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Bundesgericht (BGE), 2001-09-27, FR

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Volltext

Bundesgericht (BGE) EGMR 27.09.2001 20010927_38743_97 (Demuth Walter Michael c. Suisse) Tribunal fédéral (ATF) CEDH 27.09.2001 20010927_38743_97 (Demuth Walter Michael c. Suisse) Tribunale federale (DTF) CEDU 27.09.2001 20010927_38743_97 (Demuth Walter Michael c. Suisse)

Urteilskopf 38743/97 Demuth Walter Michael c. Suisse Décision d'irrecevabilité no. 38743/97, 27 septembre 2001 Sachverhalt SECOND SECTION DECISION AS TO THE ADMISSIBILITY OF Application no. 38743/97 by Walter Michael DEMUTH against Switzerland The European Court of Human Rights, sitting on 27 September 2001 as a Chamber composed of Mr C.L. Rozakis, President, Mr A.B. Baka, Mr L. Wildhaber, Mr G. Bonello, Mrs V. Strážnická, Mr P. Lorenzen, Mr M. Fischbach,, judges, and Mr E. Fribergh, Section Registrar, Having regard to the above application introduced with the European Commission of Human Rights on 24 October 1997 and registered on 25 November 1997, Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court, Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant, Having deliberated, decides as follows: THE FACTS The applicant, Walter Michael Demuth, is a Swiss national, born in 1949 and living in Zürich in Switzerland. The respondent Government are represented by their Agent, Mr P. Boillat, Head of the International Affairs Division of the Federal Office of Justice. A. The circumstances of the case The facts of the case, as submitted by the parties, may be summarised as follows. The applicant intended to set up a "segment television program", Car Tv Ag, limited to a particular subject-matter (Spartenfernseh-programm), namely all aspects of car mobility and private road traffic, including news on cars, car accessories, traffic and energy policies, traffic security, tourism, automobile sport, relations between railways and road traffic, and environmental issues. The television program was to be distributed via cable television in German in the German speaking areas of Switzerland, and in French in the French speaking areas. At the outset, the program was to last two hours, to be repeated during 24 hours and to be renewed once a week, and later to be extended in duration. The applicant was to be the company's managing director. The program was to be prepared in close co-operation with industry, automobile associations, and the specialised media. On 10 August 1995 the applicant filed with the Swiss Government in the name of Car Tv Ag a request for a licence (Konzessionsgesuch) to broadcast the intended program. The Federal Office for Communication replied on 16 August 1995, pointing out the lack of prospects of success of such a request. By letter of 7 September 1995 the applicant informed the Federal Office that he wished to pursue his request, while submitting further documents. From the latter it transpired that Car Tv Ag would now include in its program also matters concerning the traffic needs of non-motorists and set up an independent program commission. On 16 June 1996 the Swiss Federal Council (Bundesrat) dismissed

the request. The Federal Council noted that there was no right, either under Swiss law or Article 10 of the Convention, to obtain a broadcasting licence. With reference to the instructions for radio and television listed in Section 3 § 1 of the RTA (Bundesgesetz über Radio und Fernsehen, henceforth referred to as RTA; see below, Relevant domestic law) the decision continued: "... The electronic media have the task of conveying contents serving the development of an informed democratic opinion. They should furthermore actively contribute to a culture of communication serving as the basis for cultural development and for an intact democratic discourse. 4. According to Section 11 § 1 (a) of the RTA, a licence shall only be granted if radio and television can achieve the aims mentioned in Section 3 § 1 of the RTA as a whole. It is unnecessary that each venture complies with all aspects of the instructions mentioned. Rather, a positive contribution is required which will further the culture of communication in our country and which will under no circumstances run counter to the aims of the RTA. 5. A comprehensive and broadly based democratic discourse is guaranteed first of all by means of those programs which are committed to a service public and may be considered as full programs. These are directed at the entire public and have as their subject-matter all aspects of political and social life. Segment programs concentrate on particular themes and are directed at particularly interested sectors of the public. The result may be the formation of a public opinion which is influenced by media on specific contents and no longer primarily by broadly based full programs. Such a development would indubitably have consequences for the culture of communication. Communicative integration via electronic media would be impaired, and would lead to a society increasingly shaped by segmentation and atomisation. 6. Against this background, the direction of segment programs runs counter to the democratic considerations of the general instructions for radio and television (Section 3 § 1 of the RTA). These instructions are oriented towards the integration and promotion of an intact culture of communication. As a result, stricter conditions must apply to segment programs than would be required for a program with a varied content. Therefore, when examining the conditions for a licence according to Section 11 § 1 (a) of the RTA, qualified criteria shall be adduced, since the active contribution of segment programs towards the culture of communication must generally be called in question. 7. Nevertheless, granting a licence to segment programs continues to remain possible under qualified conditions. A licence shall be considered if the negative effects of the program are at least compensated by valuable contents within the meaning of Section 3 § 1 of the RTA. This could be the case with programs in the area of culture (music, films etc.) or of the formation of political opinions (parliament broadcasts etc.). 8. The request for a licence by Car Tv Ag aims at a segment program which has automobile mobility as its content and places the car at its centre. According to the criteria developed in §§ 4-6, it must be considered with the greatest restraint. As a result, granting a licence will only be considered if the disadvantages resulting from a segment program are compensated with valuable contents, offering a particular contribution to the general instructions mentioned in Section 3 § 1. 9. However, the orientation of the program of Car TV Ag is not able to offer this required valuable contribution to comply with the general instructions for radio and television. The program focuses mainly on entertainment or on reports about the automobile. Car Tv Ag does not therefore meet the requirements for a licence according to Section 11 § 1 (a) of the RTA."

