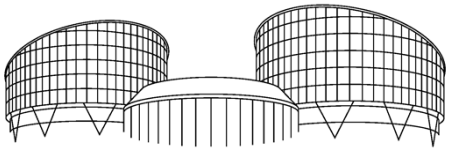

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GACHECHILADZE v. GEORGIA

(Application no. 2591/19)

JUDGMENT

Art 10 • Freedom of expression • Lack of relevant and sufficient reasons to justify administrative-offence fine, forced product recall and ban on future use of condom packaging designs • Designs regarded as unethical advertising contrary to the religious and national values of Georgian society • Expression not merely commercial but also contributing to public debate concerning various issues of general interest, thereby warranting a narrower margin of appreciation • No demonstration of the existence of a pressing social need • Unacceptable prioritisation of views on ethics of the members of the Georgian Orthodox Church in the balancing of various values protected under the Convention and the Constitution of Georgia precedence
Art 35 § 3 (b) • Significant disadvantage in light of sweeping measures, despite lack of detailed financial account submitted by applicant, and raising important questions as to application of domestic legislation

STRASBOURG

22 July 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gachechiladze v. Georgia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Síofra O'Leary, *President,*
Mārtiņš Mits,
Ganna Yudkivska,
Lətif Hüseynov,
Jovan Ilievski,
Lado Chanturia,
Arnfinn Bårdsen, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 2591/19) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Ms Ani Gachechiladze ("the applicant"), on 13 December 2018;

the decision to give notice to the Georgian Government ("the Government") of the application;

the parties' observations;

Having deliberated in private on 22 June 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The present case concerns the applicant's complaint that there had been an unjustified interference with her right to freedom of expression, contrary to Article 10 of the Convention, on account of the administrative-offence proceedings against her and the resulting sanctions for disseminating – in the social media and on the packaging of condoms produced by her – images deemed by the domestic courts to be unethical advertising.

THE FACTS

2. The applicant was born in 1995 and lives in Tbilisi. She was represented by Mr R. Kakabadze, Mr E. Marikashvili, Mr G. Mshvenieradze, and Mr T. Svanidze, lawyers practising in Tbilisi.

3. The Government were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE APPLICANT'S BRAND AND PACKAGING DESIGNS

5. On 5 May 2017 the applicant was registered as an individual entrepreneur. She started producing condoms under the brand name Aiisa, the literal meaning of which was "that thing". According to the applicant's explanations, as reported by online media when the brand was launched, the brand name reflected how condoms were referred to by some consumers allegedly uncomfortable with buying them. She also stated that light sarcasm was part of Aiisa's image. Another website described the brand as "aiming at shattering stereotypes, to aid a proper understanding of sex and sexuality". The designs of the condom packaging varied and included depictions of popular fictional characters, former and current Georgian and non-Georgian historical and political figures, references to political events (by, for instance, depicting candidates in the 2017 local elections), various objects such as lollipops, different quotes from Georgian literature, musical designs, popular slogans, phrases allegedly reflecting social biases (for instance, "Georgian gays do not exist") or involving wordplay, designs expressing support of the LGBT (lesbian, gay, bisexual and transgender) community and other images. The condoms were sold online and via vending machines.

6. In late 2017 and early 2018 the applicant created four designs which later became the subject of the administrative-offence proceedings against her (see paragraphs 12-24 below).

7. One of the designs featured a cartoon depiction of a grinning panda face with the text "I would strum down [a colloquial reference to male masturbation] but it's the Epiphany" ("ჩამოვკრავდი, მაგრამ ნათლისღებაა"). The phrase was identical to the name of a music video by an anonymous group called Panda available on YouTube. The lyrics of the song were a compilation of allegedly stereotypical and/or popular phrases in Georgia, and the video featured a man dancing at various locations, covering his face with a panda mask. At the time, the video had more than 1 million views and 15,000 "likes" on YouTube. It is still available on the platform. It appears from the parties' submissions that the design was never put on the packaging and was only ever uploaded to Aiisa's Facebook page.

8. Another design used a cartoon depiction of an inflated crown, seemingly made from a condom, with the text "Miraculous Victory" ("მლევაჲ საკვირველი") underneath. The phrase was associated, in historical sources and common parlance, with the Battle of Didgori of 1121 resulting in victory by the Kingdom of Georgia over the army of the Great Seljuk Empire.

9. The third design used a cartoon depiction of "King Tamar", a female ruler of Georgia between 1184 and 1213 canonised as a saint by the Georgian Orthodox Church. The image featured her face, with her looking up while biting her lips, accompanied by the text "samepo kari tamarshi"

("სამეფო კარი თამარში"). The literal meaning of the text was "The Royal Court inside Tamar", but given the way it sounded, it also alluded to the name, translated into Georgian, of the television series "Game of Thrones".

10. The fourth design showed a cartoon depiction of a vertically positioned female left hand with red nail polish. A condom was placed over the raised index and middle fingers.

II. PROCEEDINGS AGAINST THE APPLICANT

11. On 27 March 2018 L.Ch., the chairman of the conservative civil-political movement "Kartuli Idea" (Georgian Idea), complained to the Municipal Inspectorate of Tbilisi City Hall ("the Municipal Inspectorate") that Aiisa had used designs which were insulting to the religious feelings of Georgians.

