

[MT] Applying a Procedural Rule to Violate Freedom of Expression

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Kevin Aquilina
Faculty of Laws, University of Malta

Digi B Network Ltd. is the sole digital radio platform operating in Malta. It applied to the Broadcasting Authority by means of two separate broadcasting licence applications, in June 2018 and in August 2018, to be permitted to carry two additional digital radio stations on its platform. Although this should have been a very straightforward procedure, the broadcasting regulator never got back to the platform operator with any decision, either within or beyond the statutory four-month period allowed by law; in the meantime, the platform operator was left unaware of the outcome of its applications.

Several months beyond the statutory time limit of four months for the determination of both applications, and after having made several submissions with the broadcasting regulator and filed a judicial protest requesting the Broadcasting Authority to take a decision on the two applications pending before it, the digital radio operator was inevitably constrained to appeal by way of deemed refusal to the Court of Appeal for redress.

However, the Court of Appeal, instead of granting the requested remedy, raised *ex officio* the issue of the invalidity of the appeal, considering such an appeal to have been lodged outside the time limit required by law. The Court of Appeal referred to the Broadcasting Act provision in Article 11(3) which states that:

(3) An applicant whose application has been refused by the [Broadcasting] Authority and who feels that the Authority has not acted in conformity with the rules of natural justice, or that it has acted in a manner which is grossly unreasonable or with undue discrimination, or whose application has been pending for at least four months, may appeal against such a decision or delay to the Court of Appeal in accordance with the procedures laid down in Article 16(5), (6), (7), (9) and (10).

By means of a Court of Appeal judgment of 16 December 2019, the court concluded that, in terms of the Broadcasting Act, the appeal had to be lodged within fifteen days after a period of four months from the lodging of both applications had elapsed. This is because section 16(5) of the Broadcasting Act provides that:

(5) Any broadcasting licensee who feels aggrieved by a decision of the Authority to suspend or determine his or her licence ..., may appeal against such a decision to the Court of Appeal by filing an application within fifteen days from the date of service upon him or her of the decision of the Authority.

This is a case where a procedural rule was applied by the Court of Appeal to violate freedom of expression. First, the Court of Appeal raised a procedural point itself in its judgment whilst applying it in its decision, rather than being a party that raises such a plea. Indeed, it was not stated in the judgment that the parties were given adequate opportunity to make written and/or oral submissions on the plea raised by the court. How can the court be considered impartial when it took the side of one party to the appeal?

Secondly, the court allowed the Broadcasting Authority, without sanctioning it, to delay deciding on a broadcasting licence application beyond the four months statutory time limit where a period of fifteen days had elapsed beyond those four months. In this case, an applicant for a broadcasting licence's deemed refusal was brought to a judicial naught.

Finally, although the Broadcasting Act mandates the Broadcasting Authority and, on appeal, the Court of Appeal, to be guided by the considerations 'that the principles of freedom of expression and pluralism shall be the basic principles that regulate the provision of broadcasting services in Malta' and, in addition, 'in granting licences to different persons, it shall also take into account the possibility of broadcasting by ... digital radio', the court resorted to a literal interpretation of the law that ignored such principles.

Yet, if the platform operator were to apply before the Civil Court, First Hall, for judicial review of the Authority's inaction, the latter would plead that the platform operator had already exhausted its ordinary legal remedies once the Court of Appeal had refused the operator's appeal in terms of the Broadcasting Act, thereby provoking a catch-22 situation. This is a case where a statutory procedural rule was applied to deny freedom of expression.

Court of Appeal judgment, Digi B Network Ltd. v Broadcasting Authority, 16 December 2019

<https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=119681>

