



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 6 December 2002)

Cases nos. CH/01/8590 and CH/02/8670

Televizija "MIB" Brčko and Muzička radio stanica "Studio 76" Brčko

against

BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 5 November 2002 with the following members present:

Mr. Giovanni GRASSO, President
Mr. Viktor MASENKO-MAVI, Vice-President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the aforementioned applications introduced pursuant to Article VIII(1) of the Human Rights Agreement (the "Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Article XI of the Agreement and Rules 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. Both applications concern the attempts of the applicants, one a television station and the other a radio station, both owned by Mr. Bogdan Nikić, to acquire a long-term broadcasting licence from the Communications Regulatory Agency (“CRA”) through a competitive process designed to select a limited number of most highly qualified licence recipients. Both applicants failed to meet even the minimum criteria to qualify for a long-term broadcasting licence, and as a result, the CRA denied their licence applications.
2. These applications raise issues regarding the right to access to courts as protected under Article 6 of the European Convention on Human Rights (the “Convention”).

II. PROCEEDINGS BEFORE THE CHAMBER

3. Televizija “MIB” Brčko’s application was registered on 18 December 2001, and Muzička radio stanica “Studio 76” Brčko’s application was registered on 12 January 2002.
4. On 2 July 2002, the Chamber decided to transmit the cases to the respondent Party for its observations on the admissibility and merits of the applications under Articles 6 and 10 of the Convention. On 22 July 2002 the applications were transmitted to Bosnia and Herzegovina.
5. On 17 September 2002 the Chamber received the observations of the respondent Party.
6. On 7 October and 5 November 2002 the Chamber deliberated on the admissibility and merits of the applications. On the latter date, the Chamber adopted the present decision.

III. FACTS

A. Background facts with respect to the respondent Party

7. Starting in December 1997 at its meeting in Bonn, Germany, the Peace Implementation Council recognised the need for an institution to regulate and promote the media as an integral part of the peace implementation process in Bosnia and Herzegovina. On 11 June 1998, the Independent Media Commission (“IMC”) was established by a decision of the High Representative. The IMC was created as an independent transitional agency with a mandate that included issuing codes of practice for broadcasting, licensing all broadcasters, and ensuring compliance with license conditions and codes of practice. From the beginning, however, it was envisioned that the IMC eventually would hand over its functions to an appropriate state agency in Bosnia and Herzegovina.
8. In May and December 2000, the Peace Implementation Council recognised the need for a more comprehensive approach to communications in Bosnia and Herzegovina. In order to develop a regulatory mechanism for telecommunications and media on the state level, the Council considered combining the competencies of the IMC and the Telecommunications Regulatory Agency (“TRA”). The resulting body is the Communications Regulatory Agency (“CRA”), which acts as the state regulatory agency for telecommunications and broadcasting. The CRA was established by a Decision of the High Representative of 2 March 2001 (Official Gazette of Bosnia and Herzegovina— hereinafter “OG BiH”— no. 8/01 of 22 March 2001; Official Gazette of the Federation of Bosnia and Herzegovina— hereinafter “OG FBiH”— no. 11/01 of 3 April 2001; Official Gazette of the Republika Srpska— hereinafter “OG RS”— no. 12/01 of 26 March 2001) (see paragraph 25 below).
9. According to the mission statement of the CRA, “the Agency is fully independent in decision making. It conducts its work at the state level and in accordance with the principles of legality, objectivity, transparency and non-discrimination.” Among its stated purposes, the CRA “*issues* broadcasting and telecommunications licenses in an open and fair manner, promoting the highest level of professionalism and business viability in the broadcasting and telecommunications community in Bosnia and Herzegovina” (CRA Case Analysis June 1998-August 2001 at page 1). The CRA is composed of an Enforcement Panel, a Council, and the Chief Executive Officer (“CEO”). Both

the Enforcement Panel and the Council have seven members: 3 international members and 4 national members. The CEO (who served until 18 December 2001 and has not yet been permanently succeeded) was an international lawyer with expertise in telecommunications. The Enforcement Panel and CEO decide upon serious breaches of license conditions and applicable codes. The Council serves as the appellate body that reviews decisions by the Enforcement Panel and CEO, as well as determining general policy matters (*id.* at pages 3-4). In order to ensure compliance with international law, the CRA provides, for the provisional broadcasting licence proceedings, “a possibility for independent appeal of decisions” through “a two-instance legal procedure implemented by two collective bodies: the Enforcement Panel and the Council” (*id.*). Regarding the long-term broadcasting licence proceedings, this duty falls under the responsibility of the CEO, as a first instance body, while the second instance appeal proceedings remain the duty of the CRA Council.