12. On 18 April 2018 the applicant was served an administrative-offence report by the Municipal Inspectorate. The report stated, without providing further details, that she had placed unethical advertising on her product and the brand's Facebook page, in breach of the rules concerning the production and dissemination of advertising (see paragraph 28 below). The applicant signed the report, but noted that she considered it groundless.

13. On 24 April 2018 the Municipal Inspectorate sent the administrative-offence report and copies of the designs ("the four disputed designs", see paragraphs 7-10 above) to the Administrative Chamber of the Tbilisi City Court ("the Tbilisi City Court").

14. During an oral hearing on 2 May 2018 the Municipal Inspectorate explained that the four images constituted unethical advertising based on the following arguments: (i) the image of the panda and accompanying text had been taken from "the famous music video" and, given its reference to a holy day, were insulting to the religious beliefs of Georgians; (ii) the image of "King Tamar" and accompanying text, even if it appeared to be a play on words on the title of a popular television series ("Game of Thrones"), insulted the religious and national dignity of the population given that "King Tamar" had been declared a saint by the Georgian Orthodox Church; (iii) the image of a crown and text "Miraculous Victory" were insulting to "Georgia's national dignity as the act of sex had been compared to a historical phrase", and the crown had been equated with a phallus despite its importance to national dignity; and (iv) the hand gesture on the fourth design was widely used in religious ceremonies as the "right hand of blessing" and could be regarded as insulting by the "average person and religious groups", requiring the Municipal Inspectorate "to protect religious feelings and national values".

15. Relying on various cases heard by the Constitutional Court, the applicant argued, among other things, that the Municipal Inspectorate had

failed to provide adequate justification as to why the images were in breach of the Advertising Act, and why there were sufficient reasons to interfere with her right to freedom of expression, which applied even in cases of speech perceived by society as shocking or disturbing. As regards the four disputed designs, she submitted as follows: (i) Panda were a well-known group whose music video had garnered over 1 million views and 15,000 "likes" on YouTube. The disputed design was a replication of a pre-existing piece of artistic expression which could not be perceived as *a priori* insulting or unethical; (ii) the image of "King Tamar" depicted a historical figure whose canonisation could not exempt her from being discussed in the public sphere; (iii) the phrase "Miraculous Victory" did make reference to the famous historical event, but it was unclear why this was unethical, within the meaning of the Advertising Act, especially given that the law did not include "national dignity" as grounds for limiting the right to freedom of speech; and (iv) the "hand" design depicted a left hand and not the right hand used in religious ceremonies; it was a woman's hand with red nail polish, and could have multiple meanings, depending on the perception and fantasy of consumers.

16. On 4 May 2018 a judge of the Tbilisi City Court delivered a decision finding that the four disputed designs constituted unethical advertising. In particular, after reproducing the relevant provisions of the Advertising Act (see paragraph 29 below), the court reasoned as follows:

> "1. Text – 'I would strum down but it's the Epiphany' – Epiphany is the oldest Christian holiday, one of the [Twelve Great Feasts]. According to the Gospel, this holy day is related to the Baptism of Christ ... and from which stems the practice of baptism and the first sacred mystery of the Church.
>
> 2. Text – 'Miraculous Victory' and image – the Battle of Didgori, hence the miraculous victory. The Battle of Didgori holds a special place in the history of Georgia. This victory is a symbol of independence and the fight for freedom, unity, and dedication to the country. There is a royal crown – a carrier of national significance – depicted on the product.
>
> 3. Text – 'the Royal Court inside Tamar' and image – King Tamar ruled as a monarch of Georgia from 1184, a representative of the Bagrationi royal dynasty. Her title was as follows: the King of Kings and the Queen of Queens ... [T]he Orthodox Church canonised King Tamar, [and] her face is depicted in numerous frescoes.
>
> 4. Image – the 'hand of blessing' – a hand gesture which is used by religious officials. The hand of blessing is depicted in numerous frescoes of saints and is also used by religious officials when blessing the parish.
>
> Accordingly, in the court's assessment, the advertisements placed by the individual entrepreneur Ani Gachechiladze on the official Facebook page of the Aiisa brand and on the product itself are unethical, which, by using insulting words and comparisons (images) in respect of a religion breaches universally accepted human and ethical norms, encroaches on religious symbols, and the advertisements with their text and images encroach on national and historical treasures, monuments ..."

17. The Tbilisi City Court noted the fundamental nature of the right to freedom of expression, as provided for in Article 24 of the Constitution (see paragraph 27 below) and the Convention, stating that the right in question could be subjected to lawful and necessary restrictions in furtherance of the aims listed in the relevant provisions. The court then reproduced passages from the Court's case-law, namely the cases of *Handyside v. the United Kingdom* (7 December 1976, §§ 48-50, Series A no. 24), *Müller and Others v. Switzerland* (24 May 1988, § 36, Series A no. 133), *Sekmadienis Ltd. v. Lithuania* (no. 69317/14, §§ 76-77, 30 January 2018) and *Otto-Preminger-Institut v. Austria* (20 September 1994, § 56, Series A no. 295-A), before concluding as follows:

> "In the light of all the above, the court considers that the individual entrepreneur Ani Gachechiladze must be declared an administrative offender [within the meaning of] Article 159 § 1 of the Code of Administrative Offences and be fined 500 Georgian laris [approximately 165 euros (EUR) at the time]."

