The Human Rights Advisory Panel
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OPINION

Date of adoption: 26 November 2010

Case No. 02/08

Nexhmedin SPAHIU

against

UNMIK

The Human Rights Advisory Panel sitting on 26 November 2010
with the following members present:

Mr Marek NOWICKI, Presiding Member
Mr Paul LEMMENS
Ms Christine CHINKIN

Assisted by

Mr Rajesh TALWAR, Executive Officer

Having considered the aforementioned complaint, introduced pursuant to Section 1.2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel,

Having deliberated, makes the following findings and recommendations:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 1st March 2008 and registered on 12 March 2008.

2. On 15 April 2008 the Panel communicated the complaint to the Special Representative of the Secretary-General (SRSG) pursuant to Section 11.3 of Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human

Rights Advisory Panel requesting comments on the admissibility and merits of the complaint by 2 May 2008. The SRSG did not avail himself of this opportunity.

3. On 16 July 2008 the Panel declared the complaint admissible.

4. By letter dated 23 July 2008 the SRSG was informed of the decision and asked to respond to the substance of the complaint. On 29 July 2008 the SRSG provided comments on the admissibility of the case. He reserved his comments on the merits. The complainant answered the SRSG's comments by a note dated 10 October 2008.

5. On 20 March 2009 the Panel adopted a partial opinion in which it rejected the objection to the admissibility of the complaint. It also decided to adjourn the further examination of the merits and to contact the Independent Media Commission for clarification of some issues.

6. On 14 May 2010 the Panel contacted the Independent Media Commission in order to obtain any relevant information. The Independent Media Commission responded on 3 June 2010 and provided the Panel with documents and comments on the issues raised by the case.

7. On 21 June 2010 the Panel communicated the comments by the Independent Media Commission to the complainant and the SRSG, and invited the parties to send their comments. The complainant replied on 12 July 2010. The SRSG replied on 14 July 2010. UNMIK's observations, which contained its first comments on the merits of the complaint, were communicated to the complainant, who was invited to send his comments. The complainant replied on 30 July 2010.

II. THE FACTS

8. The complainant is the director of TV Mitrovica, a private broadcasting organization operating in the Mitrovicë/Mitrovica region of Kosovo.

9. On 27 April 2005 the Temporary Media Commissioner issued Licensing Decision 2005/01, granting TV Mitrovica an expansion of its coverage area. In September 2005 TV Mitrovica started to broadcast from its new location, on Cernusha/Crnuša Hill.

10. On 30 December 2005 the Temporary Media Commissioner issued Licensing Decision 2005/01a, in which he determined that TV Mitrovica did not fulfil the conditions set out in his Licensing Decision 2005/01. He therefore denied TV Mitrovica's request to amend that licence, and ordered that TV Mitrovica had to return to its previously-licensed location in the centre of Mitrovicë/Mitrovica, and to abide by the previously applicable technical terms and conditions within seven days.

11. During the regular monitoring carried out by the Office of the Temporary Media Commissioner, it was found that TV Mitrovica covered an area larger than allowed by its licence. On 12 January 2006 the Temporary Media Commissioner issued a Sanctioning Decision in the matter of Complaint No. 2005/41. He found fundamental violations of the terms and conditions of the licence granted pursuant to Licensing Decision 2005/01 of 27 April 2005 and amended by Licensing

Decision 2005/01a of 30 December 2005, and ordered compliance with the latter Licensing Decision.

12. TV Mitrovica appealed. On 8 March 2006 the Media Appeals Board declared that it was not satisfied that TV Mitrovica had been properly served with Licensing Decision 2005/01a. It therefore rescinded those portions of the Sanctioning Decision of 12 January 2006 which had been based on non-compliance with that Licensing Decision. At the same time, it upheld other findings of that decision, including those based on Licensing Decision 2005/01 of 27 April 2005.

13. On 14 March 2006 the Temporary Media Commissioner issued a decision in the matter of Complaint No. 2006/07. In order to conform to the findings of the above mentioned decision of the Media Appeals Board, he re-issued Licensing Decision 2005/01a, with immediate effect. In order to ensure compliance with Licensing Decisions 2005/01 and 2005/01a, the Temporary Media Commissioner ordered TV Mitrovica to surrender to him its link equipment used to transmit its signal from the Cernusha/Crnuša Hill, within seven days.

14. TV Mitrovica appealed. On 20 August 2006 the Media Appeals Board ordered that an expert investigate whether or not it was technically impossible to comply with the coverage limitations set out by Licensing Decision 2005/01. Two experts were appointed to examine the case. The experts concluded independently that it was technically feasible to comply with the licence. In the light of these expert opinions, on 27 November 2006 the Media Appeals Board ordered TV Mitrovica to bring its antennas in conformity with its licence as soon as possible, at the latest by 1 May 2007. If TV Mitrovica did not comply with this order, the licence would be automatically revoked by that date.

