



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIFTH SECTION

**CASE OF GLAS NADEZHDA EOOD AND ELENKOV
v. BULGARIA**

(Application no. 14134/02)

JUDGMENT

STRASBOURG

11 October 2007

FINAL

11/01/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Glas Nadezhda EOOD and Elenkov v. Bulgaria,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mr P. LORENZEN, *President*,

Mrs S. BOTOCHAROVA,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr R. MARUSTE,

Mr M. VILLIGER, *judges*,

and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 18 September 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 14134/02) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Glas Nadezhda EOOD, a single-member limited liability company having its registered office in Sofia, and its sole member and manager, Mr Anatoliy Elenkov, a Bulgarian national (“the applicants”), on 18 October 2001.

2. The applicants were represented before the Court by Mr Y. Grozev, a lawyer practising in Sofia. The Bulgarian Government (“the Government”) were represented by their Agent, Ms M. Karadzhova, of the Ministry of Justice.

3. The applicants complained about the refusal of the competent body to grant Glas Nadezhda EOOD a radio broadcasting licence and about the refusal of the Supreme Administrative Court to review the merits of the decision made by this body. They alleged that these had breached their rights under Articles 9, 10 and 13 of the Convention.

4. On 8 December 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

5. Mr Elenkov, who was born in 1972 and lives in Sofia, is a Christian and a follower of the Protestant Church in Bulgaria. In 2000 he decided to set up Glas Nadezhda EOOD, through which he would apply for a broadcasting licence for a religious radio station. He obtained support for this initiative from many domestic and foreign religious figures of various denominations, as well as from the Directorate of Religious Denominations at the Council of Ministers.

B. The application for a broadcasting licence and its denial

6. On 1 June 2000 the Council of Ministers announced that a number of frequencies for local radio broadcasting would be made available to private operators in several cities. Ten such licences were available for Sofia.

7. On 16 August 2000 Glas Nadezhda EOOD applied to the State Telecommunications Commission (“the STC” – see paragraphs 24 and 25 below) for a broadcasting licence for a radio station with Christian religious programming for the Sofia City Region. In support of its application it presented, *inter alia*, a business plan, a programme project, a programme concept, a programme profile, and a programme scheme. It was apparent from these that it intended to broadcast mainly Christian religious programming.

8. In line with the established procedure, the application was forwarded to the National Radio and Television Committee (“the NRTC” – see paragraph 27 below). After deliberating on the application on 26 September 2000, the Committee refused in a decision of 2 October 2000, which was not notified to Glas Nadezhda EOOD, to grant a broadcasting licence. It stated, without adding further detail, that although the company had submitted all the requisite documents, its programme documents did not correspond to points 3.4, 3.5 and 4.3 of the NRTC's criteria for licensing regional over-the-air radio operators, and only partly corresponded to points 3.1, 3.2, 3.3, 4.1 and 4.2 (see paragraph 28 below). Furthermore, Glas Nadezhda EOOD had no prior experience of creating programmes in the region.

9. In accordance with the established procedure (see paragraph 26 below), this decision was sent to the STC.

10. In a decision of 2 November 2000 the STC refused to grant a broadcasting licence to Glas Nadezhda EOOD. It stated that its refusal was based on the NRTC's decision of 2 October 2000.

C. The application for judicial review of the STC's decision

11. Glas Nadezhda EOOD lodged an application for judicial review of the STC's decision with the Supreme Administrative Court. It submitted that, since it was not clear whether the NRTC's decision was subject to direct review, the court should first examine its lawfulness before ruling on the lawfulness of the STC's decision. Glas Nadezhda EOOD further argued that it had produced all of the requisite documents, each of which corresponded to the NRTC's criteria. The fact that no reasons had been given on how, in the NRTC's view, these documents failed to meet the criteria, was in breach of the rules of procedure and the requirement that administrative decisions be reasoned. On the contrary, all of the NRTC's criteria had been complied with. The decisions had also been in breach of the substantive law and did not correspond to the latter's object and purpose. In a supplementary memorial Glas Nadezhda EOOD made detailed submissions in respect of each of its alleged failures to comply with the relevant NRTC criteria.