18. The applicant was also ordered to cease using and disseminating the relevant designs on the products and on social media, and to issue a product recall in respect of the products already distributed. The decision did not state that she produced condoms.

19. On 14 May 2018 the applicant lodged an appeal repeating her arguments made before the first-instance court (see paragraph 15 above). She added that the Tbilisi City Court had not provided sufficient reasons for its decision which, as a result, had constituted unjustified censorship aimed at imposing a world view of one part of society, rather than upholding universal values.

20. On 15 June 2018 a judge of the Tbilisi Court of Appeal, sitting as a court of final instance, delivered a decision (by means of a written procedure) upholding the lower court's judgment. In assessing the lawfulness of the interference with the applicant's right to freedom of expression, the court noted that the Advertising Act was both available and foreseeable in its application given the detailed criteria listed therein to justify a possible limitation. Analysing the definition of an advertisement (see paragraph 29 below), the appellate court further found that the four disputed designs were aimed at forming and maintaining the interest of an unlimited group of individuals in the goods produced by the applicant, facilitating their sale, and had therefore constituted advertising falling within the scope of the Act. It was also noted that by restricting the dissemination of unethical advertising, the Advertising Act aimed to protect public morals and, as a result, ensure the development of a peaceful, pluralist and tolerant society at national level. The appellate court added that the purpose of the regulation was to protect against actions which objectively went against public morals rather than in the subjective perceptions of individuals.

21. The appellate court further pointed to the importance of freedom of speech in a democratic society, as guaranteed by the Constitution of Georgia and the European Convention, observing, at the same time, the possibility of imposing certain limitations on its exercise with the aim of, among other things, protecting public morals and the rights of others, including those under Article 9 of the Convention. The court held that this right could also be subject to certain limitations when it came into conflict with another individual's honour and dignity, adding that "no opinion is worth more than a human's honour and dignity." As regards the question of the necessity and proportionality of an interference with the right to freedom of expression, the appellate court emphasised the need to ascertain the breadth of the margin of appreciation afforded to national authorities in a given case. Referring to the Court's case-law, including the case of *Sekmadienis Ltd.* (cited above), the appellate court found that the nature of speech in the applicant's case had been the dissemination of information and ideas for commercial purposes as opposed to contribution to a debate in a democratic society, leaving a wide margin of appreciation to the domestic courts. In that regard, it stated that "in so far as the four designs are concerned, the appellant could not present any evidence (information regarding public meetings, seminars, training courses, discussions or participation in other activities) which would prove that [she] produced the condoms not for commercial purposes but to raise awareness on issues important to society."

22. Noting the absence of a universal definition of morality and the constantly evolving nature of public morals, the appellate court further stated that it had been called upon to decide whether the use of the contested images on and in respect of the condoms, rather than in general terms, had constituted unethical advertising. Such an assessment was, according to the court, to be based on the perceptions and moral considerations of society prevailing at the time of deciding the case. The appellate court continued with the following remarks:

> "... the question [before the court] concerns moral considerations stemming from religion and national values ...
>
> The Chamber also points to the case of *Sekmadienis Ltd. v. Lithuania*, in which the [European Court of Human Rights] explained that paragraph 2 of Article 10 of the Convention clearly stated that freedom of expression carries with it duties and responsibilities. Also that in the context of religious beliefs, the general requirement is to ensure the peaceful enjoyment of the rights guaranteed under Article 9 ...
>
> Of course, not every use of religious symbols or individuals on advertising material can be regarded as incompatible with public morals. An action which may be limited by law must be – in form and substance – particularly insulting and must be so for a third independent assessor. The key criterion to identify insult to religion [or of a] religious figure, [or] monument is the 'object of the attack'. As a rule, this should be a central figure of a religion who is associated entirely with a religion/world view. It is possible that an insult is directed at a subject who clearly represents that religion or is symbolically associated with it. It is also an essential condition that the insult does not

reflect the truth ... given that the expression of truth, even in a somewhat undesirable form, cannot be considered an insult which can be repressed by law. It is also important to determine the threshold of what may go beyond freedom of expression and constitute insult to religion."

23. As concerns the four designs, the appellate court reproduced passages from the Tbilisi City Court's judgment (see paragraph 16 above). It also provided the following additional explanations:

"The Chamber notes that the applicant does not dispute the fact that it is King Tamar who is depicted on the product. As regards the opinion that this depiction, as the use of a public figure within the format of public discussion and communication is protected by the freedom of expression, the Chamber cannot share the appellant's view that King Tamar has to be regarded solely as a public figure. Also, [it cannot agree] as regards the qualifying of the production and advertising of condoms as a public debate on matters important to society.

The Chamber emphasises that it is imperative to correctly define King Tamar's status. A member of the Bagrationi dynasty, King Tamar reigned as the Queen of Georgia from 1184. She was canonised as a saint by the Georgian Orthodox Church, [which] celebrates her on 14 May in view of her special contribution to the Church. A number of churches situated on Georgian territory bear her name; there are also frescoes of her. Accordingly, it is impossible to equate her status solely with that of a public figure, while ignoring her status as a saint.

