title "Microwave ovens: a danger for health. The evidence is uncontestable" and stated, inter alia:

<Translation>

"The research results of B. and (the applicant) are so worrying that one should prohibit the use of microwaves as soon as possible and stop the production and trade of such apparatuses. At the same time all microwave ovens currently in use should be destroyed. Public health is at stake! ... The ... indubitably proven, devastating characteristics of microwaves adversely affect ... also directly via the radiated food the human being."

20. The "Journal Franz Weber" mentioned the applicant's name both as the co-author of the article and the editor of the journal.

21. In a previous article in the "Journal Franz Weber", published in 1989, the applicant had written:

<Translation>

"Today, microwaves, together with cigarettes, are probably one of the worst reasons for cancer which the human mind has ever thought up ... Have you got a microwave oven within your walls? Then bring it as soon as possible back to where you bought it so it can be disposed of! For microwave ovens are more malicious than the gas stoves of Dachau. If you prepare your meals in such an oven, your slow death will begin ..."

22. Professor B. later distanced himself in a newspaper article from the applicant's publications. In Professor B.'s submissions, the research of 1989 only permitted the conclusion that further research should be undertaken on the matter. He found that the applicant's conclusions had such a weak basis that a normal scientist would never have dared formulate them.

23. Subsequently, the Association of Electrical Appliances for Household and Trade in Switzerland (Fachverband Elektroapparate für Haushalt und Gewerbe in der Schweiz) told the applicant that his statements concerning the influence on the health of human beings of microwave ovens amounted to a completely unjustified denunciation

(Verteufelung) of the apparatus lacking serious scientific conclusions. The applicant was requested to issue a declaration according to which in future he would no longer make any unfair statements about microwave ovens. The applicant did not react thereto.

24. On 7 August 1992 the Association filed an action against the applicant before the Commercial Court (Handelsgericht) of the Canton of Bern. The Association submitted an expert opinion of Professor T. of the Federal Technical High School at Zurich who had specialised in food research. In his opinion, Professor T. concluded that the applicant's research was useless and the conclusions untenable.

25. On 19 March 1993 the Commercial Court upheld the action and prohibited the applicant, under threat of punishment, from stating that food which had been prepared in microwave ovens was hazardous to health. The applicant was also prohibited from using in publications or in public conferences about microwave ovens the picture of a reaper or any other symbol of death. In its decision, the Commercial Court stated, inter alia:

<Translation>

"... clearly, it may not be said that it is scientifically proven that food which has been prepared in a microwave oven is hazardous to health and causes cancer. Presently, there are insufficient indications in science for such an influence. Neither the defendant's own research - which does not comply with the generally valid scientific requirements - nor other investigations of serious scientists substantiate his statements. The contrary is rather the case, as the observations of the World Health Organisation and the Federal Health Office demonstrate ... The applicant's statement according to which food which had been prepared in microwave ovens is hazardous to health and leads to changes in the blood of consumers, indicating a situation which could amount to the beginning of cancerous growth, is manifestly untrue and false and therefore incorrect within the meaning of S. 3 (a) of the Federal Unfair Competition Act. The action must in this respect, therefore, be upheld. The defendant is of course free to base his theses on new scientific research ...

The defendant has issued statements ... and employed the picture of the reaper, for which he bears responsibility since he was aware of the style of the journal and accepted and condoned the exaggeration. Regardless of what is the truth, he has exceeded the acceptable standards and has therefore acted in an unnecessarily damaging manner within the meaning of S. 3 (a) of the Federal Unfair Competition Act. By mixing a sensational report with scientific statements he has also misled the addressed circle of clients. In particular, the picture of the reaper and also such statements as 'microwave ovens are more treacherous than the gas stoves of Dachau', 'your slow death begins', or 'so certainly will you die of cancer' are inadmissibly playing with the fear of death ..."

26. The applicant filed an appeal (Berufung) which the Federal Court (Bundesgericht) dismissed on 25 February 1994, the decision being served on 28 March 1994.

