

## Use of a Totalitarian Symbol and the Right to Freedom of Expression

*Vajnai v Hungary* [2008] ECHR 33629/06 (8 July 2008)

The European Court of Human Rights held that there was a violation of art 10 of the *European Convention on Human Rights* when criminal proceedings were instituted against the applicant for having worn a totalitarian symbol in public.

### Facts

The applicant, a Hungarian national, was the Vice-President of a registered left-wing Worker's Party. On 21 February 2003, the applicant was a speaker at a lawful demonstration in central Budapest. On his jacket, the applicant wore a five-pointed red star as a symbol of the international workers' movement. A police patrol called on the applicant to remove the red star, which he did. The request for the removal of the red star was made pursuant to section 269/B(1) of the Hungarian Criminal Code. Subsequently, criminal proceedings were instituted against the applicant for having worn a 'totalitarian symbol'.

On 11 March 2004, the District Court convicted the applicant of the offence of using a totalitarian symbol, whereupon a sanction was imposed for a probationary period of one year.

The applicant appealed to the Budapest Regional Court which upheld the conviction.

In May 2006, the applicant lodged a complaint with the European Court of Human Rights. He alleged that his conviction for having worn the symbol of the international workers' movement constituted an unjustified interference with his right to freedom of expression, in breach of art 10 of the *Convention*.

### Decision

The European Court of Human Rights held that the imposition of a criminal sanction for using a totalitarian symbol constituted an interference with the applicant's rights enshrined in art 10(1) of the *Convention*.

It reasoned, *inter alia*, that at the material time, the applicant was an official of a registered left-wing party and wore the contested red star at a lawful demonstration. The Court could not, therefore, conclude that its display was intended to justify or propagate totalitarian oppression serving totalitarian groups and was unrelated to racist propaganda. Furthermore, the Court held that the registered political party had no known intention of participating in Hungarian political life in defiance of the rule of law and the Government failed to refer to any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary.

The Court also held that the test of 'necessity in a democratic society' requires the Court to determine the interference complained of corresponded to a 'pressing social need'. It also affirmed that, although freedom of expression may be subject to exceptions, they 'must be narrowly interpreted' and 'the necessity for any restrictions must be convincingly established'.

In the Court's view, 'when freedom of expression is exercised as political speech – as in the present case – limitations are justified only in so far as there exists a clear, pressing and specific social need'. Consequently, utmost care and caution must be observed in applying any restrictions, particularly when the case involves symbols, which have multiple meanings. In the

present case, the Court held that the ban in question was too broad in view of the multiple meanings of the red star.

The Court also recognised that the systematic terror applied to consolidate Communist rule in several countries, including Hungary. The Court accepted that 'the display of the symbol...was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who might rightly find such displays disrespectful'. The Court, nevertheless, considered that such sentiments, however understandable, cannot and could not set the limits of freedom of expression.

In the Court's view, a 'legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment'. To hold otherwise, the Court asserted, would mean that freedom of speech and opinion is subjected to the 'heckler's veto'.

### **Relevance to the Victorian *Charter***

The Victorian *Charter* includes a provision relating to the right to freedom of expression, in similar terms to the *European Convention of Human Rights*.

Under s 15(2), 'Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds' in a range of media. Under s 15(3), the right to free expression may be 'subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons or for the protection of national security or public order'.

In addition to being protected by the *Charter*, the right to freedom of political communication is a constitutionally implied right in Australia (see, eg, *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 6). Any restrictions of the kind sought to be imposed in this case would therefore not only need to be consistent with s 7 of the *Charter*, but also compatible with the system of representative and responsible government and reasonably appropriate and adapted (or proportionate) to achieving a legitimate aim.

*Carolina Riveros Soto is a lawyer and recently returned from an internship with the UN Office of the High Commissioner for Human Rights in Geneva, Switzerland*