

In the case of Telesystem Tirol Kabeltelevision v. Austria (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B (2), as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr J.M. Morenilla,
Sir John Freeland,
Mr A.B. Baka,
Mr G. Mifsud Bonnici,
Mr P. Kuris,
Mr E. Levits,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 29 May 1997,

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

Notes by the Registrar

1. The case is numbered 21/1996/640/824. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

PROCEDURE

1. The case was referred to the Court by Telesystem Tirol Kabeltelevision Unterland Gesellschaft mbH & Co KG, a limited partnership under Austrian law ("the applicant"), on 26 February 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 19182/91) against the Republic of Austria lodged by the applicant with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) on 29 November 1991.

The applicant's application bringing the case before the Court referred to Article 48 of the Convention (art. 48), as amended in respect of Austria by Protocol No. 9 (P9). The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention (art. 10).

2. On 29 March 1996 the Court's Screening Panel decided not to decline consideration of the case and to submit it to the Court (Article 48 para. 2 of the Convention) (art. 48-2).

3. On 23 April 1996 the applicant designated the lawyer who would represent it (Rule 31 of Rules of Court B). The President gave the lawyer leave to use the German language in both the written and the oral proceedings (Rule 28 para. 3).

4. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4). On 30 March 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr J.M. Morenilla, Mr F. Bigi, Mr P. Kuris and Mr E. Levits (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently, Sir John Freeland, Mr A.B. Baka and Mr G. Mifsud Bonnici, substitute judges, replaced Mr Bigi, who had died, and Mr Thór Vilhjálmsson and Mr Gölcüklü, who were unable to take part in the further consideration of the case (Rule 22 para. 1).

5. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 25 September 1996.

6. On 20 November 1996 the Government sent to the Registrar by fax the text of an agreement reached that day with the applicant. On the same date the President decided to cancel the hearing initially arranged to be held on 30 November 1996.

7. The Delegate of the Commission, who had been consulted about the agreement, expressed his opinion on 7 May 1997.

AS TO THE FACTS

I. The circumstances of the case

8. Telesystem Tirol Kabeltelevision Unterland Gesellschaft mbH & Co KG ("Telesystem Tirol Kabeltelevision") is a limited partnership whose registered address is in Wörgl (Tyrol, Austria).

Having obtained authorisation to set up a shared aerial (Gemeinschaftsantennenanlage), the applicant was able to receive broadcast programmes and retransmit them to subscribers via a cable television network.

9. On 11 January 1989 it sent out to its subscribers, via the cable network, some practical information about local life.

10. On the same day the Tirol and Vorarlberg Regional Post and Telecommunications Head Office (Post- und Telegraphendirektion) informed Telesystem Tirol Kabeltelevision that the transmission of this type of information was in breach of the relevant regulations.

11. On 12 January 1989 the applicant applied for authorisation to send out its own programmes via its cable network.

12. On 16 January 1989 the Regional Head Office rejected the above application on the ground that under section 20 (1) of the Broadcasting Ordinance (Rundfunkverordnung - see paragraph 19 below) the applicant could use a shared aerial to pick up broadcasts and retransmit them to its subscribers but not to send out its own programmes on the cable network.

13. The applicant appealed against this decision to the National Post and Telecommunications Head Office (Generaldirektion für die Post- und Telegraphenverwaltung), which dismissed the appeal on 17 February 1989, basing its decision in particular on the Constitutional Court's judgment of 16 December 1983 (see paragraph 22 below).

14. Telesystem Tirol Kabeltelevision then applied to the Constitutional Court (Verfassungsgerichtshof).

15. On 26 November 1990 the Constitutional Court, referring to its judgment of 16 December 1983, decided not to give the application further consideration on the ground that it did not have sufficient prospects of success and passed it on to the Administrative Court (Verwaltungsgerichtshof).

16. On 18 September 1991 the Administrative Court dismissed the application. It held that the applicant was not content with picking up and retransmitting information but was itself creating programmes intended for the public at large and that, regard being had to the Constitutional Court's judgment of 16 December 1983, Telesystem Tirol Kabeltelevision could not therefore be authorised to send out its own programmes.