27. In its decision, the Court found that scientific research and publications did not as such fall within the framework of competition (wettbewerbsgerichtet) as long as they remained academic. Scientific statements interfered with competition, however, if, as in the present case, they were employed negatively to influence the sale of a particular product.

28. The Court further noted that in the proceedings the applicant had admitted that he liked the idea of the death symbol of a reaper, and that Professor B. had formally distanced himself from the research. The decision continued:

<Translation>

"Positive or negative publicity with scientific data must therefore, in the public interest and in order to ensure effective competition, only be admitted if the data correspond to established scientific conclusions, or at least if the diverging views are clearly referred to. If there is no full guarantee that the scientific data are correct, their uncritical publication is at least misleading and therefore deceptive within the meaning of Article 3 para. a of the Federal Unfair Competition Act ... According to the Commercial Court's conclusions the applicant's views are not at all scientifically secure; on the contrary, they are, on the whole, rejected. To state in the context of competition that they are correct is inadmissible within the meaning of Article 3 para. a of the Federal Unfair Competition Act ..."

29. The Court concluded that a person relying on the freedom of scientific research was free to explain his conclusions within academic circles. However, in the context of competition he could not assume that his views were correct if they were disputed.

B. Relevant domestic law

30. According to S. 2 of the Federal Unfair Competition Act (Bundesgesetz gegen den unlauteren Wettbewerb), any conduct, influencing relations between competitors or between persons offering and receiving, is unfair and unlawful if it is deceptive or in any other way breaches the principle of good faith.

31. According to S. 3 para. a of the Federal Act, unfair conduct consists of diminishing others, their goods, works, achievements, their prices or their business situation by means of incorrect, misleading or unnecessarily damaging statements (wer andere, ihre Waren, Werke, Leistungen, deren Preise oder ihre Geschäftsverhältnisse durch unrichtige, irreführende oder unnötig verletzende Äusserungen herabsetzt).

32. S. 9 envisages an action for persons claiming to have been threatened by means of unfair competition.

33. According to S. 84 of the Federal Judiciary Act (Organisationsgesetz), complaints about cantonal acts must be raised before the Federal Court by means of a public law appeal (staatsrechtliche Beschwerde).

### III. OPINION OF THE COMMISSION

A. Complaints declared admissible

34. The Commission has declared admissible the applicant's complaints under Articles 8 and 10 (Art. 8, 10) of the Convention that he was prohibited from publishing his views about the hazardous effects of microwave ovens; and under Article 6 para. 1 (Art. 6-1) of the Convention that he was prohibited from undertaking an act which he did not intend to carry out.

B. Points at issue

35. Accordingly, the issues to be determined are:

- whether there has been a violation of Article 10 (Art. 10) of the Convention;
- whether there has been a violation of Article 8 (Art. 8) of the Convention; and
- whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

C. As regards Article 10 (Art. 10) of the Convention

36. The applicant complains of the prohibition to publish the results of his scientific research. He relies on Article 10 (Art. 10) of the Convention which states, insofar as relevant:

"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 ...

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."

37. The applicant contends that the law on which the prohibition is based is unclear. It gives the impression that it concerns persons interested in competition. A wide interpretation of this law in fact prevents a large number of religious, philosophical or political opinions. The applicant further points out that Article 10 para. 2 (Art. 10-2) of the Convention does not mention "the economic well-being of the country" contrary to Article 8 para. 2 (Art. 8-2) of the Convention.

38. The applicant further submits that the Government are avoiding the real issue, namely whether it can be justified to prohibit the publication of a thesis only because it is not considered to be scientifically proven. The authorities intervened in a phase of scientific research and issued a prohibition although the applicant undertakes individual research and plays no part in the commerce of microwave ovens. The publication of 1989 was never the object of the present proceedings.

39. The applicant claims that it is disproportionate to throttle a weak critic whereas the producers of microwave ovens constantly advertise their products. Freedom of opinion is a necessity in a democratic society in that it can make the authorities and science discover problems of public health.