10. The “Merit-Based Competitive Process for the Awarding of Long-Term Broadcasting Licences” was established on 26 September 2000 and amended on 29 October 2001 pursuant to IMC Rule 04/2000 (the “Competitive Process”). On the basis of that Competitive Process, the CRA accepted and reviewed applications for a long-term broadcasting licence submitted by broadcasters, like the applicants, which were already provisionally operating in Bosnia and Herzegovina.

11. The Competitive Process is phase two of a two-step licensing process designed to regulate the use of the limited natural resource of the broadcasting spectrum in Bosnia and Herzegovina through the issuance of long-term broadcasting licences to a limited number of select radio and television broadcasters. The first phase was the issuance of provisional licences by the IMC to all radio and television stations in Bosnia and Herzegovina. The IMC registered and provisionally licensed some 278 stations. It completed the first phase in December 1999. Through the issuance of provisional licences, the IMC and CRA were able to obtain essential information about the operations of radio and television broadcasters in Bosnia and Herzegovina. This information was intended to assist the IMC and CRA in effectively granting long-term permission to broadcasters to use the limited natural resource of the broadcasting spectrum and to limit technical interference between broadcasting stations.

12. The second phase of the licensing process, the Competitive Process, commenced in January 2000. It involved the issuance of a limited number of long-term broadcasting licences by the CRA to the most highly qualified stations. Provisional licences issued during the first phase were valid until the date of the decision with respect to the issuance of a long-term licence in the second phase. Broadcasters desiring a long-term broadcasting licence submitted an application to the CRA. The CRA evaluated those applications, and scored the applicant broadcasters on their technical operations, financial information and viability, and programme quality¹. If the applicant broadcaster achieved a minimum number of qualifying points based on these three criteria (24 points), then the CRA took into account negative points attributed to an applicant broadcaster due to any history of past violations of the applicable Code of Practice and Rules of the IMC or CRA. Only those stations with the highest total scores were then awarded long-term broadcasting licences by the CRA.

B. Facts with respect to the applicants

1. Televizija “MIB” Brčko

13. On an unknown date, the television station started broadcasting in the Brčko area.

14. On 5 January 2000, the IMC issued a decision granting a provisional broadcasting licence to the television station for a six-month period.

15. In the meantime, the television station submitted an application for a long-term broadcasting licence. On 2 May 2001, the CEO of the CRA (the successor agency to the IMC) rejected the applicant’s application for a long-term broadcasting licence on the grounds that the applicant did not fulfil the “financial information and viability” and the “programme quality” criteria. The television

¹ “Programme quality” in this context, refers to the quality of the broadcasting signal, not the contents of the programme itself.

station did not achieve even the minimum number of points necessary to qualify for a long-term broadcasting licence — the television station received 18.5 points, whilst the minimum number of required points is 24. The CRA ordered the television station to cease its broadcasting operations.

16. The applicant submitted an appeal against the CRA decision of 2 May 2001. It presented the CRA with new elements to improve its points on its “financial information and viability” and “programme quality”. On 7 June 2001, the CRA Council rejected the appeal on the grounds that the new elements were not sufficient to increase the television station’s points to the minimum number necessary to qualify for a long-term broadcasting licence.

17. Due to irregularities in the appeal proceedings, *i.e.* the appeal documents were not considered by the CRA Council, a “rehearing of the case” was held by the CRA Council. On 30 October 2001 the CRA Council issued a new decision rejecting the television station’s application for a long-term broadcasting licence. The television station was ordered to cease its broadcasting operations within 14 days after publication of the decision.

18. The television station ceased its broadcasting operations as of 1 February 2002.

2. Muzička radio stanica “Studio 76” Brčko

19. On an unknown date, the radio station started broadcasting in the Brčko area.

20. On 7 August 1999, the IMC issued a decision granting a provisional broadcasting licence to the radio station for a six-month period.

21. In the meantime, the radio station submitted an application for a long-term broadcasting licence. On 2 May 2001, the CEO of the CRA rejected the applicant’s application for a long-term broadcasting licence on the grounds that the applicant did not fulfil the “financial information and viability” and the “technical operation” criteria. The radio station did not achieve even the minimum number of points necessary to qualify for a long-term broadcasting licence — the radio station received 19 points, whilst the minimum number of required points is 24. The CRA ordered the radio station to cease its broadcasting operations.

