



PARTIAL OPINION

Date of adoption: 20 March 2009

Case No. 02/08

Nexhmedin SPAHIU

against

UNMIK

The Human Rights Advisory Panel sitting on 20 March 2009
with the following members present:

Mr. Marek NOWICKI, Presiding Member,
Mr. Paul LEMMENS
Ms Snezhana BOTUSHAROVA

Mr. John RYAN, 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, adopts the following partial opinion:

I. FACTS OF THE CASE

1. The applicant is the director of TV Mitrovica.
2. 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 Hill.
3. On 30 December 2005 the Temporary Media Commissioner issued Licensing Decision 2005/01a, in which he determined that TV Metrovica did not fulfill the conditions set out in his Licensing Decision 2005/01. He therefore denied TV

Metrovica's request to amend that license, and ordered that TV Mitrovica had to return to its previously-licensed location in the center of Mitrovica, and to abide by the previously applicable technical terms and conditions within seven days.

4. Moreover, 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 license 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.
5. 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 the Licensing Decision 2005/01a of 30 December 2005. It therefore rescinded those portions of the Sanctioning Decision of 12 January 2006 which had been based on non-compliance with the said Licensing Decision. At the same time, it upheld other findings of that decision, including those based on the Licensing Decision 2005/01 of 27 April 2005.
6. 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 Hill, within seven days.
7. 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 the licensing decision 2005/01 of 27 April 2005. Two experts were appointed to examine the case. Both experts concluded that it was technically feasible to comply with the license. 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 license as soon as possible, at the latest by 1 May 2007, otherwise the license would be automatically withdrawn by that date.
8. Despite subsequent reminders and warnings by the Office of the Chief Executive of the Independent Media Commission, which has taken over the powers of the Temporary Media Commissioner, TV Mitrovica failed to comply with the said order.
9. 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 license. She warned that, unless there would be an immediate interruption of transmission, the transmission equipment would be seized.
10. Four days later, on 28 December 2007, the equipment was effectively confiscated.
11. The applicant submits that he tried to file a complaint with the Independent Media Commission and the Media Appeals Board, but that the Chief Executive refused to forward the complaint to the said bodies. As the Media Law obliges applicants to proceed through the Office of the Chief Executive, he was thus unable to file a complaint.

II. PROCEEDINGS BEFORE THE PANEL

12. The complaint was introduced on 1st March 2008 and registered on 12 March 2008.
13. 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 present any observations by the relevant date or request an extension of time within which to respond.
14. On 16 July 2008 the Panel declared the complaint admissible.
15. By letter dated 23 July 2008 the SRSG was informed of the decision and asked to respond to the substance of the complaint.
16. On 29 July 2008 the SRSG provided comments on the admissibility of the case. He reserved his comments on the merits.
17. The complainant answered the SRSG's comments by a note dated 10 October 2008.

III. RESPONSIBILITY OF UNMIK

A. Arguments of the parties

1. UNMIK

18. In his comments of 29 July 2008 the respondent raised an objection to the admissibility of the complaint, based on Section 1.2 of Regulation No. 2006/12 of 23 March 2006. According to the respondent, the alleged violation was committed by the Chief Executive of the Independent Media Commission, "at a time when competence for media matters had been transferred from UNMIK to competent local authorities".

2. The complainant

19. The complainant acknowledges that the competence for media matters had been transferred to the local authorities, but this transfer was only a partial one. He refers to the Constitutional Framework for Provisional Self-Government, which was in force when the act complained of took place, i.e. on 28 December 2007. According to Chapter 12 of that Framework, the exercise of the responsibilities of the Provisional Institutions of Self-Government did not affect or diminish the authority of the SRSG to ensure full implementation of resolution 1244 (1999) of the Security Council, including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions were inconsistent with resolution 1244 (1999) or the Constitutional Framework.
20. The complainant furthermore refers to the Media Law in force at the time of the act complained of (Law No. 02/L-15 on the Independent Media Commission and Broadcasting). According to that Law the SRSG appointed two of the seven members of the Council of the Independent Media Commission as well as the president of the Media Appeals Board. The Chief Executive of the Independent

Media Commission was appointed by the Council and was responsible before the Council.

21. For the above reasons, UNMIK is responsible for the alleged violation of the complainant's human rights.

B. The Panel's assessment

22. The objection raised by the SRSG concerns the responsibility of UNMIK for the alleged violation of the complainant's human rights. That objection concerns the merits of the complaint.

23. Section 1.2 of Regulation No. 2006/12 provides that the Panel shall examine complaints from any person or group of individuals claiming to be the victim of a violation "by UNMIK" of the human rights.

24. The creation of the Independent Media Commission is a result of the Constitutional Framework for Provisional Self-Government. This Framework, adopted by the SRSG, by Regulation No. 2001/9 of 15 May 2001, sets up a number of institutions, among which the Assembly and "other bodies and institutions set forth in this Constitutional Framework", as Provisional Institutions of Self-Government (Section 1.5). The Provisional Institutions of Self-Government have received certain responsibilities, among others "in the field of mass media" (Section 5.4). One of the responsibilities is to "[regulate] broadcast media ... through an independent media commission, whose members will be appointed by the Provisional Institutions of Self-Government from nominations submitted by non-governmental and non-political organisations in Kosovo" (Section 5.4 (b)). Section 11.1 (e) of the Constitutional Framework provides for the creation of the Independent Media Commission. It will be one of the "other bodies and institutions" that are Provisional Institutions of Self-Government. It shall "carry out [its] functions independently of the [other] Provisional Institutions of Self-Government" (Section 11.1, introductory sentence).

25. Section 12 of the Constitutional Framework spells out the "authority of the SRSG" over the Provisional Institutions of Self-Government. It reads as follows:

"The exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244(1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244(1999) or this Constitutional Framework."

26. The Independent Media Commission has been set up by Act 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 (Regulation No. 2005/34 on the Promulgation of the Law on the Independent Media Commission and Broadcasting Adopted by the Assembly of Kosovo).

27. Article 2.2 of the Law provides that the Independent Media Commission is an independent body, and that it exercises the functions entrusted to it by the said law or by other laws applicable in Kosovo, "in compliance with Article 11.1 (e) of the

Constitutional Framework". According to Article 2.3 of the Law, the Independent Media Commission is composed of three separate bodies, namely the Council, the Office of the Chief Executive and the Media Appeals Board. The Council is composed of seven members: five resident members of Kosovo appointed by the Assembly and two international members appointed by the SRSG (Article 4). The Chief Executive is appointed by the Council, following an announcement and an open and competitive process (Article 9.2). The Media Appeals Board is composed of three members: two resident members of Kosovo appointed by the Assembly and one international member appointed by the SRSG. The SRSG also appoints one of the members as the President of the Media Appeals Board (Article 22).

28. It is not disputed that the act complained of is directly imputable to the Chief Executive of the Independent Media Commission, a Provisional Institution of Self-Government. However, for the purposes of Regulation No. 2006/12, the sole issue of relevance is UNMIK's responsibility, irrespective of the authority to which the alleged breach of human rights is imputable (compare, with respect to the responsibility of a State under the European Convention on Human Rights, ECtHR, 8 April 2004, *Assanidze v. Georgia*, no. 71503/01, § 146, ECHR 2004-II). It is therefore not decisive that the act complained of emanates from a Provisional Institution of Self-Government. The question is whether UNMIK is responsible for these acts.
29. It results from the Constitutional Framework, in particular from Section 12, that the SRSG retains a power of oversight of the Provisional Institutions of Self-Government, their officials and their agencies. He is in particular empowered to take appropriate measures whenever their actions are inconsistent with the Constitutional Framework. Since the Provisional Institutions of Self-Government have to "observe and ensure internationally recognized human rights and fundamental freedoms", including those rights and freedoms set forth in a number of international human rights instruments (Section 3.2), it is within the power of the SRSG to take action when these rights are violated. This in itself leads to the conclusion that UNMIK remains responsible, from a human rights perspective, for any action or omission imputable to a Provisional Institution of Self-Government. UNMIK is thus responsible for acts and omissions imputable to the Independent Media Commission, whether these acts and omissions are imputable to the Council, the Chief Executive or the Media Appeals Board.
30. This conclusion is corroborated by the fact that the SRSG appoints also two of the members of the Council, which body appoints the Chief Executive, and one of the members of the Media Appeals Board.
31. The Panel is therefore of the opinion that the objection is unfounded.

IV. ALLEGED VIOLATION OF THE RIGHT OF PROPERTY

32. The Panel notes that the SRSG has reserved his comments on the merits, as the Panel has not yet conducted its own examination of the case and has not communicated all relevant materials.
33. The SRSG has invited the Panel in a general way to address queries with regard to cases that have been examined by agencies, including the Provisional Institutions of Self-Government, directly to these agencies or their successors. Availing itself of that

opportunity in the present case, the Panel decides to adjourn the further examination of the merits of the complaint and to contact the Independent Media Commission.

FOR THESE REASONS,

The Panel, unanimously,

- **REJECTS THE RESPONDENT'S OBJECTION AS TO THE RESPONSIBILITY OF UNMIK;**
- **ADJOURNS THE FURTHER EXAMINATION OF THE MERITS OF THE COMPLAINT.**

John J. RYAN
Executive Officer

Marek NOWICKI
Presiding Member