40. The Government submit that the interference with the applicant's rights was justified under Article 10 para. 2 (Art. 10-2) of the Convention. Thus, the measure was "prescribed by law" as required by this provision in that it was based on S. 9 of the Unfair Competition Act. Moreover, the measure aimed at "the protection of the ... rights of others" and "the

prevention of disorder" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

41. The Government submit that the domestic authorities had not exceeded the margin of appreciation left to them under Article 10 para. 2 (Art. 10-2). The measure only affected the applicant in his commercial competition relations. He remains free to undertake scientific studies and to publish his results, in particular in scientific and academic circles. It is true that scientific progress at times originates in far-fetched ideas, and the Federal Court never determined whether or not microwave ovens damaged health.

42. In the Government's opinion, the question before the authorities was whether or not these dangers were scientifically proven. They concluded that there was a controversy in this respect and that one could not therefore refer to objectively and scientifically established dangers. Indeed, commercial publicity is inadmissible where it is incorrectly presented as being scientifically proven. Insofar as the applicant also employed symbols of death in his publications, this was bad taste, unnecessarily hurting and misleading. In a publication in 1989 the applicant compared microwave ovens with Nazi extermination camps.

43. The Commission notes that the applicant was prohibited from publishing the results of his scientific research outside a scientific context. In the Commission's opinion, this prohibition constituted an interference by a public authority with the exercise of the applicant's rights under Article 10 para. 1 (Art. 10-1) of the Convention. The Commission has, therefore, to examine whether such interference was justified under Article 10 para. 2 (Art. 10-2) of the Convention.

44. The Commission notes that the prohibition was based on SS. 2 and 3 (a) of the Federal Unfair Competition Act which concerns inter alia unfair conduct towards the business of others. S. 9 envisages an action for persons claiming to have been threatened by unfair competition. These provisions were sufficiently precise for the applicant to regulate his conduct (see Eur. Court HR, Markt Intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165, p. 18 et seq., para. 30). The interference was, therefore, "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

45. Moreover, the interference, serving to protect the public from inadmissible publicity, aimed at "the protection of the reputation (and) rights of others". It therefore pursued a legitimate aim in accordance with Article 10 para. 2 (Art. 10-2) of the Convention.

46. Finally, the Commission must examine whether the interference was "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

47. According to the Convention organs' case-law, the interference at issue must correspond to a "pressing social need" and be proportionate to the legitimate aim pursued. In this respect the Commission recalls that freedom of expression constitutes one of the essential foundations of a democratic society; subject to para. 2, 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 (see Eur. Court HR, Lingens v. Austria judgment of 8 July 1986, Series A no. 103-B, p. 26, para. 41).

48. On the other hand, in determining whether an interference is "necessary in a democratic society", the Convention organs must also

take into account that a margin of appreciation is left to the Contracting States. Such a margin of appreciation appears essential in commercial matters, in particular in an area as complex and fluctuating as that of unfair competition (see Eur. Court HR, *Jacobowski v. Germany* judgment of 23 September 1994, Series A no. 291, p. 14, para. 26; *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* judgment, loc. cit., p. 19 et seq., para. 33).

49. In the present case the Commission considers at the outset that the applicant was expressing his views on issues of public health in connection with the use of a modern technical appliance. Clearly, the applicant was not acting as a competitor. There is also no indication in the case-file that he was undertaking negative commercial publicity by attacking a specific brand, or a particular producer, of the appliance.

50. The domestic courts mainly criticised the applicant for publishing scientifically untenable results. However, the Commission notes that the applicant is an engineer by training. While the applicant's research apparently deviated from the mainstream of scientific opinion, at least at the outset his research was supported by Professor B., though the latter later distanced himself from the applicant as his research had a weak basis.

51. It is true that the publications at issue employed an exaggerated language, for instance, that "all microwave ovens ... should be destroyed", and were accompanied by the symbol of a reaper. In the Commission's opinion, however, the publications thereby made it clear to the reader that the applicant was aiming at expressing his own opinion on a matter on which he felt strongly, rather than engaging on a balanced and pondered scientific discussion.

52. While it is true that Article 10 (Art. 10) of the Convention leaves a margin of appreciation to Contracting States in such circumstances, the Commission considers that freedom of expression is of special importance for free debate on matters of public importance for the community, such as public health (see *mutatis mutandis* Eur. Court HR, *Barthold v. Germany* judgment of 25 March 1985, Series A no. 90, p. 26, para. 58).

53. As a result, the measure complained of was not proportionate to the legitimate aim pursued and, accordingly, was not "necessary in a democratic society ... for the protection of the reputation (and) rights of others" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

#### CONCLUSION

54. The Commission concludes, by 10 votes to 5, that in the present case there has been a violation of Article 10 (Art. 10) of the Convention.

D. As regards Articles 6 para. 1 and 8 (Art. 6-1, 8) of the Convention

55. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the authorities prohibited him from undertaking an act which he did not intend to carry out. Under Article 8 (Art. 8) of the Convention the applicant complains that the prohibition to publish his views called in question his position as a scientist.

56. Article 6 para. 1 (Art. 6-1) of the Convention which states, insofar as relevant:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ..."

Article 8 (Art. 8) of the Convention states, insofar as relevant:

"1. Everyone has the right to respect for his private ... life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

57. However, the Commission has just found that prohibition to publish the views at issue breached the applicant's rights under Article 10 (Art. 10) of the Convention. The Commission finds that no separate issue arises under Articles 6 para. 1 and 8 (Art. 6-1, 8) of the Convention.

#### CONCLUSION

58. The Commission concludes, unanimously, that no separate issue arises under Articles 6 para. 1 and 8 (Art. 6-1, 8) of the Convention.

#### E. Recapitulation

59. The Commission concludes, by 10 votes to 5, that in the present case there has been a violation of Article 10 (Art. 10) of the Convention (see above, para. 54).

60. The Commission concludes, unanimously, that no separate issue arises under Articles 6 para. 1 and 8 (Art. 6-1, 8) of the Convention (see above, para. 58).

M.-T. SCHOEPFER  
Secretary  
to the Second Chamber

G.H. THUNE  
President  
of the Second Chamber

(Or. English)

DISSENTING OPINION OF MM S. TRECHSEL, G. JÖRUNDSSON,  
A. GÖZÜBÜYÜK, D. SVÁBY AND E. BIELIUNAS

We agree with the majority that the interference with the applicant's rights under Article 10 para. 1 of the Convention was "prescribed by law" and aimed at "the protection of the reputation (and) rights of others" within the meaning of Article 10 para. 2 of the Convention.

However, we disagree as to the finding that the measure was not "necessary in a democratic society".

We consider, first, that the applicant was only prevented from publishing his views on the dangers associated with eating food thawed or heated in a microwave oven in publications aimed at the public at large. There was also no obstacle for him to continue his research, and he was free to publish his views and the result of his research in publications addressed to scientifically educated readers.

Second, the applicant had presented certain theories as being the result of serious scientific research while, in fact, they were highly contested. In this respect the national courts relied on the fact that Professor B. had disclaimed his support of the earlier research in which he had participated and Professor T. had declared that the applicant's views could not seriously be upheld.

Third, we note that the national courts attached considerable weight to the manner in which the applicant had presented his views. His language had been highly emotionalised, in particular the association between microwave ovens and a Nazi extermination camp was considered as being exceedingly polemic and creating anxieties which were in no way scientifically justified as the applicant alleged. The use of a reaper as a symbol was considered equally unacceptable.

On the whole, the Swiss courts carefully weighed the competing interests at stake. We also consider that the exercise of the rights guaranteed under Article 10 "carries with it duties and responsibilities". In this respect, it does not appear unreasonable to impose some restraint on publications alarming consumers in connection with the use of very popular appliances. Taking these considerations into account, we do not find that the national authorities exceeded their margin of appreciation when they imposed the restrictions at issue upon the applicant, particularly as that margin of appreciation is relatively wide in matters of unfair competition (see *Jacobowski v. Germany* judgment, loc. cit.).

We therefore consider that the interference with the applicant's right to freedom of expression was justified under Article 10 para. 2 of the Convention in that it could reasonably be considered "necessary in a democratic society ... for the protection of the reputation (and) rights of others" within the meaning of this provision.

We conclude that in the present case there has been no violation of Article 10 of the Convention.