II. Relevant domestic law

A. The Telecommunications Law of 13 July 1949

17. According to the Telecommunications Law (Fernmeldegesetz) of 13 July 1949, "the right to set up and operate telecommunications installations (Fernmeldeanlagen) is vested exclusively in the federal authorities (Bund)" (section 2 (1)). The latter may however confer on natural or legal persons the power to exercise that right in respect of specific installations (section 3 (1)). No licence is required in certain circumstances, including the setting up of an installation within the confines of a private property (section 5).

B. The Ministerial Ordinance of 18 September 1961 concerning private telecommunications installations

18. The Ministerial Ordinance of 18 September 1961 concerning private telecommunications installations (Verordnung des Bundesministeriums für Verkehr und Elektrizitätswirtschaft über Privatfernmeldeanlagen) lays down, inter alia, the conditions for setting up and operating private telecommunications installations subject to federal supervision. According to the case-law, it cannot however constitute the legal basis for the grant of licences.

C. The 1965 Broadcasting Ordinance

19. Section 20 (1) of the 1965 Broadcasting Ordinance provides that radio signals must be retransmitted in full to users immediately after being picked up.

Under section 24 of the Ordinance, in the amended version in force since 31 July 1993 (Official Gazette - Bundesgesetzblatt - no. 507/1993) the bearers of a licence to operate a shared aerial may, without having to seek further permission, send text via the cable network, using their own equipment (paragraph 1). By means of this type of teletext it is possible, inter alia, to impart information to the members of a community or the population of a region in the form of alphanumeric symbols, other graphical signs or pages of teletext. This is an additional service provided to subscribers (via a separate channel and the vertical interval of the television signal).

D. The Constitutional Law of 10 July 1974 guaranteeing the independence of broadcasting

20. According to section 1 of the Constitutional Law of 10 July 1974 guaranteeing the independence of broadcasting (Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks),

"...

2. Broadcasting shall be governed by more detailed rules to be set out in a federal law. Such a law must, inter alia, contain provisions guaranteeing the objectivity and impartiality of reporting, the diversity of opinions, balanced programming and the independence of persons and bodies responsible for carrying out the duties defined in paragraph 1.

3. Broadcasting within the meaning of paragraph 1 shall be a public service."

E. The Law of 10 July 1974 on the Austrian Broadcasting Corporation

21. The Law of 10 July 1974 on the Austrian Broadcasting Corporation (Bundesgesetz über die Aufgaben und die Einrichtung des Österreichischen Rundfunks) established the Austrian Broadcasting Corporation with the status of an autonomous public-law corporation.

It is under a duty to provide comprehensive news coverage of major political, economic, cultural and sporting events; to this end, it has to broadcast, in compliance with the requirements of objectivity and diversity of views, in particular current affairs, news reports, commentaries and critical opinions (section 2 (1) (1)), and to do so via at least two television channels and three radio stations, one of which must be a regional station (section 3). Broadcasting time must be allocated to the political parties represented in the national Parliament and to representative associations (section 5 (1)).

A supervisory board (Kommission zur Wahrung des Rundfunkgesetzes) rules on all disputes concerning the application of the above-mentioned law which fall outside the jurisdiction of an administrative authority or court (sections 25 and 27). It is composed of seventeen independent members, including nine judges, appointed for terms of four years by the President of the Republic on the proposal of the Federal Government.

F. The Constitutional Court's judgment of 16 December 1983

22. In a judgment of 16 December 1983 the Constitutional Court held that the freedom to set up and operate radio and television stations was subject to the powers accorded to the legislature under paragraph 1 in fine and paragraph 2 of Article 10 of the Convention (art. 10-1, art. 10-2) (Gesetzesvorbehalt). The Constitutional Broadcasting Law had instituted a system which made all activity of this type subject to the grant of a licence by the federal legislature. This system was intended to ensure objectivity and diversity of opinions (Meinungsvielfalt), and would be ineffective if it were possible for everybody to obtain the requisite authorisation. As matters stood, the right to broadcast was restricted to the Austrian Broadcasting Corporation, as no implementing legislation had been enacted in addition to the law governing that organisation (see the Informationsverein Lentia and Others v. Austria judgment of 24 November 1993, Series A no. 276, pp. 8-9, para. 10).