22. The applicant submitted an appeal against the CRA decision of 2 May 2001. It presented the CRA with new elements to improve its points on its “financial information and viability” and “technical operation”. On 7 June 2001, the CRA Council rejected the appeal on the grounds that the new elements were not sufficient to increase the radio station’s points to the minimum number necessary to qualify for a long-term broadcasting licence. The radio station was ordered to cease its broadcasting operations within 14 days after the publication of the decision.

23. The site where the radio station had its transmitter was placed within the Republika Srpska Army military compound. The station had a lease contract with the Ministry of Defence of the Republika Srpska (“the Ministry”) for placement of the transmitter within the compound. On 21 February and 15 March 2002, the CRA informed the Ministry about the CRA Council’s decision to deny a long-term broadcasting licence to the radio station. Subsequently, the Ministry sent a letter to the radio station on 22 April 2002, by which it made the lease contract to the station no longer valid. The Ministry also requested the radio station to make and send it a report upon its removal of its equipment. The radio station, then, ceased its broadcasting operations.

24. On 16 November 2001, the owner of the radio station and television station suggested to the CRA the possibility of merging the two companies into one. The CRA rejected this proposal.

IV. RELEVANT LEGAL PROVISIONS

A. Decision of the High Representative of 2 March 2001 creating the CRA

25. On 2 March 2001, the High Representative issued a Decision Combining the Competencies of the Independent Media Commission and the Telecommunications Regulatory Agency, thereby “produc[ing] a single communications regulator having jurisdiction over both broadcasting and telecommunications” named the Communications Regulatory Agency (Article 1.1) (OG BiH no. 8/01 of 22 March 2001; OG FBiH no. 11/01 of 3 April 2001; OG RS no. 12/01 of 26 March 2001). The CRA was granted sole regulatory responsibility over the field of communications in Bosnia and Herzegovina (Article 1.2).

26. The Decision provides that the CRA shall be managed by a CEO appointed by the High Representative (Article 2.1). “The CEO shall be responsible for the day-to-day operations of the CRA including, but not limited to, the implementation of relevant law and policy, technical oversight, industry affairs, administration and staffing” (Article 2.1). “The organisation of the CRA shall include a broadcasting division and a telecommunications division among possible others” (Article 2.2). The CEO appoints the Head of each division and international advisors (Article 2.2).

27. The CRA shall have a Council with seven members (four national members and three international members) appointed by the High Representative (Article 2.3). “The Council shall guide the CRA with regard to strategic issues of policy implementation” (Article 2.3). “The Council shall adopt codes of practice and rules for broadcasting and telecommunications and shall adopt internal procedural rules. Additionally, the Council shall serve as an appellate body for CRA decisions.” (Article 2.3). “The CEO shall attend all meetings of the Council as a non-voting participant” (Article 2.3).

28. Article 4 of the Decision provides for the independence of the CRA, as follows:

“The CRA shall be an independent body with the status of a legal person in Bosnia and Herzegovina and shall carry out its duties pursuant to the principles of telecommunications policy as enumerated in Article 3 of the Law on Telecommunications and the Telecommunications Sector Policy of Bosnia and Herzegovina. In fulfilment of its duties, the CRA shall act in accordance with the principles of objectivity, transparency and non-discrimination.”

29. Article 5 of the Decision further describes the CRA “as a state-level agency”, the overall budget, proposed by the CEO, of which is an “integral part” of the budget of Bosnia and Herzegovina.

B. Merit-Based Competitive Process for the Awarding of Long-Term Broadcasting Licences

30. The “Merit-Based Competitive Process for the Awarding of Long-Term Broadcasting Licences” was established on 26 September 2000 and amended on 29 October 2001 pursuant to IMC Rule 04/2000 (the “Competitive Process”).

31. Article 3 of the Competitive Process provides that the IMC/CRA will award licences to applicants on the basis of points scored by the applications on the following four criteria: Programme quality (maximum points awarded = 20), financial information and viability (maximum points awarded = 10), technical operation (maximum points awarded = 10) and prior compliance with IMC/CRA regulations (possible negative points awarded). In order to obtain a licence, each broadcaster must achieve a minimum of 12 points regarding the programme quality; and 6 points for the two following criteria. Further, the prior compliance criterion shall be considered only if the broadcaster achieves a minimum of 24 points in the first three criteria.

