Judicial violation of freedom of expression

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Digi B Network Ltd. is the sole digital radio platform operating in Malta. It applied, by means of two separate broadcasting licence applications, to the Broadcasting Authority, 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 straight forward procedure, the broadcasting regulator never got back to the platform operator with any decision both within and beyond the statutory four months period allowed to it by law, leaving in the meantime the platform operator hanging in mid-air, in total suspended animation, till this very day.

The digital radio operator, several months beyond the statutory time limit of four months for determination of both applications, and after having made several submissions with the broadcasting regulator and filed a judicial protest to awaken the Broadcasting Authority's conscience to decide the two applications pending before it which, needless to say, bore no fruit, 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 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) that 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 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 provided that:

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

Clearly, the interpretation given by the Court of Appeal, although in line with the written wording of the law, runs counter to justice, the spirit of the law, and the whole edifice of freedom of expression and the right to a fair trial, for the very simple reason that section 16(5) of the Broadcasting Act is referring to a case of a 'licensee' whilst the deemed refusal limb of section 11(3) is referring to an applicant for a broadcasting licence whose application is not processed within the maximum four months statutory limit, and, therefore it is not a case of comparing like with like.

But whilst the law is affording a remedy to an applicant for a broadcasting licence whose application has not been determined within the statutory four month period, the court is nullifying that remedy if the Authority takes more than four and a half months to decide that broadcasting licence application. Quite a contradiction in terms as this interpretation of the law is encouraging the Broadcasting Authority to ignore freedom of expression after four months and a half elapse and not to provide a timely determination or any determination at all of a broadcasting licence application beyond the said four and a half months period.

The Court of Appeal in determining the appeal on a procedural point without investing the merits of the case, breached the right to a fair trial when it raised *ex officio* a plea itself and, quite naturally, passed on to decide, not unsurprisingly, in favour of its own *ex parte* plea, dismissing the platform operator's appeal to the Court of Appeal, thereby perpetrating a continuous breach of freedom of expression when it adopted a literal interpretation of the provisions in question which is not consonant with the will of the legislature.

This court judgment has denied freedom of expression when it failed to resort to a teleological interpretation of the law which was the most suitable in the circumstances to adopt. The court had to bear in mind that the legislator's intention was to establish a reasonable time limit to curb the broadcasting regulator's indecision and to oblige the regulator to arrive at a speedy, though reasonable, determination of a broadcasting licence application, without perpetuating the continuous breach of freedom of expression by its unnecessary delay in approving an application within the statutory four months period.

Moreover, the Broadcasting Act, and this seems to have escaped the Court of Appeal's attention, 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'.

A teleological interpretation of the law would have distinguished the case of a licensee from that of a deemed refusal of an application intended to give a remedy for breach of freedom of expression to an applicant for a broadcasting licence.

Furthermore, to add insult to injury, the Court of Appeal, with its decision, not only did not censor the Broadcasting Authority for not having decided both applications within the statutory four months' time period, but has given its blessing to the Broadcasting Authority to continue *ad aeternum* to violate the time period for deciding a broadcasting licence once four months and a half elapse from the date of submission of the application.

Through its judgment the Broadcasting Authority can decide, beyond the four and a half months period, never to determine such applications or to prolong its decision unreasonably and, consequently, thanks to the Court of Appeal's judgment, the platform operator has remained remediless.

Also, if the platform operator applies before the Civil Court, First Hall for judicial review, the Broadcasting Authority will plead that the platform operator has already exhausted its ordinary remedies at law once the Court of Appeal refused the operator's appeal in terms of the Broadcasting Act, provoking a catch-22 situation.

The whole import of this judgment is indeed that it allows the infinite and perpetual violation of freedom of expression by the Broadcasting Authority beyond the four months and a half period from the date of application instead of calling the regulator to order and imposing thereupon a time limit within which to decide the applications or, alternatively, decide the applications itself!

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