B. Relevant domestic law 1. The Swiss Federal Constitution Section 55bis §§ 2 and 3 of the Swiss Federal Constitution (Bundesverfassung), in the version in force at the relevant time, stated: "2. Radio and television shall contribute to the cultural development, the free

expression of opinion and the entertainment of the public. They shall consider the characteristics of the country and the requirements of the Cantons. They shall objectively depict the events, and they shall adequately express the variety of the opinions. 3. The independence of radio and television as well as the autonomy in the matters of programs are guaranteed subject to § 2." These provisions are now stated in Section 93 §§ 2 and 3 of the Federal Constitution. 2. The Swiss Radio and Television Act Based on the provisions of the Federal Constitution, Section 3 § 1 of the Swiss Radio and Television Act (Bundesgesetz über Radio und Fernsehen, henceforth referred to as RTA) provides: "Instructions (Auftrag) Radio and television shall as a whole: contribute to the free expression of opinion and to a general, varied and objective information of the public and to its education and entertainment, and convey civic knowledge; consider, and bring closer to the public, the diversity of the country and its population and advance the understanding for other peoples; promote Swiss cultural enterprise and stimulate the public to participate in cultural life; facilitate contact with Swiss expatriates and promote the presence of Switzerland abroad as well as the understanding for its concerns; particularly consider Swiss audio-visual production, namely films; particularly consider European productions." Section 5 §§ 1 and 2 provide: " Independence and autonomy 1. The operators are free in the manner in which they manage their programs; they bear the responsibility therefor. 2. To the extent that Federal law does not state otherwise, the operators are not bound by instructions of the Federal, cantonal and municipal authorities." According to Section 10 § 2, nobody is entitled to receive, or to have renewed, a broadcasting licence. Section 10 § 3 determines the Swiss Government, i.e. the Federal Council (Bundesrat), as the authority to grant broadcasting licences for radio and television. Section 11 § 1 (a) mentions various conditions for the granting of a licence, inter alia , the conditions stated in Section 3 § 1; that the applicant must be a person with Swiss citizenship and residence in Switzerland, or a company with its seat in Switzerland; and that the applicant must disclose the financial situation. Section 42 provides in § 1 that the licensed cable companies are in principle free to transmit radio and television programs. However, according to § 2 (c), the cable company is obliged to transmit, inter alia , "uncoded television programs which according to the law are destined for the area of the licence holder and which will be transmitted within this area without cable". § 3 states that the licence holder may be relieved of the obligation of transmitting these programs in case of insufficient frequencies. According to Section 56, the competent authority shall control whether all licence holders comply with international and domestic regulations, though supervision of programs is not permitted. COMPLAINTS The applicant complains under Article 10 of the Convention of the allegedly arbitrary decision of the Federal Council not to grant Car Tv Ag a broadcasting licence. He claims that none of the grounds for justification mentioned in Article 10 § 2 of the Convention have been met. In particular, it cannot be argued that broadcasting frequencies are limited, since the program would have been distributed solely by cable television. He submits that another television program with a similar direction has been authorised to broadcast with a segment program consisting of entertainment, films and music. Erwägungen THE LAW The applicant complains under Article 10 of the Convention of the Federal Council's refusal to grant Car Tv Ag a broadcasting licence. This provision states: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it

duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic 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." The Government contend that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Thus, the third sentence of Article 10 § 1 of the Convention envisages the possibility of States requiring licences for broadcasting. This requirement applies not only to technical aspects but also, as the Court pointed out in the judgment of *Informationsverein Lentia and Others v. Austria*, to other conditions, such as "the nature and objectives of a proposed station, its potential audience at national, regional or local level, (and) the rights and needs of a specific audience" (see judgment of 24 November 1993, Series A no. 276, p. 14, § 32). In Switzerland, there is no audio-visual monopoly. Rather, the mixed system set up by the Swiss Radio and Television Act (*Bundesgesetz über Radio und Fernsehen*, henceforth referred to as RTA) provides for a plurality of media. Access hereto is nevertheless subject to a licence which is granted if certain conditions are met; the fact that no right is conferred does not contradict the Convention. The Government point out that the conditions for a licence apply to all audio-visual media which are called upon, according to Section 55bis § 2 of the Federal Constitution, to contribute to the cultural development of the viewers, to enable them freely to form their opinion, and to entertain them. These aims correspond entirely with the requirements of the third sentence of Article 10 § 1 of the Convention. It cannot therefore be said that the licensing system in Switzerland contradicts Article 10 of the Convention, a fortiori as there is no monopoly. The Government further submit that the interference with the applicant's rights under Article 10 § 1 of the Convention was "prescribed by law" within the meaning of § 2 of this provision. Reference is made in particular to Section 55bis § 2 of the Federal Constitution and Sections 3 § 1 and 11 § 1 of the RTA. These provisions were sufficiently accessible. It could also not be said that the Federal Council's decision of 16 June 1996 was not foreseeable, since general television programs were better placed to meet the respective conditions than segment television programs. Indeed, the latter could also meet the conditions if, for instance, cultural elements are included in the program. As regards the legitimate aim pursued, the Government consider that the interference at issue, aiming at maintaining a pluralism of information and of culture and at contributing to the formation of public opinion, served "the protection of the ... rights of others" within the meaning of § 2 of Article 10 of the Convention. In any event, the interference satisfied the third sentence of Article 10 § 1 of the Convention in that it served the purpose of maintaining the "quality and balance of programmes", as confirmed by the Court in the *Informationsverein Lentia* case (see the judgment cited above, p. 15, §§ 33-34). Furthermore, the Government submit that the measure was proportionate as being "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. As the Commission pointed out, the particular political circumstances in Switzerland must be taken into consideration, necessitating "the application of sensitive political criteria such as cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federalist policy" (see *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland*, application no. 10746/84, decision of 16 October 1986, DR 49, p. 140). These criteria are directly reflected in Section 55bis § 2 of the Swiss Federal Constitution. In the present case,

the request of Car Tv Ag did not at all comply with the requirements stated in Section 3 § 1 of the RTA which aims precisely at offering a common basis of informations not limited to a particular segment of viewers. This aspect is of primordial importance in a country marked by cultural and linguistic pluralism. In the Government's opinion, the Federal Council would have granted the licence, if Car Tv Ag had included cultural elements in its program. For instance, another television program, the Star Tv, received such a licence as its aim was the promotion of Swiss and European films. Car Tv Ag, on the other hand, did not include such cultural elements. Indeed, it contained public information on motorised mobility which is part of the licence granted by the Federal Council to the Swiss Society of Radio and Television. Clearly, the Federal Council did not wish to say that questions concerning automobiles were not worthy of being dealt with on television. The Government invoke the Commission's decision in the *Hins and Hagenholtz v. the Netherlands* case which referred to "the aim of pluralism pursued in the Dutch broadcast system and policy" (see application no. 25987/94, decision of 8 March 1996, DR 84-A, p. 146). Moreover, even if the Federal Council did not refer to the limited number of broadcasting frequencies, even on cable television such frequencies are limited. It is conceivable that the Federal Council would have decided to reserve the licence for a future broadcasting program, such as Star Tv, which complied better with the cultural requirements for such a program. The applicant considers that the Government no longer refer to certain arguments invoked by the Federal Government, for instance that Car Tv Ag would bring about the "segmentation and atomisation" of society. Even so, the refusal to grant a licence was arbitrary. The Government's conclusion, that a democratic debate is primarily made possible by providing a full program, is neither proved by the facts or by research or even by one's own experience. In any event, cable networks today are already distributing a large number of specialised programs. Such programs are very common in Germany and the United States, yet no research has proved that democratic debate has been disrupted in these countries. In Switzerland in 1997 there were an average of 45 TV and 50 FM radio programs of various types, thus bringing about integration and a communication culture resulting from the existing media taken as a whole. It can also not be said that Car Tv Ag aimed primarily at entertaining the viewer. The application for a licence made it clear that the program would have been based on a strictly journalistic and pluralistic approach and would have also provided information on such matters as environmental issues. The applicant further points out that the project of Car Tv Ag complied with the various rules and regulations, and that the refusal of the licence was based on arbitrary assumptions. This explains why the reasons herefor do not correspond with any of the aims justifying an interference stated in Article 10 § 2 of the Convention. The present television program, like all the other ones, would have made its own contribution towards shaping public opinion. Furthermore, the present program would have duly taken account of the specific linguistic and political situation in Switzerland. For instance, in addition to other measures to ensure pluralism, it was planned to set up a French-language program. It was all the more discriminating that the Government approved a licence for Top TV, a weather channel exclusively devoted to reporting on the weather. It is also discriminatory to state that other channels are already dealing with issues of automobiles. If this were true, it is clear that the public is interested, and that such a topic can and should be covered by an additional program. The applicant concludes by pointing out that in 1997 there were still frequencies available on the cable networks. Indeed, Car Tv Ag had been assured a channel by the largest cable operator, which was also going to be a shareholder. It cannot be up to the licensing authority to make

its opinion dependent on the availability of channels in the cable networks. Here, Section 42 of the RTA contains a "must carry" clause which conclusively regulates this question. The Court considers, in the light of the parties' submissions, that the application raises serious issues of law and fact under the Convention, the determination of which should depend on an examination of its merits. The Court concludes therefore that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established. Entscheid For these reasons, the Court unanimously Declares the application admissible, without prejudging the merits of the case. Erik Fribergh Christos Rozakis Registrar President

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