32. To encourage public participation, Article 4 of the Competitive Process provides that the IMC/CRA will make its decision public and will permit the interest parties to submit comments 30 days from the date of publication of the decision.

C. Laws of Bosnia and Herzegovina

1. Law on the Court of Bosnia and Herzegovina

33. The Law on the Court of Bosnia and Herzegovina (OG BiH no. 29/00 of 30 November 2000; OG FBiH 52/00 of 12 December 2000; OG RS 40/00 of 27 November 2000) became effective as of 8 December 2000. The Law provides for a competent court on the state level. Article 14 provides for administrative jurisdiction of that court, which shall be carried out by the Administrative Division, as follows:

“1. The Court is competent to decide actions taken against final administrative acts or silence of administration of the institutions of Bosnia and Herzegovina and its bodies, Public Agencies, Public Corporations, institutions of the Brčko District and any other organisation as provided by State Law, acting in the exercise of a public function.

“2. The Court shall have, in particular, jurisdiction over the following:

“a) The assessment of the legality of individual and general enforceable administrative acts adopted under State law, performed in the exercise of public functions by the authorities listed in paragraph 1 of this Article, for which judicial review is not otherwise provided by law. ...”

34. In accordance with Article 51(2), an action within the administrative jurisdiction of the Court of Bosnia and Herzegovina “must be lodged within two months from the day following the day the applicant is notified, or received the act or the decision complained of, or from the day of the publication of the regulation challenged”.

2. Decision of the High Representative of 8 May 2002 on the appointment of judges and on the establishment of the Court of Bosnia and Herzegovina

35. On 8 May 2002, the High Representative issued a decision on the appointment of judges and on the establishment of the Court of Bosnia and Herzegovina. In making the decision, the High Representative recalled that, according to the Declaration of the Peace Implementation Council, “the establishment of judicial institutions at the State level, which meet an established constitutional need to deal ... with administrative and electoral matters, is a precondition for the establishment of the rule of law in Bosnia and Herzegovina”. He further considered the Law on the Court of Bosnia and Herzegovina (see paragraph 31 above), which was enacted “to ensure the effective exercise of the competencies of the State of Bosnia and Herzegovina and respect for human rights and the rule of law in the territory of Bosnia and Herzegovina”. Accordingly, the Decision states in Article 3 that “from the date of this Decision the Court of Bosnia and Herzegovina shall be established”.

36. The Decision of 8 May 2002 appoints seven judges as the Plenum of the Court and the Appellate Division of the Court of Bosnia and Herzegovina (Articles 1 and 4). They are authorised to adopt rules of procedure and to determine the organisational structure of the Court (Article 4). The Decision further specifies that “the initial primary task of the Appellate Division shall be to discharge the electoral appeals competence” (Article 5).

37. The inaugural session of the Appellate Division of the Court of Bosnia and Herzegovina was held on 6 June 2002. At that time, the High Representative, Paddy Ashdown, stated “I consider it a priority that the Criminal Division and the Administrative Division of the Court are established by the end of this year”. The Administrative Division is not yet operative.

3. Law on Telecommunications of Bosnia and Herzegovina

38. The Law on Telecommunications of Bosnia and Herzegovina, referenced in the Decision of the High Representative of 2 March 2001 (see paragraph 26 above), has not to date entered into force².

² After the adoption of the present decision, the High Representative issued a Decision Enacting the Law on Communications of Bosnia and Herzegovina on 21 October 2002, which entered into force on 20 November 2002.

V. COMPLAINTS

39. The applications allege a violation of the right to work of their founder and owner. They also raise the issue of a possible breach of Article 6 of the Convention in the context of the proceedings before the CRA to decide upon their applications for long-term broadcasting licences.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. Regarding Article 6 of the Convention

40. In its observations, the respondent Party quotes the Chamber's decision on admissibility and merits of 3 June 2002 in case no. CH/01/7248, "*ORDO*" – RTV "*Sveti Georgije*" v. *Bosnia and Herzegovina*, in which the Chamber concluded that the CRA does not satisfy the requirements of Article 6 of the Convention. The respondent Party further recalled the Chamber's opinion in that case regarding the necessity to create a "court with proper procedural guarantees and full jurisdiction" (*id.* at paragraphs 219 and 226).

