



DECISION

Date of adoption: 16 July 2008

Case No. 02/08

Nexhmedin SPAHIU

against

UNMIK

The Human Rights Advisory Panel sitting on 16 July 2008
with the following members present:

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

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, decides as follows:

I. THE FACTS

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.

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.

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.

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 It therefore rescinded those portions of the Sanctioning Decision of 12 January 2006 which had been based on non-compliance with the said Licensing Decision.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.

3. 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.

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.

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.

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.

Four days later, on 28 December 2007, the equipment was effectively confiscated.

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. COMPLAINTS

4. 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.

III. PROCEEDINGS BEFORE THE PANEL

5. The complaint was introduced on 1 March 2008.

The Panel communicated the case to the SRSG on 15 April 2008 giving him the opportunity to provide comments on behalf of UNMIK on the admissibility and merits pursuant to Section 11.3 of UNMIK Regulation No. 2006/12 and Rule 30 of the Panel's Rules of Procedure by 2 May 2008.

The SRSG did not avail himself of this opportunity.

IV. THE LAW

6. Before considering the case on its merits the Panel has to decide whether to accept the case, taking into consideration the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.

7. The Panel notes that the complainant alleges a violation of his right to the peaceful enjoyment of property. The applicant refers to Article 17 (2) of the Universal Declaration of Human Rights. Article 17 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. “

In this connection, the Panel considers that it is the master of the characterisation to be given in law to the facts of the case. It does not consider itself fully bound by the characterisation given by the complainant. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (compare ECtHR, *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, p. 13, § 29). The Panel will therefore examine the complaint, apart from the provisions expressly relied on by the complainant, also under Article 1 of Protocol No. 1 to the European Convention on Human Rights. That provision 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.”

8. The complainant submits, in particular, that the interference complained of, namely the confiscation of the equipment, had 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 Independent Media Commission, composed of seven members, not to its Chief Executive, to assess whether or not TV Mitrovica had complied with the decision of the Media Appeals Board of 27 November 2006.

9. The Panel considers that the complaint raises issues of law and of fact the determination of which should depend on an examination of its merits.

The Panel concludes therefore that the complaint is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12. The Panel does not see any other grounds for declaring it inadmissible.

FOR THESE REASONS,

The Panel, by a majority,

DECLARES THE COMPLAINT ADMISSIBLE.

John J. RYAN
Executive Officer

Marek NOWICKI
Presiding Member