European Court of Human Rights: Case of Demuth v. Switzerland

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In 1997, Mr. Demuth complained to the European Court of Human Rights that the decision of the Swiss Bundesrat (Federal Council) refusing to grant Car Tv AG a broadcasting licence for cable television ran counter to Article 10 of the European Convention on Human Rights (freedom of expression). He considered that the refusal was arbitrary and discriminatory. In a decision of 16 June 1996, the Federal Council had decided that there was no right, either under Swiss law or under Article 10 of the European Convention, to obtain a broadcasting licence. With reference to the instructions for radio and television listed in Section 3 § 1 and Section 11 § 1 (a) of the Bundesgezetz über Radio und Fernsehen (Radio and Television Act - RTA), the Federal Council was of the opinion that the orientation of the programme content of Car Tv AG was not able to offer the required valuable orientation to comply with the general instructions for radio and television, as the programme focused mainly on entertainment and reports about automobiles.

In its judgment of 5 November 2002, the European Court confirmed its earlier case-law that the refusal to grant a broadcasting licence is to be considered as an interference with the exercise of the right to freedom of expression, namely the right to impart information and ideas under Article 10 para. 1 of the Convention. The question is whether such an interference is legitimate. According to the third sentence of Article 10 para. 1, Member States are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It remains to be determined, however, whether the manner in which the licensing system is applied satisfies the relevant conditions of paragraph 2 of Article 10.

The Court was of the opinion that the relevant provisions of the licensing system of the RTA were capable of contributing to the quality and balance of programmes. This was considered a sufficient legitimate aim, albeit not directly corresponding to any of the aims set out in Article 10 para. 2. The Court also referred to the particular political and cultural structures in Switzerland that necessitate the application of sensitive political criteria such as cultural and linguistic pluralism and a balanced federal policy. The Court saw no reason to doubt the validity of these considerations, which are of considerable importance for a federal State. Such factors, which encourage in particular pluralism in broadcasting may legitimately be taken into account when authorising radio and

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television broadcasts. The Court came to the conclusion that the Swiss Federal Council's decision, guided by the policy that television programmes shall to a certain extent also serve the public interest, did not go beyond the margin of appreciation left to national authorities in such matters. The Court also observed that the refusal to grant the requested licence was not categorical and did not exclude a broadcasting licence once and for all. Although the Court explicitly recognised that opinions may differ as to whether the Federal Council's decision was appropriate and whether the broadcasts should have been authorised in the form in which the request was presented, the Court reached the conclusion that the restriction of the applicant's freedom of expression was necessary in a democratic society. The Court took special note of the Government's assurance that a licence would indeed be granted to Car Tv AG if it included cultural elements in its programme. The Court considered it unnecessary to examine the Government's further ground of justification for refusing the licence, contested by the applicant, namely that there were only a limited number of frequencies available on cable television. By 6 votes to 1, the Court reached the conclusion that there had been no violation of Article 10 of the Convention. The dissenting opinion of Judge G. Jörundsson is annexed to the judgment.

Judgment of the European Court of Human Rights (Second Section), Case of Demuth v. Switzerland, Application no. 38743/97 of 5 November 2002

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