2. Regarding Article 10 of the Convention

41. The respondent Party considers that the entire licensing process, including the adoption of all IMC/CRA rules, has been conducted in full accord with the principles of transparency, openness and non-discrimination, requiring only minimum operating standards by broadcasting stations. It argues that the entire licensing process was in full accordance with Article 10 paragraph 1 of the Convention. Indeed, while Article 10 guarantees the freedom of expression, paragraph 1 also provides that this right "*shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*".

42. The respondent Party states that the CRA licensing regime in Bosnia and Herzegovina is in accordance with international human rights laws. The CRA regulations on the frequency spectrum, which is by nature a limited natural resource, were adopted in accordance with the International Telecommunications Union standards. The CRA applied minimum standards in order to regulate and allocate the frequency spectrum, taking into account the specific situation in the country, *i.e.*, the large number of broadcasting stations in Bosnia and Herzegovina and the very low level of economic development.

43. Turning to the facts of these two particular cases, the respondent Party further details the reasons for the CRA's rejection of the applicants' applications for long-term broadcasting licences.

B. The applicants

44. The applicants allege a violation of the right to work of their founder and owner. They claim that the rejection of the long-term licence applications has caused them great financial damages. They further raise the issue of a possible breach of Article 6 of the Convention in the context of the proceedings before the CRA to decide upon their applications for long-term broadcasting licences.

VII. OPINION OF THE CHAMBER

A. Admissibility

45. Before considering the merits of these applications, the Chamber must decide whether to accept them, taking into account the admissibility criteria set forth in Article VIII(2) of the Agreement.

46. The respondent Party, in its observations, did not raise any ground regarding the question of admissibility of the applications. However, the Chamber may raise any of the admissibility criteria on its own and declare part or the entire applications inadmissible.

1. Compatibility *ratione materiae*

47. In accordance with Article VIII(2) of the Agreement, “the Chamber shall decide which applications to accept.... In so doing, the Chamber shall take into account the following criteria: ... (c) The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition.”

48. The Chamber notes that the applications alleged a violation of the right to work of the applicants’ founder and owner. The Chamber notes that the European Convention on Human Rights does not contain a right to that effect. Therefore, in accordance with Article II(2)(b) of the Agreement, the Chamber only has jurisdiction to consider the right to work, which is protected by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, in connection with alleged or apparent discrimination in the enjoyment of such right. The facts of these cases do not indicate that the owner of the applicant stations has been the victim of discrimination on any of the grounds set forth in Article II(2)(b) of the Agreement. It follows that this part of the applications is incompatible *ratione materiae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c).

2. Conclusion as to admissibility

49. As no other grounds for declaring the applications inadmissible appear, the Chamber declares the applications admissible with respect to Article 6 of the Convention, concerning the long-term broadcasting licence proceedings. However, the Chamber declares the remainder of the applications inadmissible as incompatible *ratione materiae* with the provisions of the Agreement.

B. Merits

50. Under Article XI of the Agreement, the Chamber must next address the question of whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article 1 of the Agreement, the parties are obliged to “secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms,” including the rights and freedoms provided for in the Convention and the other international agreements listed in the Appendix to the Agreement.

1. Right to access to courts as protected by Article 6 of the Convention

51. The applicants allege that their rights protected by Article 6 of the Convention have been violated. They appear to argue that in the proceedings before the CRA to decide upon their applications for a long-term broadcasting licence, which form the subject matter of these applications, they were not granted fair hearings by an impartial tribunal established by law. The applicants challenge the legality of the appellate process within the CRA and further raise the compatibility of the whole long-term licensing process before the CRA with Article 6 of the Convention.

52. The respondent Party quotes the “*ORDO*” – RTV “*Sveti Georgije*” case (case no. CH/01/7248, decision on admissibility and merits of 3 June 2002, Decisions January-July 2002), in which the Chamber concluded that the CRA does not satisfy the requirements of Article 6 of the Convention for the purpose of challenging a revocation of a broadcasting licence. The respondent Party further recalls the Chamber’s opinion in that case regarding the necessity to create a “court with proper procedural guarantees and full jurisdiction” (*id.* at paragraphs 219, 226).

53. Paragraph 1 of Article 6 of the Convention states as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

a. Determination of a civil right

54. As the Chamber has already stated in the *RTV Sveti Georgije* case, when it has considered whether a particular case concerns a “civil right” for the purposes of Article 6 of the Convention, the European Court of Human Rights (“the Court”) has set forth certain well-established governing principles. Firstly, the phrase “civil rights and obligations” in paragraph 1 of Article 6 “covers all proceedings the result of which is decisive for private rights and obligations” (Eur. Court HR, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, page 39, paragraph 94). Accordingly, “there must be a direct relationship between the proceedings and the right at issue” (Eur. Court HR, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, page 21, paragraph 47). Secondly, “the dispute must be genuine and of a serious nature,” and it may relate to the existence, scope, or exercise of the right at issue (Eur. Court HR, *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159, page 17, paragraph 37). Thirdly, the concept of “civil rights and obligations” is determined by only the character of the right at issue and not its legal classification by the domestic system (Eur. Court HR, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, page 30, paragraphs 89 and 90).

55. The Court has taken a case by case approach to the determination of “civil rights” within the meaning of paragraph 1 of Article 6 of the Convention (*see* case no. CH/01/7248 “*ORDO*” –*RTV “Sveti Georgije”*, decision on admissibility and merits of 3 June 2002, Decisions January-July 2002, paragraphs 203-204). The Chamber further recalls that the Court has considered the refusal of a licence to operate a petrol station as giving rise to “civil rights” (Eur. Court HR, *Bentham v. Netherlands*, judgment of 23 October 1985, Series A no. 97, page 16, paragraph 36). In *Bentham*, the Court noted that the right to the licence claimed by the applicant was a necessary condition for the exercise of his desired business activities, and as such, “it was closely associated with the right to use one’s possessions in conformity with the law’s requirements”. Since there were “direct links between the grant of the licence and the entirety of the applicant’s commercial activities”, the Court concluded that the right at stake was “civil” (*id.*).

56. In addition, the Court has found the revocation of a licence to operate a taxi and interurban traffic business to involve “civil rights” (Eur. Court HR, *Pudas v. Sweden*, judgment of 27 October 1987, Series A no. 125-A, page 16, paragraph 38). The Court noted that the licence obtained conferred a “right” upon the applicant, even though the licence was subject to certain prescribed conditions and the possibility of revocation by the authorities competent to supervise public transportation services (*id.* at page 15, paragraph 34). “The maintenance of the licence to which the applicant claimed to be entitled was one of the conditions for the exercise of his business activities.” Those business activities were commercial, carried out in order to earn profits, and based upon a contractual relationship between the licence-holder and his customers (*id.* at page 16, paragraph 37). Lastly, the revocation of a licence to sell alcohol gave rise to “civil rights”, even though the licence was subject to conditions and supervision by competent administrative authorities (Eur. Court HR, *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159, page 19, paragraph 44). The Court noted that under the applicable domestic law, the applicant could argue it was entitled to continue to operate its business under the licence unless it violated the conditions (*id.* at page 18, paragraph 40). The licence had allowed the applicant to sell alcoholic beverages, a private commercial activity with the object of earning profits, and the withdrawal of the licence had adversely affected the goodwill of the remainder of its restaurant business (*id.* at page 19, paragraph 43).

57. The Chamber recalls that in its *RTV Sveti Georgije* case it found that proceedings before the CRA concerning the withdrawal of a provisional broadcasting licence involved the determination of the applicant’s “civil rights and obligations” (case no. CH/01/7248 “*ORDO*” –*RTV “Sveti Georgije”*, decision on admissibility and merits of 3 June 2002, Decisions January-July 2002, paragraphs 203-208).

58. With respect to the character of the right involved in the proceedings before the CRA challenged in the present applications, the Chamber observes that the applicants’ desired business activities, to operate a radio or television broadcasting station, respectively, are commercial activities that are carried out for the purpose of gaining profits. Radio and television stations primarily gain such profits by selling airtime to broadcast commercial advertisements to television viewers and radio

listeners. Therefore, as the object of their activities, the applicants sought a contractual relationship between themselves, as the licence-holders, and commercial businesses or persons, as the purchasers of advertisements. Furthermore, as the IMC/CRA had previously granted provisional broadcasting licences to the applicants, the rejection of their requests for long-term broadcasting licences directly affected their right to use their possessions. Indeed, all their investments in possessions such as broadcasting equipment and operational structures, in addition to their client lists, were lost due to this rejection. Since there were direct links between the grant or refusal of the long-term broadcasting licence and the entirety of the applicants' desired commercial activities, the Chamber concludes that the right at stake is a "civil right".