The court reiterates that the question to be assessed is not whether or not the [existing] views and moral values of society are justified or welcome. The court is obliged to be guided by the existing views and to protect from gratuitous attack the moral and ethical attitudes and religious feelings of individuals holding such views.

The Chamber considers that in view of King Tamar's historical, cultural, and religious importance, her portrayal in the above-mentioned context is clearly perceived as insulting and denigrating to the average reasonable member of society. This constitutes an unjustified attack on a religious figure important to the followers of a particular religion.

Accordingly, the Chamber considers it established that the text "Royal Court inside Tamar" and King Tamar's image unavoidably insults the religious feelings of Orthodox Christians and public morals. By abusing freedom of expression [it] attempts to use, for commercial purposes, views on the values of society. Accordingly, the placement on the product, as well as the dissemination via the Internet, of the described image, must be considered unethical advertising which goes beyond the boundaries of protected expression.

[as regards the image of a panda and the related text] ... the Chamber cannot share the appellant's views, given that the song and the substance of its lyrics are subject to a different regulatory framework, while the use of the same substance for the purposes of advertising is insulting. In this case, to find a breach [of the Advertising Act] it is essential [to consider] not only the importance of the Epiphany as a Christian holiday, but also the insulting [attitude] against the teaching of a specific religious group – the Orthodox Church. The image and text, given their content, are aimed at the lifestyle of religious persons [such as] the Christian teaching to abstain from sexual contact during the Fast, and so on. [This] is perceived as an intrusion into the intimate sphere of believers and represents a clear, direct and deliberate ridicule of believers and their lifestyle which ... aims at denigrating, ridiculing, mocking the followers of a specific religion ... thereby constituting unethical advertising.

> ... Image of the 'hand of blessing': the Chamber notes that despite the explanations offered by [the applicant], the hand gesture is linked to religion, [as] it is used by religious authorities, ... Jesus Christ, saints ... is depicted on frescoes ... and constitutes an insult to the believers ... Criticism, ironic assessment/expression, or the communication of a true story is possible if it is not perceived as an insult. However, it is possible ... that [during such an expression] a religion or its symbol becomes somewhat equated with an objectively insulting or denigrating symbol [or] item. The latter mainly presupposes items or symbols of a sexual nature [as well as] reference by means of an insulting form. Accordingly, the depiction of the above-mentioned image on the product and its dissemination on the Internet clearly constituted unethical advertising.
>
> ...Text – 'Miraculous Victory' and the image of a crown ... The Chamber notes that the Battle of Didgori implied [by the phrase] holds a special place in Georgian history. This victory is a symbol of the fight for independence and freedom, unity and dedication to the country. A royal crown is depicted on the product, which is linked to a form of State governance and [has] national value. In the present case ... the Chamber notes that the phrase 'Miraculous Victory' and its use on an item of a sexual nature with a specific image, as well as its dissemination via the Internet, clearly constitutes unethical advertising, [and] that this encroaches on society's views on values and ethics."

The appellate court concluded that:

> "each advertisement is an insulting action which is in conflict with public morals and falls within the definition of 'unethical advertising' under the Advertising Act."

24. As regards the question of whether the interference was necessary in a democratic society, the court stated as follows:

> "... it is without doubt that at the national level in Georgia, figures and religious symbols which are depicted on items of a sexual nature – condoms – are perceived as an action aimed against public morals. Additionally, in the case under consideration, it should be noted that the [applicant] could easily appreciate and take into account the circumstance that her action would have been objectively perceived as an insult to religion, religious symbols and monuments which would target a large part of society. The court hereby refers to the explanation made in the case of *Otto-Preminger-Institut v. Austria* ... that the freedom to express an opinion also implied the individual's an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."

25. The appellate court's final decision also upheld the fine, the product recall order, and the ban on the future use of the disputed designs imposed by the Tbilisi City Court (see paragraphs 17-18 above). It appears from the parties' submissions that the product recall order became redundant as the entire batch of 10,000 condoms featuring the disputed designs on their packaging had already sold out by the time the appellate court delivered its final decision on the matter.

26. On the date of adoption of the present judgment, the Aiisa Facebook page did not feature the disputed designs. The brand's website was inaccessible.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

27. At the material time, the Constitution of Georgia of 1995 provided as follows:

Article 24

"1. Every person has the right to freely receive and impart information, express and impart his or her opinion orally, in writing, or by other means.

...

4. [The exercise of the] rights listed in the first and second paragraphs of this Article may be limited by law, in so far as is necessary in a democratic society to ensure national security, territorial integrity or public safety, for the prevention of crime, for the protection of the rights and dignity of others, for prevention of the disclosure of information recognised as confidential, or for ensuring the independence and impartiality of the judiciary ..."

Article 44

"1. Every person residing in Georgia shall comply with the requirements of the Constitution and Georgian law.

2. The exercise of the fundamental rights and freedoms of an individual shall not violate the rights and freedoms of others."

28. At the material time, Article 159 § 1 of the Code of Administrative Offences of 1984 provided as follows:

"Violating the established rules for commissioning, producing and disseminating advertisements shall carry a fine of 500 Georgian laris for a natural person and a fine of 3,000 Georgian laris for a legal person, an institution or an organisation."

