



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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37093/97
by INFORMATIONSVEREIN LENTIA
against Austria

The European Court of Human Rights (First Section), sitting on 10 January 2002 as a Chamber composed of

Mr C.L. ROZAKIS, *President*,
Mr G. BONELLO,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mrs S. BOTOCHAROVA,
Mr V. ZAGREBELSKY,
Mrs E. STEINER, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 26 May 1997 and registered on 29 July 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, Informationsverein Lentia, is an association with its seat in Linz. It is represented before the Court by Mr B. Binder, a lawyer practising in Linz. The respondent Government are represented by Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

A. The circumstances of the case

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

The applicant association, whose members are co-proprietors and inhabitants of a large housing project in Linz, has the aim of improving communication between the inhabitants *inter alia* by setting up an internal cable network. In proceedings brought in 1978 and terminated in 1986, it unsuccessfully applied for an operating licence.

On 24 November 1993 the European Court of Human Rights gave judgment in the case of Informationsverein Lentia and Others v. Austria (Series A no. 276), finding a violation of Article 10 of the Convention as regards *inter alia* the applicant's complaint that it had been unable to set up a television station due to the broadcasting monopoly of the Austrian Broadcasting Corporation (*Österreichischer Rundfunk*, "the ORF").

On 18 August 1994 the applicant, referring to the above judgment, filed a new request for an operating licence under section 5 § 1 of the Telecommunications Law 1993 (*Fernmeldegesetz*) with the Telecommunications Office (*Fernmeldebüro*, 'the Telecommunications Office') for Upper Austria and Salzburg. It stated that its intention was to establish a cable broadcasting installation in order to disseminate a radio and television programme exclusively addressed to the inhabitants of the housing project and aiming at improving communication between them.

On 3 May 1995 the Telecommunications Office dismissed the request. It referred to the Constitutional Law of 10 July 1974 guaranteeing the independence of broadcasting (*Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks*, 'the Constitutional Broadcasting Law'), which provides that broadcasting shall be authorised by federal legislation and noted that such legislation had only been enacted in respect of the ORF and in respect of regional or local radio broadcasting. However, no such

legislation had been adopted for other broadcasters. The judgment of 24 November 1993 by the European Court of Human Rights did not constitute a legal basis for granting an operating licence. The Telecommunications Office further noted that the technical description of the broadcasting installation was too general.

On 9 November 1995 the Federal Ministry of Public Economy and Transport (*Bundesministerium für öffentliche Wirtschaft und Verkehr*) dismissed the applicant's appeal. Referring to the Constitutional Court's (*Verfassungsgerichtshof*) judgment of 16 December 1983, it confirmed the Telecommunication Office's assessment that the Constitutional Broadcasting Law applied to the applicant's request as well as the reasons for dismissing it. In addition it noted that following the Constitutional Court's judgment of 27 September 1995 which was to take effect on 1 August 1996, unless legislation was passed before then, there would no longer be any obstacle to the creation and transmission of broadcasting programmes via cable. However, on the basis of the relevant law as it stood, the operating licence requested by the applicant could not be granted.

Subsequently, the applicant lodged a complaint with the Constitutional Court. It repeated that its intention was to establish a broadcasting installation in order to disseminate a radio and television programme exclusively addressed to the inhabitants of the housing project and aiming at improving communication between them. Even if this project constituted "broadcasting" within the meaning of the Constitutional Broadcasting Act - which the applicant contested - the latter had to be interpreted with a view to Article 10 of the Convention. Thus an operating licence under section 5 § 1 of the Telecommunications Act could only be refused where the requirements of the second paragraph of Article 10 were met.

On 10 June 1996 the Constitutional Court, referring to its judgments of 16 December 1983 and 27 September 1995, refused to deal with the applicant's complaint for lack of prospects of success and transferred the case to the Administrative Court (*Verwaltungsgerichtshof*).