59. Therefore, having in mind the case law of the European Court of Human Rights discussed above and its own case law, the Chamber concludes that the challenged proceedings before the CRA involved the determination of the applicants' "civil rights and obligations", within the meaning of paragraph 1 of Article 6 of the Convention. As such, Article 6 is applicable to those proceedings, and the Chamber must next consider whether those proceedings afforded the applicants the required protections.

b. Tribunal established by law

60. Paragraph 1 of Article 6 of the Convention requires "an independent and impartial tribunal established by law" to make the determination of civil rights and obligations. The applicants have challenged the legality of the activities by the CRA because the Parliamentary Assembly of Bosnia and Herzegovina has not yet adopted the draft Law on Telecommunications, which would authorise and regulate the CRA.

61. As explained above, the CRA has been acting under the authority of the Decision of the High Representative of 2 March 2001. This Decision, which has the force of law in Bosnia and Herzegovina, established the CRA, thereby "produc[ing] a single communications regulator having jurisdiction over both broadcasting and telecommunications" (Article 1.1 of the Decision of 2 March 2001). The Decision further describes in detail the structure of the agency (Article 2 of the Decision of 2 March 2001). It follows that the CRA has been properly "established by law".

c. Independent and impartial tribunal

62. The Chamber notes that in many countries of the world, administrative bodies are composed of two or more levels or instances that decide upon initial disputes and appeals. However, after the parties participate in decision-making before the administrative body, they usually have the right to file an appeal to a regular court against the final decision of the administrative body. The Law on the Court of Bosnia and Herzegovina provides that the Court of Bosnia and Herzegovina "is competent to decide actions taken against final administrative acts or silence of administration of the institutions of Bosnia and Herzegovina" (see paragraph 33 above). Therefore, provided the Court of Bosnia and Herzegovina had been operative (which it was not during the relevant time period in the present cases), after proceedings before the CEO and the CRA Council, a broadcaster would have been entitled to file an appeal against a final administrative decision of the CRA to that Court. However, as there was no operative Court of Bosnia and Herzegovina during the relevant time period, the CRA must on its own fulfil the requirements of Article 6 of the Convention in order for the long-term license proceedings in the *Televizija "MIB" Brčko* and *Muzička radio stanica "Studio 76" Brčko* cases to be in compliance with Article 6 of the Convention.

63. The Chamber notes that in its "*ORDO*" – *RTV "Sveti Georgije"* decision, it has considered the provisional broadcasting licence proceedings under the scope of Article 6 (1) of the Convention. In that case, the Enforcement Panel of the CRA suspended the provisional broadcasting licence of a broadcaster for having breached applicable provisions of the Broadcasting Code of Practice and the Terms and Conditions of its license. Its provisional licence was later revoked for non-compliance with the first decision. Thereafter, the broadcaster appealed these decisions before the CRA Council. In its decision, the Chamber has decided that in the provisional broadcasting licence proceedings, the CRA, as a singular administrative body, did not meet the requirements of the principles of an "independent and impartial tribunal" and did not provide a "public hearing" within the meaning of paragraph 1 of Article 6 of the Convention (*id.* paragraph 226). The Chamber has further considered in this case that

the appeal body, the CRA Council, was a “structure lack[ing] the appearance of independence and impartiality required for a ‘tribunal’” (*id.* paragraphs 218 and 226).

64. The Chamber remarks that the long-term broadcasting licence proceedings involved similar bodies as those in the provisional broadcasting licence proceedings. Indeed, the CEO of the CRA and the CRA Council, on appeal, are similar authorities as the Enforcement Panel and the CRA Council, considered previously by the Chamber. Moreover, all of these bodies are part of the CRA as a whole.

65. Having in mind these conclusions, and regarding the first instance body of the long-term licence proceedings, the Chamber observes that the CEO is not only in charge of the competent authority to decide on the long-term proceedings, but he is also responsible for the day-to-day operations of the CRA (see paragraph 26 above). The CEO is in charge of “the implementation of relevant law and policy, technical oversight, industry affairs, administration and staffing”. Therefore, since the CEO is intervening in policy-making, implementing it, and deciding as a first instance body, this function cannot be seen as an independent body in the long-term licence proceedings. As to the second instance body, the Chamber recalls that it has already considered that the CRA Council, as an appeal body, did not respect all the principles set out by Article 6 (1) of the Convention (see paragraph 63 above).