15. According to the complainant, he complied with the order of the Media Appeals Board by changing the direction of the antennas. However, according to the Office of the Chief Executive of the Independent Media Commission, which in the meantime had taken over the powers of the Temporary Media Commissioner, TV Mitrovica continued to cover an area larger than that allowed by its licence. The Office sent several reminders and warnings.

16. In a letter to TV Mitrovica, dated 24 December 2007, the Chief Executive of the Independent Media Commission expressed the view that, as a result of non-compliance with the decision of the Media Appeals Board, TV Mitrovica was broadcasting without a licence. She warned that, unless there was an immediate interruption of broadcasting, the broadcasting equipment would be confiscated.

17. Four days later, on 28 December 2007, the Chief Executive ordered the confiscation of TV Mitrovica's broadcasting equipment. The order referred among others to decision 2007/02 of the Council of the Independent Media Commission of 20 April 2007, which delegated a number of responsibilities to the Chief Executive, in particular the responsibility to take actions and decisions in cases of unlicensed or illegal broadcasting. The order was carried out the same day. This act is the subject of the complaint before the Panel.

18. Soon after the seizure the complainant submitted a complaint to the Media Appeals Board. This complaint was sent to the Independent Media Commission. On the basis of the applicable law the Chief Executive considered that no appeal against a confiscation was possible, and she therefore did not forward the

complaint to the Media Appeals Board. No decision has thus been taken on the complaint.

19. After a public call for tenders by the Independent Media Commission for the allocation of frequencies in the municipality of Mitrovicë/Mitrovica, TV Mitrovica applied for a licence, together with other interested parties. The licensing conditions provided for a larger coverage area than the one that was allowed under the 2005 licence. On 7 November 2008 the newly composed Council of the Independent Media Commission issued the new licence to TV Mitrovica. As a result, the confiscated equipment was returned to TV Mitrovica.

III. COMPLAINT

20. The complainant alleges a violation of his right to the peaceful enjoyment of property, as guaranteed by Article 17 (2) of the Universal Declaration of Human Rights (UDHR). In its decision on admissibility of 16 July 2008 the Panel decided that it would examine the complaint also under Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR).

IV. THE LAW

A. Arguments of the parties

1. The complainant's submissions

21. In his comments of 30 July 2010, in reply to the comments made by UNMIK on 14 July 2010, the complainant states that it is incorrect to state that the SRSG was not aware of the situation with respect to the decision taken by the Independent Media Commission in his case. Given the position occupied by TV Mitrovica in the media landscape, UNMIK must have been aware of the situation. Moreover, the complainant informed the SRSG directly of it.

22. As to the merits, the complainant submits in his complaint and in his later comments that the interference complained of, namely the confiscation of the equipment, has been ordered by the Chief Executive of the Independent Media Commission, while such order exceeded her competence. According to the complainant it was for the Council of the Independent Media Commission, composed of seven members, not for its Chief Executive, to assess whether or not TV Mitrovica had complied with the decision of the Media Appeals Board of 27 November 2006. He argues that the Chief Executive took the law in her own hands. In this respect he also draws attention to the fact that TV Mitrovica's new licence, issued by the Council in 2008, grants it a much wider coverage area than the prior licence; for the complainant this is an illustration of the fact that a council of seven persons can make a more mature and impartial judgment than a single executive officer.

23. Insofar as the Chief Executive relied on a delegation of power granted to her by the Council, the complainant argues that such delegation was illegal, since the Council had no right to delegate its power.

2. UNMIK's submissions

24. In its comments of 14 July 2010 UNMIK maintains its view, already expressed in its comments of 27 August 2008, that the Provisional Institutions of Self-Government, their officials and their agencies, are independent from the powers of the SRSG. This is particularly true with respect to the Independent Media Commission. Its decisions cannot be attributed to UNMIK. In the present case the decisions taken by the Independent Media Commission were not of such a nature that the SRSG should have known about them and should have taken corrective measures. Had the SRSG intervened, he would have violated the independence given to the Independent Media Commission as well as the procedural guarantees given to the Provisional Institutions of Self-Government.

25. With respect to the decision of the Council of the Independent Media Commission of 20 April 2007 to delegate its powers to the Chief Executive, UNMIK refers to the delegation of the responsibility of "case resolution, as provided by [Instruction No. 2006/04 of the Council] on applying sanctions to licensees". UNMIK also refers to Articles 3.11 and 3.12 of Law No. 02/L-15 on the Independent Media Commission and Broadcasting, adopted by the Assembly of Kosovo on 21 April 2005 and promulgated, with amendments, by the SRSG on 8 July 2005 ("Media Law"). According to these provisions it is the Council that may issue sanctions, including ordering the confiscation of equipment. UNMIK concludes that "it is clear from the core provisions of the Media Law and its legislative intent that delegating the authority to issue sanctions, including the seizure of equipment, would be contrary to the provisions of the Media Law particularly in view of the [distribution] of powers among the Council, the Media Appeals Board and the Office of the [Chief Executive] carefully outlined therein".