29. At the material time, section 3 of the Advertising Act of 1998 provided as follows:

"1. Advertisement – information regarding goods, services and works (hereinafter 'goods'), natural and legal persons, [and] ideas and initiatives disseminated by any means and form which is intended for an unlimited group of persons, and aims at forming and maintaining interest towards natural and legal persons, goods, ideas and initiatives, and at facilitating the sale of goods and the advancement of ideas and initiatives.

2. Improper advertising – dishonest, untrustworthy, unethical, misleading or any other [type of] advertising which violates the requirements for content, timing, placement and dissemination, as provided for in Georgian law.

...

5. Unethical advertising – advertising which violates universally accepted human and ethical (ზნეობრივ) norms by using insulting words and comparisons in relation to nationality, race, profession, social origin, age, gender, language, religion, political and philosophical beliefs of natural persons[;] encroaches on (ხელყოფს) objects of

art [included in the list of] national and world cultural heritage [or] historical and architectural monuments[; or] insults (ბღალავს) State symbols (flag, coat of arms, anthem), the national currency of Georgia or of any other State, religious symbols, natural and legal persons, their activities, profession or products ..."

30. At the material time, section 9(1)(z) of the Freedom of Speech and Expression Act of 2004 provided that the content of speech could be regulated by law if it concerned advertising, teleshopping, or sponsorship. Section 9(2) specified that such regulation could only be viewpoint-neutral and non-discriminatory.

31. The Constitutional Court of Georgia addressed the right to freedom of expression in a number of judgments. In a judgment of 10 November 2009 (no. 1/3/421,422) it stated as follows:

"The right to freedom of expression is guaranteed by Georgian law, but legislative guarantees are insufficient for the full implementation of such rights, [as] it is necessary that society itself tolerates an individual's right to express his or her opinion freely and without fear. In a democratic society, people have an obligation to tolerate opinions which they do not share or even consider ethically unjustified. It is impermissible to impose ethical norms or the world view [held by] a specific person or group of persons on other groups of society through State institutions, including the courts ...

It should be noted that relatively broad discretion may be afforded to a State to limit the right to freedom of expression when the expression subject to limitation is of an offensive nature. The European Convention on Human Rights also allows for a limitation of freedom of expression when the expression goes against established moral norms. While a State may have the right to impose such a limitation, [it is not its obligation to do so, as per] the Constitution of Georgia and the European Convention [on Human Rights]. It should also be noted that any ... such limitation must comply with the Constitution ..."

32. In a judgment of 14 May 2013 (no. 2/2/516,542) the Constitutional Court noted as follows:

"The right to freedom of expression is not an absolute right and may be subject to limitations in order to achieve the legitimate aims specified in the Constitution, using means proportionate to [such] aims ... A democratic state should treat an individual's freedom of expression with respect; the limitation [of this right] should be reasoned, necessary and essential for the existence of a democratic society, for the coexistence of people ... [Interference] with freedom of expression should only be effected with strict adherence to the principle of proportionality."

33. In a judgment of 30 September 2016 (no. 1/6/561,568, § 50) the Constitutional Court stated as follows:

"In general, speech should be made an object of justice as a measure of last resort, when it is objectively necessary. Freedom of expression cannot be limited through [judicial proceedings] just because we disagree, are afraid, hate, [or] believe that [it] is contrary to public morals and traditions ... The best way to balance freedom of expression is to express [yourself again] – because any opinion, expression, which you disagree with, dislike or, in your opinion, is not true, can be refuted by opposing opinions and ideas which you share, like, or consider right."

II. INTERNATIONAL LAW AND PRACTICE

34. The relevant international law and practice has been summarised in the case of *Sekmadienis Ltd. v. Lithuania* (no. 69317/14, §§ 47-49, 30 January 2018).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant complained that there had been an unjustified interference with her right to freedom of expression, contrary to Article 10 of the Convention, on account of the administrative-offence proceedings against her and the resulting sanctions for using designs in respect of her products which were deemed by the domestic courts to be unethical advertising. Article 10 of the Convention reads as follows:

> "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."

A. Admissibility

1. Submissions by the parties

36. The Government submitted that the applicant had suffered no significant disadvantage on account of the administrative-offence proceedings as (i) the fine of approximately 165 euros (EUR) imposed on her had been modest; (ii) the sanction had targeted only four of the many designs used by her; and (iii) her company had benefited from the domestic and international spotlight, increasing its sales. As regards this latter point, the Government submitted that an entire batch of 10,000 condoms with the disputed designs on the packaging had sold out before the court order concerning the product recall had come into force. The Government also stated that the disputed designs had still featured on the applicant's website, albeit with the word "banned" covering each design. They submitted screenshots of the website showing the images as described.

37. The applicant submitted, among other arguments, that given the popularity of the four disputed designs, she had in fact suffered a significant pecuniary disadvantage on account of the ban on their future use. She further noted that the case concerned one of the fundamental values of a democratic society, and an unjustified interference would have a chilling effect on the exercise of that right by her and other members of Georgian society, especially considering the wide media attention her case had received at domestic level. The non-pecuniary dimension of her complaint therefore involved an important matter of principle rather than a mere material interest, warranting consideration by the Court.