On 12 February 1997 the Administrative Court dismissed the applicant's complaint. As regards the applicant's argument that the cable network it intended to set up did not fall within the scope of the Constitutional Broadcasting Law, since its programmes were not addressed to the general public, the court noted that this argument had already been dismissed by the Constitutional Court in its decision of 16 December 1983, where it considered that the programmes the applicant wanted to broadcast were to be directed at a general audience of variable composition. The applicant had not submitted any new facts that would allow departure from this assessment. Notwithstanding Article 10 of the Convention, an operating licence for a broadcasting installation could only be granted where broadcasting had been authorised by federal legislation. Such legislation had only been enacted in respect of the *ORF* and in respect of regional or local

radio broadcasting. However, no such legislation had been adopted for the type of broadcasting envisaged by the applicant.

On 1 July 1997 the Cable and Satellite Broadcasting Act entered into force. The applicant has not notified any cable broadcasting activities to the competent authorities.

B. Relevant domestic law and practice

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

According to Article 1 of the Constitutional Broadcasting Law 1974

"1. Broadcasting is the dissemination of all types of presentations which are intended for the general public and which employ words, sounds and images on the basis of electric oscillations without connecting circuits and/or alongside or by means of a conducting medium and the operation of technical facilities serving this purpose.

2. Broadcasting shall be governed by 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. "

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

The Austrian Broadcasting Corporation Law 1974 (*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 objectively and with a diversity of views, *inter alia*, 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 (section 5 (1)).

A supervisory board (*Kommission zur Wahrung des Rundfunkgesetzes*) rules on all disputes concerning the application of this 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.

3. *The Constitutional Court's judgment of 16 December 1983*

In a judgment of 16 December 1983 the Constitutional Court held that the freedom to set up and operate radio and television broadcasting stations was subject to the powers accorded to the legislature under paragraph 1 *in fine* and paragraph 2 of Article 10 of the Convention. The Constitutional Broadcasting Law had instituted a system which made all activities 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, and would be ineffective if it were possible for everybody to obtain the requisite authorisation. As matters stood, the right to broadcast was limited to the *ORF*, as no implementing legislation had been enacted in addition to the law governing that organisation.

4. *The Administrative Court's judgment of 8 July 1992*

On 8 July 1992 the Administrative Court decided that the Constitutional Broadcasting Law of 10 July 1974 did not cover "passive" broadcasting via cable, in other words the broadcasting in their entirety by cable of programmes picked up by an aerial. Consequently, the mere fact that such programmes originated from a foreign station and were directed principally or exclusively at an Austrian audience could not constitute grounds for refusing the licence necessary for this type of operation.

5. *The Regional Broadcasting Law of 9 July 1993*

The Regional Broadcasting Law 1993 (*Regionalradiogesetz*), which came into force on 1 January 1994, governs the licensing of local and regional terrestrial radio stations.

It provides for the allocation of one regional radio licence for each of the *Länder* and of two such licences for Vienna, and for the allocation of local radio licences as required by local demand (section 2). All programmes have to comply with the principles of objectivity and diversity of opinions (section 4).

6. *The Telecommunications Law of 28 December 1993*

Pursuant to section 5 § 1 of the Telecommunications Law 1993, which entered into force on 1 April 1994, the setting up and operation of telecommunication installations, including broadcasting installations, requires a licence.

Under the Telecommunications Law 1997, which entered into force on 1 July 1997, no operating licence is required for running a cable network.

7. *The Constitutional Court's judgment of 27 September 1995*

In a judgment of 27 September 1995 the Constitutional Court set aside, with effect from 1 August 1996, parts of the 1965 Broadcasting Ordinance, which limited cable distribution to the retransmission of programmes produced by others ("passive cable broadcasting") and the transmission of text, on the ground that this was contrary to Article 10 of the Convention. In that connection the Constitutional Court referred explicitly to the Informationsverein Lentia and Others v. Austria judgment of 24 November 1993 (*loc. cit.*). Thus, as of 1 August 1996 the transmission via cable of original programmes ("active cable broadcasting") was legal, just as passive cable broadcasting already was.

8. *The Cable and Satellite Broadcasting Law 1997*

In summer 1996 the legislative process for a cable broadcasting law was instituted. A draft bill for a Cable and Satellite Broadcasting Law (*Kabel- und Satelliten-Rundfunkgesetz*) was presented in Parliament in November 1996 and was adopted on 20 March 1997.