26. As to the holding by the Independent Media Commission of the confiscated equipment until the issuance of the new licence to TV Mitrovica on 7 November 2008, UNMIK notes that TV Mitrovica could have obtained its equipment at an earlier stage if it had attempted to reassure the Independent Media Commission that it would limit the area in which it would broadcast, pending the resolution of the dispute between TV Mitrovica and the Independent Media Commission. However, it does not appear that TV Mitrovica has made such an attempt.

27. UNMIK concludes that there was no violation of the complainant's right to peaceful enjoyment of his property.

B. The Panel's assessment

1. As to the responsibility of UNMIK

28. The Panel recalls that it already considered the issue of UNMIK's responsibility in its partial opinion of 20 March 2009. It found that, although the act complained of emanated from a Provisional Institution of Self-Government, UNMIK is responsible for it. The decisive elements in this respect are that UNMIK set up the Independent Media Commission, that the Commission was an organ operating within the Constitutional Framework for Provisional Self-Government issued by the SRSG, and that the SRSG, holding the legislative power in Kosovo, was able to regulate its activities and to correct any deficiencies in its operation.

29. It is true that UNMIK did not personally, through the SRSG or another official, participate in the TV Mitrovica case. For the reasons given above, however, this circumstance does not absolve UNMIK from its responsibility.

30. The Panel therefore sees no reason to alter the conclusion reached in its partial opinion. Accordingly, it confirms that UNMIK is responsible for the act complained of.

2. As to the alleged violation of the right to protection of property

a. General considerations

31. Article 17 of the UDHR, referred to by the complainant, reads as follows:

> "1. Everyone has the right to own property alone as well as in association with others.
> 2. No one shall be arbitrarily deprived of his property. "

32. Article 1 of Protocol No. 1 to the ECHR, which the Panel has decided to include in its examination, reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

33. The Panel considers that both provisions in substance guarantee the same right, namely the right to protection of property.

34. The confiscation of the broadcast equipment amounted to an interference with the complainant's right to protection of his property. This point is not in dispute.

35. As to the possible justification of that interference, the Panel considers that the conditions laid down in Article 1 of Protocol No. 1 to the ECHR can be applied also in the context of Article 17 of the UDHR.

36. As the European Court of Human Rights (ECtHR) consistently holds,

> "Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules (…): the first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful

enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (…)" (see, *e.g.*, ECtHR (Grand Chamber), *Depalle v. France*, no. 34044/02, judgment of 29 March 2010, § 77).

37. The order by the Media Appeals Board for TV Mitrovica to bring its antennas in conformity with its licence clearly constituted a control of the use of property, in the sense of the second paragraph of Article 1.

38. The confiscation of TV Mitrovica's broadcasting equipment was a measure taken for the enforcement of that order. The complainant did not lose his ownership of that equipment. As was indicated on the receipt for the seized equipment, 'the seized equipment [would] be held by the [Independent Media Commission] in safekeeping, to be returned to [the complainant] upon satisfactory assurance that the illegal broadcasting [would] not recur". The complainant in fact regained possession of the equipment following the issuance of the 2008 licence.

39. The confiscation therefore also amounted to control of the use of property. Accordingly, the second paragraph of Article 1 is applicable in the present case (see ECtHR, *AGOSI v. United Kingdom*, judgment of 24 October 1986, *Publications of the Court*, Series A, no. 108, pp. 17-18, §§ 50-51; ECtHR, *Air Canada v. United Kingdom*, judgment of 5 May 1995, *Publications of the Court*, Series A, no. 316-A, pp. 15-16, §§ 33-34).

b. Compliance with the requirements of Article 1, second paragraph, of Protocol No. 1 to the ECHR

40. The first and most important requirement of Article 1 of Protocol No. 1 to the ECHR is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. In particular, the second paragraph of Article 1, while recognising that States have the right to control the use of property, subjects their right to the condition that it be exercised by enforcing "laws" (ECtHR (Grand Chamber), *Hutten-Czapska v. Poland*, no. 3501/97, judgment of 19 June 2006, *ECHR*, 2006-VIII, § 163).

41. The issue in this case is whether the Chief Executive of the Independent Media Commission, when she ordered the confiscation of the broadcasting equipment, was legally competent to take such decision.