2. The Court's assessment

38. The Court reiterates that the admissibility criterion set forth in Article 35 § 3 (b) of the Convention is applicable only if the applicant has suffered no significant disadvantage and provided that the two safeguard clauses contained in the same provision are respected (see *Giuran v. Romania*, no. 24360/04, § 24, ECHR 2011 (extracts)). The relevant general principles are summarised in, among other authorities, *Smith v. the United Kingdom* ((dec.) [Committee], no. 54357/15, §§ 44-47, 28 March 2017).

39. Turning to the present case and the financial impact of the domestic proceedings on the applicant, the Court agrees that the fine of approximately EUR 165 does not seem particularly onerous, especially considering that she is a successful entrepreneur. However, she also claimed to have suffered a loss of income on account of the ban on using the four disputed designs on her products. In this connection, contrary to what the Government claimed, it does not appear that the disputed images are still in use (see paragraph 26 above). As to the Government's submission that a batch of 10,000 condoms featuring the banned designs sold out before the court order in respect of the applicant became final, the Court notes that this development cannot lead it to disregard the fact that the applicant was ordered to recall and, therefore, stop selling, merchandise of significant financial value. She was also banned from using those designs in the future and, as a result, the impugned measures were of such nature and magnitude that, potentially, they could have caused her to suffer an important financial impact. Accordingly, even if the applicant did not submit a detailed financial account, having regard to the sweeping nature of the impugned measures, the Court cannot accept that those measures had an insignificant impact on her.

40. The Court further notes that a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest (see *Korolev v. Russia* (dec.), no. 25551/05, ECHR 2010-V). In cases concerning freedom of expression, the application of the admissibility criterion contained in Article 35 § 3 (b) of the Convention should take due account of the importance of this

freedom (see *Appleby and Others v. the United Kingdom*, no. 44306/98, § 39, ECHR 2003-VI, and *Roşiianu v. Romania*, no. 27329/06, § 56, 24 June 2014) and be subject to careful scrutiny by the Court. In the present case, the domestic courts' application of the Advertising Act in respect of what they regarded as unethical advertising contrary to the religious and national values of Georgian society, and whether such an interpretation was compatible with the principles established in the Constitutional Court's practice (see paragraphs 31-32 above) and the Court's case-law (see *Sekmadienis Ltd. v. Lithuania*, §§ 62-84, 30 January 2018) concerned important questions of principle and went beyond the scope of the applicant's case.

41. The Court therefore concludes that given what was at stake for the applicant, as well as considering the important questions of principle arising in her case, it is not appropriate to dismiss the present application with reference to Article 35 § 3 (b) of the Convention.

42. The application is furthermore neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicant

43. The applicant submitted that the interference with her right to freedom of expression had not been lawful, in pursuit of legitimate aims or necessary in a democratic society. Among other arguments, she maintained that her brand had been involved in social activism, generally speaking, by promoting the use of condoms and safe intercourse in a society in which sex and sex education were, according to her, considered taboo subjects. Stating that the domestic courts had not meaningfully addressed any of her arguments against declaring the four disputed designs unethical advertising, the applicant submitted that the impugned decisions had effectively imposed a world view of the dominant religious group on her.

(b) The Government

44. The Government did not dispute the existence of an interference with the applicant's right to freedom of expression but submitted that it had been justified under Article 10 § 2. They stated, however, that the interference had had a legal basis, and it had pursued the legitimate aims of (i) protecting the rights of others not to have their religious beliefs insulted, and (ii) protecting public morals. Furthermore, in the Government's submission, the four disputed designs had constituted advertising of

commercial goods rather than speech contributing to an important debate in a democratic society. On this account, the case was, in the Government's submission, similar to that of *Sekmadienis Ltd.* (cited above, § 76) and the domestic courts had had a wide margin of appreciation. It had accordingly been within the courts' remit to assess the scope of public morals and consider whether the disputed designs had been contrary thereto, taking into account the local context.

2. The Court's assessment

(a) Existence of an interference

45. It is undisputed between the parties that the imposition of the fine, the obligation to issue a product recall, and the ban on the future use of the disputed designs constituted an interference with the applicant's right to freedom of expression under Article 10 of the Convention. The Court sees no reason to decide otherwise.

(b) Whether the interference was prescribed by law

46. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see the relevant general principles in *Delfi AS v. Estonia* [GC], no. 64569/09, § 120-22, ECHR 2015; *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 131-33, ECHR 2015 (extracts); and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, §§ 143-45, ECHR 2017 (extracts)).

47. In the present case, as concerns the concept of unethical advertising involving religious symbols, the courts examining the case did not refer to any previous domestic case-law. Nor did the parties provide any examples of such case-law to the Court. The Court acknowledges that the very fact that the applicant's case could have been the first of its kind does not, as such, make the interpretation of the law unforeseeable, as there must come a day when a given legal norm is applied for the first time (see *Sekmadienis Ltd.*, cited above, § 67, with further references). Taking into account the appellate court's reasoning when applying the Advertising Act to the designs used by the applicant (see paragraphs 20-23 above), the Court will proceed on the assumption that the impugned measures had a basis in domestic law.

(c) Whether the interference pursued a legitimate aim

48. The Court notes that in the present case the domestic courts linked their decision in respect of three of the four disputed designs to the protection of the religious rights of others and the ethical considerations

arising therefrom (see paragraphs 16 and 23 above), a legitimate aim provided for in domestic law (see paragraphs 27 and 29 above) and under Article 10 § 2 of the Convention. As regards the fourth design, however, which referenced a historical event and depicted a crown, the domestic courts held that the disputed design encroached on "national and historical treasures, monuments" (see paragraph 16 above) and "society's views on values and ethics" (see paragraph 23 above). In that regard, the Government appears to be suggesting that the ban on using the latter design had pursued the aim of protecting public morals. Considering the absence of a European consensus on the concept of morality for the purpose of Article 10 § 2 of the Convention (see, among other authorities, *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996 V), the Court is prepared to accept that the interference in respect of all four designs pursued a legitimate aim within the meaning of Article 10 § 2 of the Convention (see also, *mutatis mutandis*, *Sinkova v. Ukraine*, no. 39496/11, § 103, 27 February 2018).

(d) Whether the interference was necessary in a democratic society

(i) General principles

49. The Court reiterates that 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 enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 101, ECHR 2012; *Bédat v. Switzerland* [GC], no. 56925/08, § 48, ECHR 2016; and *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 124).

50. 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 is not unlimited and goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 164; see also *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012 (extracts); *Animal Defenders International*

v. the United Kingdom [GC], no. 48876/08, § 100, ECHR 2013 (extracts); and *Bédat*, cited above, § 48).

51. The breadth of the Contracting States' margin of appreciation varies depending on a number of factors, among which the type of speech at issue is of particular importance (see, among other authorities, *Mouvement raëlien suisse*, cited above, § 61). The Court has consistently held that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see *Baka v. Hungary* [GC], no. 20261/12, § 159, ECHR 2016, and *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 167). However, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (see *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V, and *Murphy v. Ireland*, no. 44179/98, § 67, ECHR 2003-IX (extracts)). Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising (see *Sekmadienis Ltd.*, cited above, § 73, with further references).

52. 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 power 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 (see *Mouvement raëlien Suisse*, cited above, § 48; *Morice v. France* [GC], no. 29369/10, § 124, ECHR 2015; and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 75, 27 June 2017).

53. The Court lastly reiterates that, as paragraph 2 of Article 10 expressly recognises, the exercise of the freedom of expression carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane (see *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 49; *Murphy*, cited above, § 65; *İ.A. v. Turkey*, no. 42571/98, § 24, ECHR 2005-VIII; *Aydın Tatlav v. Turkey*, no. 50692/99, § 28, 2 May 2006; *Giniewski v. France*,

no. 64016/00, § 43, ECHR 2006-I; and *Klein v. Slovakia*, no. 72208/01, § 47, 31 October 2006). Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a State may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures. In addition, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention (see *E.S. v. Austria*, no. 38450/12, § 43, 25 October 2018).

(ii) Application of the above principles to the present case

54. Turning to the circumstances of the present case, the Court observes that the parties disagreed as to whether the designs used by the applicant had only had a commercial purpose, with the consequence that the domestic authorities enjoyed a wide margin of appreciation in respect of the necessity and proportionality of the interference with the applicant's rights under Article 10 of the Convention. In this regard, the domestic courts found that the four designs constituted an "expression" made solely in a commercial context, as in the case of *Sekmadienis Ltd*. (cited above, § 76). The Government expressed a similar view.

55. However, the Court notes that unlike the circumstances which obtained in the case referred to by the domestic courts and the Government (see the previous paragraph), the applicant's brand also appears to have been aimed at initiating and/or contributing to a public debate concerning various issues of general interest. In particular, the declared objective of the brand, expressed at the time of its launch, was to shatter stereotypes, and "to aid a proper understanding of sex and sexuality" (see paragraph 5 above). Some images used by the applicant concerned same-sex relationships (see paragraph 5 above; see also, in so far as negative attitudes towards the LGBT community in Georgian society are concerned, *Identoba and Others v. Georgia*, no. 73235/12, § 68, 12 May 2015). Furthermore, several designs used by the brand also appear to have been a social as well as political commentary on various events or issues (see paragraph 5 above). It is also relevant to note that the organisation which lodged a complaint in respect of the applicant's brand was apparently active in civil and political matters (see paragraph 11 above). Therefore, the Government's argument that the applicant's "expression" had to be treated as having been made solely in a commercial context, giving the authorities a broad margin of appreciation at domestic level, should be treated with some caution. In circumstances where a message on issues of public interest was at least partly involved, the margin of appreciation afforded to the domestic courts was necessarily narrower compared to situations concerning solely commercial speech.

56. As to the four disputed designs, one of them featured the text "the Royal Court inside Tamar" (see paragraph 9 above) and referred to the former female ruler of Georgia between 1184 and 1213 who had been canonised as a saint by the Georgian Orthodox Church. The applicant's position with regard to this design was that a historical figure could not be exempt from being the subject of public discussion (see paragraphs 15 and 19 above). In this regard, the Court agrees, on the basis of the principles set out above (see paragraphs 49-53 above), that canonising a public figure or, indeed, any person, cannot of itself serve to exclude a discussion of his or her persona in a public debate. Nor should, contrary to what the domestic courts' reasoning suggests (see paragraph 23 above), the choice of the medium of expression – the production and dissemination of condoms in the present case – be deemed in and of itself inappropriate in the assessment of whether the expression can contribute to a public debate on matters important to society.