The Cable and Satellite Broadcasting Law 1997 entered into force on 1 July 1997. It provides that satellite broadcasting requires a licence by the Broadcasting Authority (section 3 (1)). Cable broadcasting has to be notified to the authority. The notification has to show compliance with the requirements of sections 5 and 6. A notification is not required for cable-networks which serve no more than ten households (section 4). Cable and satellite broadcasters have to be Austrian nationals or legal persons with headquarters in Austria (section 5 (1)). Certain legal persons, such as public law institutions, the political parties and the *ORF*, are excluded from cable and satellite broadcasting (section 5 (2)). The owners of domestic or foreign daily newspapers or weekly periodicals are also excluded from cable and satellite broadcasting (section 6 (1)).

Like under the Constitutional Broadcasting Law, a supervisory board composed of seventeen independent members, including nine judges, is established in order to exercise judicial control.

COMPLAINTS

The applicant complains under Article 10 of the Convention that despite the Informationsverein Lentia and Others v. Austria judgment of 24 November 1993, it was still unable to obtain an operating licence for cable broadcasting due to the continuing television broadcasting monopoly of the *ORF*.

THE LAW

The applicant complains that despite the Court's Informationsverein Lentia and Others v. Austria judgment of 24 November 1993 it was still unable to obtain an operating licence for cable broadcasting. It invoked Article 10 of the Convention, which 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.”

The Government contend that the applicant failed to exhaust domestic remedies in two respects. Firstly, they submit that the applicant provided too short a description of its broadcasting project in the domestic proceedings. Thus, the authorities were not in a position to conclude that the applicant's programmes would not be intended for the general public and would therefore not fall within the scope of the Constitutional Broadcasting Law. Secondly, the Government asserted that the applicant failed to request the supervisory board set up under the Cable and Satellite Broadcasting Law 1997 to give a declaratory decision to the effect that the intended project did not constitute “broadcasting” within the meaning of the Constitutional Broadcasting Law on the ground that it was not intended for the general public and would, thus, not fall within the scope of the Cable and Satellite Broadcasting Law either.

Further, the Government submit that the applicant can no longer claim to be a victim of the alleged violation. As of 1 August 1996, the date when the Constitutional Court's judgment of 27 September 1995 took effect, cable broadcasting was no longer subject to any legal restrictions. Thus, there was no longer an obstacle to granting an operating licence under section 5 of the Telecommunications Law 1993. With the entry into force of the Cable and Satellite Broadcasting Law 1997 and the Telecommunications Law 1997 on 1 July 1997, an operating licence was no longer required in respect of cable broadcasting. Cable broadcasting simply has to be notified to the Broadcasting Authority.

The applicant contests the Government's view. It maintains that it has sufficiently substantiated its request for an operating licence. None of the domestic authorities required further specification. On the contrary, all the

domestic authorities including the Administrative Court found that the programme the applicant intended to disseminate constituted “broadcasting” falling within the scope of the Constitutional Broadcasting Law. Further the applicant points out that the task of the supervisory board established under the Cable and Satellite Broadcasting Law 1997 is to ensure that cable and satellite broadcasters comply with the law. There was nothing to indicate that it would be competent to rule on whether or not the dissemination of a particular programme would constitute “broadcasting” at all.

The applicant contests that it has been free to carry out its broadcasting project since 1 August 1996 and 1 July 1997, respectively. It submits in particular that the Cable and Satellite Broadcasting Law 1997 is not geared towards non-commercial broadcasting addressed to the inhabitants of a particular housing project as it intends to operate. Further, Austrian broadcasting law is still not in conformity with the Convention as private broadcasters have no access to terrestrial broadcasting. It also complains that the Constitutional Broadcasting Law contravenes the third sentence of Article 10 § 1 of the Convention, as it sets up a licensing system for any form of broadcasting and not only for broadcasting enterprises.

The Court will first deal with the Government’s argument that the applicant can no longer claim to be a victim of the alleged violation within the meaning of Article 34 of the Convention. The Court notes that from 18 August 1994, when the applicant filed its new request for an operating license until 1 August 1996 the same legal situation as was examined in the Informationsverein Lentia and Others v. Austria judgment (*loc. cit.*) pertained. Since 1 August 1996, private cable broadcasting became possible.

The Court finds that the changes in law which occurred after 1 August 1996 cannot remove the applicant’s victim status as regards the preceding period, during which legislation that had been found to be contrary to Article 10 of the Convention in the Informationsverein Lentia and Others v. Austria judgment (*loc. cit.*) remained in force. In this context the Court recalls that the freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 46 cannot allow it to suspend the application of the Convention while waiting for a reform to be completed (see the Vermeire v. Belgium judgment of 29 November 1991, Series A no. 214-C, p. 83, § 26).

As regards the period after 1 August 1996, the Court notes that the applicant did not request an operating licence when there were no longer any restrictions on cable broadcasting, nor did it after 1 July 1997 notify any cable broadcasting activities to the competent authorities established under the Cable and Satellite Broadcasting Law 1997.

In the absence of any proceedings brought or any other steps taken by the applicant in order to broadcast, it cannot be said that the applicant continued to be a victim of the alleged violation after the change in law. Its complaints, namely that the Cable and Satellite Broadcasting Act is not

geared towards non-commercial broadcasting activities, that terrestrial television broadcasting is still reserved to the ORF and that Austrian law provides for a licensing system for any form of broadcasting and not only for broadcasting enterprises, constitute a general claim that Austrian legislation is not in conformity with Article 10 of the Convention. However, it is not the Court's task to rule *in abstracto* on the compatibility of domestic legislation with the Convention (see for instance, the Radio ABC v. Austria judgment of 20 October 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2200, § 37). In this respect, the applicant cannot claim to be a victim of a violation of Article 10 of the Convention.

It follows that the applicant's complaint, as far as it concerns the period since 1 August 1996 is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

For the period until 1 August 1996 the Court will examine the question whether the applicant has exhausted domestic remedies. Given its above finding it is not necessary, however, to examine the question whether the applicant has exhausted any remedies available under the Cable and Satellite Broadcasting Law 1997 since that law only entered into force on 1 July 1997.

The Court recalls that pursuant to Article 35 § 1 it may only deal with the matter after all domestic remedies have been exhausted. Article 35 § 1 requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, § 66).

The Government allege that the applicant failed to put all relevant facts before the domestic authorities and, thus, did not enable them to conclude that its broadcasting project was not intended for the general public and would therefore not fall within the scope of the Constitutional Broadcasting Law.

The Court notes that the applicant, when requesting an operating licence referred to the Informationsverein Lentia and Others v. Austria judgment and by and large submitted the same project to the authorities which had already been the subject of that judgment (*loc. cit.*, p. 8, § 8). In particular it stated that it intended to disseminate a radio and television programme via cable exclusively addressed to the inhabitants of the housing project and aiming at improving communication between them. The competent authorities qualified this intended activity as "broadcasting" within the meaning of the Constitutional Broadcasting Law subject to the licensing requirements provided therein. The applicant explicitly contested this view. Nevertheless, the Administrative Court confirmed the lower authorities' assessment that the programmes were intended for the general public and thus fell within the scope of the Constitutional Broadcasting Law.

However, given that the law had not changed since the Informationsverein Lentia and Others v. Austria judgment the authorities found that they were not in a position to grant the applicant's request.

In these circumstances, the Court is satisfied that the applicant brought the substance of the complaint it is now raising before the Court to the attention of the domestic authorities thus enabling them to redress the alleged violation of the Convention at the domestic level (see the above-cited Akdivar and Others judgment, *ibid.*, § 65).

It follows that the applicant has exhausted domestic remedies as required by Article 35 § 1 of the Convention.

The Government did not make observations on the merits of the application while the applicant maintained that the impossibility to obtain an operating licence following the Informationsverein Lentia and Others v. Austria judgment violated its right to impart information as guaranteed by Article 10 of the Convention.

The Court considers, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint that, despite the Court's Informationsverein Lentia and Others v. Austria judgment of 24 November 1993 it was still unable to obtain an operating licence for cable broadcasting as regards the period from 18 August 1994 until 1 August 1996;

Declares inadmissible the remainder of the application.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President