42. It is useful to recall that, according to Article 2.3 of the Media Law, the Independent Media Commission is composed of three separate bodies, including the Council and the Office of the Chief Executive. The Council is composed of seven members: five resident members of Kosovo appointed by the Assembly of Kosovo and two international members appointed by the SRSG (Article 4). The Chief Executive is appointed by the Council, following an open and competitive process (Article 9.2).

43. The Media Law provides that the Council may issue licences, and that it has the power to impose sanctions, upon the recommendation of the Chief Executive, for violations of licence conditions (Articles 3.11, 3.12 and 20.1). Especially relevant are, moreover, Articles 20.3 and 20.5, which read as follows:

> "20.3. Where a broadcaster fails to respect a sanction, the Council may take the necessary action as permitted by the applicable law to enforce the sanction through the Office of the Executive Chief.
>
> …
>
> 20.5. Relevant broadcasting equipment shall be confiscated from anyone who is operating without a valid broadcasting licence. Such a broadcasting entity cannot appeal to the Board on Complaints of Media."

44. The functions of the Council are described in Article 3 of the Media Law, and those of the Office of the Chief Executive and those of the Chief Executive himself or herself in Articles 8 and 9 of the that Law. In none of these articles or in any other article of the Law is mention made of the possibility for the Council to delegate any of its powers to the Chief Executive.

45. Moreover, as the SRSG indicates in his comments, the Media Law provides for a "carefully outlined" distribution of powers among the Council and the Office of the Chief Executive. Specifically with respect to the imposition of sanctions, it is spelled out in the Law that the Chief Executive may make recommendations, but that the decision-making power is vested in the Council.

46. The Panel considers that it follows from the letter and spirit of the Media Law that the Council illegally delegated its power with respect to the "issuance of decisions on all actions-decisions related to cases of unlicensed broadcasting – illegal broadcasting" to the Chief Executive (decision 2007/02 of the Council of 20 April 2007), in particular insofar as this delegation is understood to comprise the competence to order the confiscation of broadcasting equipment. The Panel notes that the SRSG agrees that such delegation of power was unlawful.

47. As the confiscation order issued by the Chief Executive on 28 December 2007 was based on an illegal delegation of power to her, the Panel cannot but conclude that the Chief Executive was not legally competent, and that the order was therefore unlawful. The order thus did not satisfy the first requirement of Article 1 of Protocol No. 1 to the ECHR (see above, § 40).

48. This finding that the interference was not lawful makes it unnecessary to examine other aspects under Article 1 of Protocol 1 to the ECHR, including whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

49. For the reasons above, the Panel considers that there has been a violation of Article 1 of Protocol No. 1 to the ECHR and Article 17 of the UDHR on account of the lack of legal competence of the Chief Executive to issue the confiscation order against TV Mitrovica.

50. This conclusion makes it unnecessary to examine whether the complainant's rights have also been violated on account of the refusal by the Chief Executive to submit his complaint to the Media Appeals Board.

V. RECOMMENDATIONS

51. In his complaint the complainant requested that the Panel recommend the SRSG to annul the decision of the Chief Executive and to order the Independent Media Commission to return the equipment to him.

52. Given the independence of the Independent Media Commission vis-à-vis the SRSG, it would not be appropriate for the Panel to recommend the annulment of a decision taken by the Commission. In any event, at the present time the SRSG does not exercise any power which would make it possible for him to interfere with the activities of the Commission.

53. As to the return of the equipment, the Panel notes that there is no longer any need to recommend such a measure, since on this point the complainant has already obtained satisfaction.

54. The Panel considers it appropriate to examine *ex officio* whether other reparation measures are called for.

55. It recalls in this respect that it has found that the act complained of was taken by an organ of the Independent Media Commission -the Chief Executive- lacking the competence to take such a measure. The Panel cannot speculate as to whether no decision would have been taken, or whether a different decision would have been taken, if the matter had been considered instead by the Council. The Panel furthermore notes that in the meantime the confiscated equipment has been returned to the complainant. It therefore does not recommend any reparation for pecuniary damage.

56. The fact remains that the decision relating to the confiscation of the broadcasting equipment was, in the Panel's opinion, not in conformity with the ECHR and the UDHR. The Panel considers that the recognition by UNMIK that a violation has occurred would constitute an adequate form of redress for any non-pecuniary damage that may have been sustained by the complainant.

FOR THESE REASONS,

The Panel, unanimously,

1. FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF ARTICLE 17 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS;

2. RECOMMENDS:

   A. THAT THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON BEHALF OF UNMIK RECOGNISE THAT THERE HAS BEEN A VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF ARTICLE 17 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, AS INDICATED IN PARAGRAPH 56 ABOVE;

B. THAT UNMIK INFORM THE COMPLAINANT AND THE PANEL ABOUT THE IMPLEMENTATION OF THIS RECOMMENDATION.

Rajesh TALWAR
Executive Officer

Marek NOWICKI
Presiding Member