57. However, the Court also does not lose sight of the applicant's failure, at domestic level, to explain why or how the using of that persona on condoms with the sign which accompanied it either started or contributed to any public debate on a matter of general interest (see paragraph 19 above).

58. The Court observes that the appellate court emphasised the historical, cultural, and religious importance of the persona of the saint, her depiction on frescoes, and the contribution to the church. Pointing out that it had also taken into account the local context, the court concluded that King Tamar's sainthood had to take precedence over her status as a public figure, finding that the manner in which the disputed design had been used had constituted, for the average reasonable member of society, an unjustified attack on a religious figure, in breach of the Advertising Act. In this connection, it is regrettable that the domestic courts did not assess the meaning of the text accompanying the disputed image. Nonetheless, in the absence of convincing arguments raised by the applicant at domestic level, not least in relation to the objective pursued by her brand and the role of the particular image in that respect (see paragraph 19 above), the Court finds it difficult to accept that the domestic authorities – which are normally better placed than the international judge to assess the need for such a measure in the light of the situation obtaining locally at a given time (see *Otto-Preminger-Institut*, cited above, § 56; see also *Wingrove*, § 58, and *Murphy*, § 67, both cited above) – erred in finding that the design could be seen as a gratuitous insult to the object of veneration for Georgians following the Orthodox Christian faith.

59. As concerns the remaining designs, however, the circumstances are different. In particular, as regards the design featuring a panda face and referencing a Christian holy day (see paragraph 7 above), the Court takes note of the appellate court's reasoning that the image and accompanying

text unjustifiably insulted the lifestyle of practising Orthodox Christians and the religious teaching that sexual relations should be avoided during the fast related to important religious holidays (see paragraph 23 above). However, the Court is not convinced that these reasons were sufficient to justify the necessity of the interference in a democratic society. In particular, the fact that the design merely replicated a pre-existing piece of artistic expression by an anonymous group called Panda which, at the time, had more than 1 million views on YouTube and approximately 15,000 "likes" (see paragraph 7 above) cannot be overlooked. The popularity of that music video was not disputed either at domestic level or before the Court. As to its content, it appears to have been a satirical take on different phrases used frequently in Georgia, essentially constituting the criticism of various ideas, including those relating to religious teachings and practices. Against this background, the appellate court's brief dismissal of the applicant's arguments referring to the above-mentioned factors, by merely noting that a different regulation applied to that piece of artistic expression, effectively left unaddressed the crucial question of whether there existed any "pressing social need" (see paragraph 50 above) to limit the dissemination of the disputed design.

60. The two remaining designs featured a female left hand with a condom placed over two raised fingers (see paragraph 10 above) and an image of a crown apparently made from a condom with a caption referring to a historical event (see paragraph 8 above).

61. As regards the image featuring a hand, the applicant's argument about the absence of any religious connotation on account of the fact that it depicted a female left hand rather than the right hand used in a religious context, suggesting the lack of a legal basis for the interference, was left unaddressed. Instead, it is striking that the courts insisted on labelling the design as the so-called "hand of blessing", a symbol of the Christian faith. While it cannot be excluded that even the most trivial image may contain elements provoking very specific associations with a religious symbol, it was for the domestic courts to demonstrate why that was the case with regard to the image of a female hand, and they failed to do so in the applicant's case. As regards the design featuring a crown and reference to a historical event, the domestic courts concentrated on the importance of that event for the history of Georgia. However, despite the applicant's related submissions, it remained unclear throughout the proceedings against her why the domestic courts considered that a reference to a historical event or the depiction of a crown on condoms could fall within the definition of unethical advertising provided for in the Advertising Act (see paragraph 29 above). Nor was it explained whether there had existed any "pressing social need", within the meaning of the Court's case-law (see paragraphs 51-53 above), to limit the dissemination of these two designs. Accordingly, the Court considers that none of the reasons given by the domestic courts were

relevant to justify necessity and proportionality of the interference with the applicant's freedom of expression in so far as the designs featuring a female hand and a crown with a reference to a historical event are concerned.

62. Finally, the Court takes issue with the apparent implication in the domestic courts' decisions that the views on ethics of the members of the Georgian Orthodox Church took precedence in the balancing of various values protected under the Convention and the Constitution of Georgia. Such an implication went against the views of the Constitutional Court (see paragraphs 31-33 above), according to which it was "impermissible to impose ethical norms or the world view [held by] a specific person or group of persons on other groups of society through State institutions, including the courts." It was also at odds with relevant international standards (see *Sekmadienis Ltd*., cited above, § 80, with further references). The Court reiterates that in a pluralist democratic society those who choose to exercise the freedom to manifest their religion must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (see, among other authorities, *Otto-Preminger-Institut*, § 47, and *İ.A.* v. Turkey, § 28, both cited above).

63. In the light of the foregoing, the Court concludes that at least in so far as three of the four disputed designs are concerned (see paragraphs 59-61 above), the reasons adduced by the domestic courts were not relevant and sufficient to justify an interference under Article 10 § 2 of the Convention.

There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

65. The applicant did not submit any claims for just satisfaction under Article 41 of the Convention. The Court therefore makes no award.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention.

Done in English, and notified in writing on 22 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Martina Keller Deputy Registrar	Síofra O'Leary President