66. For these reasons, the Chamber concludes that neither the Executive Officer of the CRA nor the CRA Council individually, nor the CRA in its entirety as a singular administrative body, can be considered an “independent and impartial tribunal” within the meaning of paragraph 1 of Article 6 of the Convention. However, if there had been a court with proper procedural guarantees and full jurisdiction functioning during the relevant time period in Bosnia and Herzegovina that could have decided upon an appeal filed against the challenged final administrative decisions of the CRA, then the Chamber would be satisfied that the CRA, as an administrative body, has acted within the scope of its competence and its proceedings have been entirely proper and fair.

2. Conclusion as to Article 6 of the Convention

67. The Chamber concludes that the long-term broadcasting licence proceedings before the CRA involved the determination of the applicants’ “civil rights and obligations”; therefore, Article 6 of the Convention is applicable to those proceedings. The Chamber further concludes that the CRA is “established by law”; however, the CRA is not an “independent and impartial tribunal” within the meaning of paragraph 1 of Article 6. Accordingly, the respondent Party has violated the rights of the applicants protected by Article 6 of the Convention.

VIII. REMEDIES

68. Under Article XI(1)(b) of the Agreement, the Chamber must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

69. The Chamber has found a violation of the applicants’ rights protected by Article 6 of the Convention. In particular, the Chamber has found that the respondent Party violated Article 6 of the Convention because the disputed proceedings before the CRA concerning the applicants’ applications for long-term broadcasting licences were not decided by “an independent and impartial tribunal”. The Chamber further observes that if there had been a fully functioning Court of Bosnia and Herzegovina during the relevant time period with broad jurisdiction to deal with all questions of fact and law and with all appropriate procedural guarantees to which the applicants could appeal the final administrative decisions by the CRA, then there would be no violation of Article 6 in these cases.

70. In light of these facts, the Chamber does not find it appropriate to award the applicants compensation for pecuniary damages. Nor, in the circumstances, will the Chamber award the applicants compensation for non-pecuniary damages. The Chamber will, however, order the respondent Party, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber’s Rules of Procedure, to take all necessary steps to provide

the applicants with an opportunity, upon their written request, to file an appeal against any disputed final administrative decisions of the CRA to an independent and impartial tribunal.

71. The Chamber will further order the respondent Party to report to it within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps it has taken to comply with this decision.

IX. CONCLUSIONS

72. For the above reasons, the Chamber decides,

1. by 6 votes to 1, that the applications are admissible against Bosnia and Herzegovina with respect to claims under Article 6 of the Convention concerning the long-term broadcasting licence proceedings;

2. unanimously, that the remainder of the applications are inadmissible;

3. by 5 votes to 2, that the failure to provide the applicants with an independent and impartial tribunal for the determination of their civil rights and obligations violated the applicants' rights protected by paragraph 1 of Article 6 of the Convention, Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

4. by 4 votes to 3, to order Bosnia and Herzegovina, within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, to take all necessary steps to provide the applicants with an opportunity, upon their written request, to file an appeal against any disputed final administrative decisions of the CRA to an independent and impartial tribunal; and

5. unanimously, to order Bosnia and Herzegovina to report to it within 6 months from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps it has taken to comply with this decision.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

Annex I: Dissenting opinion of Mr. Manfred Nowak, joined by Mr. Jakob Möller.

ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Manfred Nowak, joined by Mr. Jakob Möller.

DISSENTING OPINION OF MR. MANFRED NOWAK JOINED BY MR. JAKOB MÖLLER

As I have already stated in my partly dissenting opinion in the case "*ORDO*" – RTV "*Sveti Georgije*" (case no. CH/01/7248, decision on admissibility and merits of 3 June 2002, Decisions January – July 2002), I consider the revocation of a provisional broadcasting license as a classical public law function and, therefore, not as an act which determines civil rights and obligations in the sense of Article 6 of the European Convention on Human Rights. Even less can the granting of a long-term license be considered as determining a civil right and, therefore, requiring full access to an independent and impartial tribunal. As the frequency spectrum is a limited natural resource, only a limited number of broadcasters will be granted a long-term license. Nothing in the practice of the CRA suggests that the granting of long-term broadcasting licenses was not carried out in a fully professional and impartial manner. From a political point of view, it is, of course, highly desirable that the State Court of Bosnia and Herzegovina shall be in full operation without further delay and shall also have the power to review decisions of administrative authorities at the level of the State of Bosnia and Herzegovina. But not every administrative decision determines civil rights and obligations and, therefore, requires a full review by an independent and impartial tribunal as provided for in Article 6. Consequently, I disagree that in this case Article 6 was applicable and has been violated.

(signed)
Manfred NOWAK

(signed)
Jakob MÖLLER