G. The Constitutional Court's judgments of 27 September 1995 and 8 October 1996

23. In a judgment of 27 September 1995 the Constitutional Court set aside with effect from 1 August 1996 the rule limiting cable distribution to the retransmission of programmes produced by others ("passive broadcasting") and the transmission of text, on the ground that it was contrary to Article 10 of the Convention (art. 10). In that connection the Constitutional Court referred explicitly to the judgment given by the European Court of Human Rights on 24 November 1993 in the case of Informationsverein Lentia and Others

(loc. cit.). Since 1 August 1996 the transmission of original programmes ("active broadcasting") has accordingly been legal, just as passive broadcasting already was.

24. In a judgment of 8 October 1996 the Constitutional Court declared unconstitutional the prohibition of commercial advertising laid down in section 24b (2) of the Broadcasting Ordinance, on the ground that it was contrary to Article 10 of the Convention (art. 10) and restricted the freedom to carry on a gainful occupation.

PROCEEDINGS BEFORE THE COMMISSION

25. Telesystem Tirol Kabeltelevision applied to the Commission on 29 November 1991. Relying on Article 10 of the Convention (art. 10), it complained that, pursuant to Austrian law, it had been refused permission to send out its own programmes on account of the Austrian Broadcasting Corporation's monopoly.

26. On 17 January 1995 the Commission declared the application (no. 19182/91) admissible. In its report of 18 October 1995 it expressed the unanimous opinion that there had been a violation of Article 10 of the Convention (art. 10). The full text of the Commission's opinion is reproduced as an annex to this judgment (1).

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-III), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

27. On 20 November 1996 the Court received by fax from Mr Klaus Fabjan, Minister Plenipotentiary at the Federal Ministry of Foreign Affairs, the following text, signed that day by Mr Fabjan and the applicant's lawyer:

"...

1. The Government of the Republic of Austria will pay to the applicant a sum amounting to altogether ATS 200,000 [Austrian schillings] as compensation in respect of any possible claims relating to the present application.

This amount will be paid to the applicant's counsel,
Mag. Dr. Eleonore Berchtold-Ostermann ...

2. The applicant declares its application settled.

3. The applicant waives the right to any further claims before any national or international body against the Republic of Austria relating to the present application.

4. The Austrian Government will take the necessary steps to implement the terms of the friendly settlement within one month after the Court has decided to strike the case out of its list.

In witness whereof the undersigned, being duly authorised thereto, have signed this Statement."

In the same letter Mr Fabjan requested the Court to strike the case out of its list. He drew attention to the fact that redress had been afforded for the violation of Article 10 (art. 10) complained of by the applicant in that, since the Constitutional Court's judgments of 27 September 1995 and 8 October 1996 (see paragraphs 23 and 24

above), "the dissemination of various objective information services, the prohibition of which the applicant company challenged at the domestic level, and the dissemination of commercial advertising are now legally permissible".

28. The Delegate of the Commission was consulted in accordance with Rule 51 para. 2 of Rules of Court B and stated that he had no objection to the friendly settlement reached by the parties. Moreover, he assumed that "the matter which gave rise to the application, namely the State monopoly on broadcasting, has been resolved to the satisfaction of all concerned".

29. The Court takes formal note of the friendly settlement reached by the Government and the applicant. It discerns no reason of public policy militating against striking the case out of its list (Rule 51 paras. 2 and 4 of Rules of Court B).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Decides to strike the case out of the list.

Done in English and in French, and notified in writing under Rule 57 para. 2, second sub-paragraph, of Rules of Court B on 9 June 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar