

(TRANSLATION)

THE FACTS

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

The applicants are two associations established to broadcast local radio programmes, the Verein Alternatives Lokalradio Bern, whose registered office is in

Berne, and the Verein Radio Dreyeckland Basel, whose registered office is in Basle. They are represented before the Commission by Mr. W. Egloff, a lawyer in Berne.

In Switzerland, radio programmes can only be broadcast if a concession has been granted by the Federal Council which, in accordance with Section 3 of the 1922 Telegraph and Telephone Communications Act, has sole authority for this.

In 1931, the Federal Council first granted a concession to the SSR (Société suisse de radio-télévision — Swiss radio-television company) to operate wireless radio transmitters. The concession was renewed on a number of occasions, in particular on 22 December 1980. Until 1982, the Federal Council did not grant any other concessions, with the result that the Swiss radio-television company enjoyed a *de facto* monopoly.

However, on 7 June 1982 the Federal Council issued a decree on local broadcasting trials (Verordnung über lokale Rundfunkversuche) which, as part of an experimental programme scheduled to last until 1988, provided for a number of local broadcasting trials over a certain period of time with a view to drafting legislation on the subject.

Section 5 of the decree expressly stated that experimental licences were not granted as of right ("Ein Anspruch auf die Versuchserlaubnis besteht nicht").

All applications for concessions had to be submitted before 30 December 1982 (Section 29 of the decree).

One of the applicant associations submitted its written application for a local broadcasting concession on 20 September 1982 and the other on 29 September 1982. Applications were also submitted by 212 other associations from throughout Switzerland.

In a decision dated 20 June 1983, the Swiss Federal Council decided to grant local broadcasting concessions to 36 of the 214 organisations and associations which had submitted applications, including two for the Berne region and one for the Basle region.

In decisions dated 15 July and notified on 16 July 1983, the first and second applicants were informed that the Federal Council had decided not to grant them concessions.

In the two rejection decisions of 15 July 1983, the Federal Council made the following statement:

"The application certainly fulfilled the formal conditions set out in Section 28 of the 1982 decree and the substantive conditions provided for in Section 7, and might have been in a position to fulfil one or more of the experimental aims set out in the decree, particularly in Sections 3 and 7 para. 1 (f)."

After stating that only a limited number of local broadcasting trials were anticipated in the 1982 decree (Section 1) and that the number of frequencies available was limited, the Federal Council based its decision to reject the applications on Section 8 paras. 1 and 2 (*) of the 1982 decree.

In effect, the Federal Council considered that, even if an application for a concession met the substantive requirements set out in paragraph 1 of Section 8 fully enough to be given preference over other applications, the application could nevertheless be rejected if, in accordance with Section 8 para. 2, there was a broader obligation to accept another application which conformed more closely to the experimental objectives set out in the 1982 decree on local broadcasting trials.

In the name of the Federal Chancellor, the Federal Council also stated that there was no such thing as entitlement to an experimental broadcasting concession and that the decision to reject the applications was final.

Nevertheless, the applicants wrote to the Federal Council, the first on 12 and the second on 28 August 1983, asking for the decision to be reconsidered. No replies were received.

The applicant associations state that in such a case Swiss law gives no right to seek a remedy against a decision taken by the Federal Council, the highest executive authority.

COMPLAINTS

1. The applicant associations complain that the Federal Council arbitrarily refused to grant them a local broadcasting concession, even though they fulfilled all the conditions for obtaining such a concession laid down in the decree of 7 June 1982 on local broadcasting trials.

The applicants argue that the authority given to States in the third sentence of Article 10 para. 1 to require the licensing of broadcasting enterprises could in no way empower the competent authorities to make an arbitrary selection among the large number of applications submitted on the basis of criteria which could not be verified.

(*) Section 8 states:

1. When several applications for licences are submitted for the same area, the competent authority shall give preference to the applicant
 - a. which has objectives other than those of its competitors;
 - b. whose normal programmes and special broadcasts give particular prominence to local events and the applicant's own productions;
 - c. for whom it can be assumed that the parallel enquiry (Section 27) will give more conclusive results;
 - d. whose representative body is firmly established.
2. Before granting licences, the authority shall ensure that the trials take place in regions which are as socially, culturally and geographically varied as possible, and shall try to encompass as many of the stated objectives as possible."

Moreover, the interference in the applicants' right to impart information and ideas in public broadcasts was not prescribed by law. In the applicants' opinion, under the 1922 Act federal responsibilities in the field of broadcasting do not extend beyond technical matters. However, the 1982 decree, which was introduced in the form of legislation implementing (Ausführungsvorschrift) the 1922 Act, contained a considerable number of provisions relating to the nature and content of programmes.

In any case, the Federal Council could not, without violating Article 10 of the Convention, simply base its decision of 15 July 1983 to reject the applications on Section 8 para. 2 of the decree of 7 June 1982.

The applicants claim that the great majority of concessions were granted to purely commercial radio stations, although the absence of advertising was supposed to be a determining factor in the selection process. Moreover, the decree's expressly stated objectives relating to active listener participation in programmes and the importance given to local events and own productions were not determining factors since the grant of concessions in the applicants' geographical areas did not respect these objectives.

2. The applicant associations also allege that there has been a violation of Article 14 of the Convention in conjunction with Article 10.

On this point, they state that they had planned to set aside broadcasting time so that the views of national minorities living in the Berne and Basle regions could be aired, and that only one of the 20 concessions granted in German-speaking Switzerland provides for foreign language broadcasts, even though one fifth of the population of the area have a mother tongue other than German.

3. Finally, the applicants allege that Article 13 of the Convention has been violated, claiming that under Swiss law they have no right to seek a remedy against an individual decision taken by the Federal Council, the highest executive authority.

THE LAW

1. As to the alleged violation of Article 10 of the Convention

The applicant associations complain that the Federal Council arbitrarily refused to grant them a local broadcasting concession, even though they fulfilled all the conditions therefor laid down in the decree of 7 June 1982 on local broadcasting trials.

In support of this, they invoke Article 10 of the Convention which provides that:

"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 respondent Government stress that Article 10 of the Convention expressly states that it "shall not prevent States from requiring the licensing of broadcasting ... enterprises". The Government thereby argue that the right to a broadcasting concession cannot be based on Article 10 of the Convention.

The Commission recalls firstly that the right to freedom of expression recognised in Article 10 includes among other things the freedom to impart information and ideas through broadcasting (cf. No. 6452/74, Dec. 12.3.76, D.R. 5 p. 3).

It notes that the applicants do not complain of the existence in Switzerland of a licensing system *per se*, whose compatibility with the Convention appears clearly from the Commission's case-law (cf. No. 2071/67, Dec. 7.2.68, Collection 26 p. 71) and is specifically provided for in Article 10 para. 1, *in fine*, of the Convention.

The Commission notes that in Switzerland, as in other States Parties to the Convention, considerably more enterprises are capable of producing radio broadcasts as a result of technical advances in broadcasting. However, given the continued limitation on the number of frequencies available, it is clear that, by definition, there is always an unmet demand for licences.

The Commission notes that, in this case, the decision about which of a number of competing undertakings would be granted a broadcasting licence was based on Section 8 of the decree of 7 June 1982 on local broadcasting trials.

The Commission recalls that freedom of expression is one of the essential foundations of a democratic society (Eur. Court H.R., Handyside judgment of 7 December 1976, Series A no. 24, para. 49). The Commission considers that this principle is of particular importance, not only for the press (cf. Eur. Court H.R., Sunday Times judgment of 26 April 1979, Series A no. 30, para. 65), but also for broadcasting.

States do not, therefore, have an unlimited margin of appreciation concerning licensing systems. Although broadcasting enterprises have no guarantee of any right

to a licence under the Convention, it is nevertheless the case that the rejection by a State of a licence application must not be manifestly arbitrary or discriminatory, and thereby contrary to the principles set out in the preamble to the Convention and the rights secured therein.

For this reason, a licensing system not respecting the requirements of pluralism, tolerance and broadmindedness without which there is no democratic society (cf. Eur. Court H.R., *Handyside* judgment, *loc. cit.*) would thereby infringe Article 10 para. 1 of the Convention (cf. No. 4515/70, Dec. 12.7.71, Yearbook 14 p. 538).

In this case, the Commission notes first that the Federal Council (i.e. the Government) had recognised in its response of 15 July 1983 that the applicant associations actually fulfilled all the conditions for obtaining such a concession laid down in the decree of 7 June 1982 on local broadcasting trials. The Government also recognise in their written observations that the selection criteria listed in the decree of 7 June 1982 had clear political overtones and that the refusal to grant a licence was as much a political as an administrative act.

The Commission attaches importance to the fact that the applicant associations met all the conditions set out in the decree of 7 June 1982, while fully realising that the limited number of frequencies available necessitated a choice between different broadcasting enterprises.

The Commission considers that the political element in the decision, acknowledged by the Government, does not necessarily signify that the decision was arbitrary. The Commission takes into consideration the particular political circumstances in Switzerland which necessitate the application of sensitive political criteria such as cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federalist policy.

The Commission also lays particular stress on the fact that these were local broadcasting trials and that, in accordance with Section 11 of the decree of 7 June 1982, the contentious licence was in any case to run for a maximum of five years, that is until 1988.

After considering the submissions of the parties and examining the complaint, the Commission finds no evidence that the rights and freedoms guaranteed by the Convention, and in particular Article 10, have been violated.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. *As to the alleged violation of Article 10 in conjunction with Article 14 of the Convention*

The applicant associations complain that the refusal to grant them trial broadcasting concessions reflected language discrimination. They maintain that neither in

the City of Basle, where a high percentage of the population speaks a foreign language, nor in the City of Berne, was a licence granted to an undertaking producing foreign language broadcasts.

The Government maintain that the refusal to grant a concession was not based on language discrimination and state specifically that, given the limited number of frequencies available, the choice between enterprises which had applied for a trial broadcasting licence was based only on objective criteria, listed in particular in Section 8 of the 1982 decree. They state that, in addition to the SSR (Swiss radio-television company), six broadcasting organisations regularly or at least occasionally broadcast foreign language programmes.

The applicant associations invoke Article 10 of the Convention, in conjunction with Article 14 of the Convention, which reads:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The Commission notes firstly that the applicant associations have failed to show in any way how the Federal Council's rejection of their applications could have been based simply on the fact that they had planned to set aside broadcasting time so that coverage could be given to linguistic minorities living in the Berne and Basle regions.

The Commission nevertheless considers that refusal to grant a broadcasting licence may raise a problem under Article 10, in conjunction with Article 14 of the Convention in specific circumstances. Such a problem would arise, for example, if the refusal to grant a licence resulted directly in a considerable proportion of the inhabitants of the area concerned being deprived of broadcasts in their mother tongue.

In this case, however, the Commission does not consider that the applicants have demonstrated that such specific circumstances exist.

The Commission notes firstly that, with regard to Section 8 of the 1982 decree, the grant of a licence depended particularly on the distinctiveness of programme objectives in a number of spheres. The fact that the applicants planned to broadcast foreign language programmes cannot be regarded as the only factor which the Federal Council took into account.

The Commission notes particularly that according to information provided by the Government (and not contested by the applicants), the foreign language populations of the cities of Basle and Berne are effectively able to receive programmes in their mother tongue, broadcast by private stations, the SSR or foreign stations.

An examination of this complaint, as presented, does not, therefore, reveal any apparent violation of Article 10, in conjunction with Article 14 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. *As to the alleged violation of Article 13 of the Convention*

The applicants allege that Article 13 of the Convention has been violated, arguing that apart from a request for a re-examination, Swiss law gives then no right to seek a remedy, in conjunction with Articles 10 and 14 of the Convention, against the individual decisions on their applications taken by the Federal Council, the highest executive authority.

The respondent Government consider, first, that the opportunity to request a re-examination is sufficient for the purposes of Article 13 of the Convention and, second, that the Federal Council is the highest administrative body in Switzerland. The Government here refer to the Commission's decision in the Crociani and others case (No. 8603/70 *et al.*, Dec. 18.12.80, D.R. 22 pp. 147, 224) which states that the right to an effective remedy guaranteed in this Article is subject to an implied limitation, when it applies to the highest judicial authority.

Article 13 of the Convention states :

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

The Commission notes firstly that the case-law on the interpretation of Article 13 (cf. Eur. Court H.R., *Silver and others* judgment of 25 March 1983, Series A no. 61, para. 113) includes in particular the principle that where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (cf. also Eur. Court H.R., *Klass and others* judgment of 6 December 1978, Series A no. 28, para. 64).

The Commission also refers to its own case-law according to which Article 13 plays a key role in the Convention system at national level because it requires the provision of national safeguards against the misuse of power and the infringement of Convention rights. It represents the counterpart of the requirement to exhaust domestic remedies in Article 26 of the Convention and reflects the subsidiary character of the Convention system to the national systems safeguarding human rights (cf. *X. and Boyle v. United Kingdom*, Comm. Report 7.5.86, para. 73, Eur. Court H.R., Series A no. 131, p. 40).

Nevertheless, the Commission considers that if Article 13 is to apply, the individual relying on it must have an arguable claim to have been the victim of a

violation of one of his rights and freedoms under the Convention. The Commission considers that an arguable claim falls to be determined on the particular facts of each case and should have the following elements:

- it should concern a right or freedom guaranteed by the Convention;
- the claim should not be wholly unsubstantiated on the facts;
- the claim should give rise to a *prima facie* issue relating to the application and interpretation of the Convention (cf. the above Report of 7.5.86, para. 74).

In this case, the Commission considers that the first two conditions for the applicants to have an arguable claim to have been victims of a violation of Articles 10 and 14 of the Convention have been met.

However, according to the Commission's case-law, for a broadcasting enterprise to have an arguable claim to be the victim of a violation of its rights under Articles 10 and 14 of the Convention, the applicants must also claim to be victims of a violation raising a *prima facie* problem relating to the application and interpretation of the Convention.

In the Commission's opinion, as stated above, the decision of the Federal Council not to grant the applicants a broadcasting licence was not made arbitrarily, which would be contrary to Article 10 para. 1, nor in a discriminatory fashion, which would be contrary to Article 14 of the Convention.

Accordingly, the Commission concludes that the case involves an aspect of freedom of expression where national authorities have explicit authority to exercise choice under Article 10 para. 1 *in fine* of the Convention, and that the applicant associations have not been able to show grounds for their claim to have been victims of a violation of their rights under Articles 10 and 14 of the Convention.

It follows that this part of the application must also be rejected as being manifestly all-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.