12. In a judgment of 12 March 2001, a three-member panel of the Supreme Administrative Court dismissed the application. It held that the NRTC's decision was subject to review in separate proceedings. However, Glas Nadezhda EOOD had not sought such review, whereas indirect review of that decision in proceedings against the STC's decision was impossible. The court went on to say that the STC's decision concerned the allocation of the radio spectrum, whereas the NRTC's decision related to the broadcasting content. It was therefore impossible to grant a broadcasting licence without a prior finding by the NRTC that it would be used for broadcasting quality programmes. In issuing its decision, the STC was therefore bound by the NRTC's decision and the latter's refusal had effectively precluded the former from granting the requested licence.

13. Glas Nadezhda EOOD appealed on points of law to a five-member panel of the Supreme Administrative Court. It argued, *inter alia*, that while it could be accepted that the NRTC's refusal was binding on the STC, the former was bound to give reasons for its decision.

14. In a final judgment of 11 July 2001 the five-member panel of the Supreme Administrative Court upheld the three-member panel's judgment, holding, *inter alia*, that the STC was bound by the NRTC's decision and could not have reviewed its lawfulness. Nor could the court, in proceedings against the STC's decision, examine the lawfulness of the NRTC's decision. It could do so only pursuant to an application for judicial review of the latter's decision.

D. The application for judicial review of the NRTC's decision

15. Having been apprised of the tenor of the NRTC's decision in the course of the proceedings for judicial review of the STC's decision, on 1 March 2001 Glas Nadezhda EOOD made an application for its judicial review. It submitted that it had provided all necessary documents, thus establishing that it had complied with the NRTC's licensing criteria. However, that body had not pointed out any perceived deficiencies, thus failing to provide a duly reasoned decision and acting in breach of the rules of administrative procedure.

16. In a judgment of 21 March 2002 a three-member panel of the Supreme Administrative Court dismissed the application. It held that the NRTC's assessment of whether the licence application met its criteria was not subject to judicial scrutiny, since the NRTC enjoyed discretion in that respect. In the instant case it had found that the programme documents submitted by Glas Nadezhda EOOD did not meet its requirements for regional targeting, societal function and business perspective of the programming, and only partially met its criteria regarding the justification and uniqueness of its programme profile, conformity with the audience's expectations and professional and technological resources. These findings fell within the exclusive province of the NRTC.

17. Glas Nadezhda EOOD appealed on points of law to a five-member panel of the Supreme Administrative Court, reiterating its arguments.

18. In a final judgment of 28 December 2002 the five-member panel of the Supreme Administrative Court upheld the three-member panel's judgment, fully endorsing its reasoning.

E. The attempt to obtain a copy of the minutes of the NRTC's deliberations

19. On 16 November 2000 Mr Elenkov, acting on behalf of Glas Nadezhda EOOD, requested the NRTC to provide it with a copy of the minutes of the deliberations at which it had examined its application for a broadcasting licence. He relied on the Access to Public Information Act 2000 (*“Закон за достъп до обществена информация”*).

20. As the NRTC did not reply within the statutory time-limit, Mr Elenkov asked the Sofia City Court to review its tacit refusal.

21. In a judgment of 2 July 2001 the Sofia City Court quashed the NRTC's tacit refusal and ordered it to reply to the request for information. It held that the minutes of the NRTC's deliberations were public information within the meaning of the Access to Public Information Act 2000.

22. The NRTC did not appeal and shortly afterwards the judgment entered into force. However, at the time of the latest receipt of information

from the applicants (26 June 2006) the NRTC had still not complied with the judgment and had not replied to the applicants' request for information.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

23. The relevant provisions of the Constitution of 1991 read as follows:

Article 37

“1. Freedom of conscience, freedom of thought and choice of religion or of religious or atheistic views shall be inviolable. The State shall assist in the maintenance of tolerance and respect between the adherents of different denominations, and between believers and non-believers.

2. Freedom of conscience and religion shall not be exercised to the detriment of national security, public order, public health and morals, or of the rights and freedoms of others.”

Article 39

“1. Everyone is entitled to express an opinion or to publicise it through words, written or oral, sound, or image, or in any other way.

2. This right shall not be used to the detriment of the rights and reputation of others, or for the incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of enmity or violence against anyone.”

Article 40

“1. The press and the other mass media shall be free and not subject to censorship.

2. Printed matter or another information medium may be stopped or confiscated only pursuant to an act of the judicial authorities, where it encroaches on good morals or incites to a forcible change of the constitutionally established order, the perpetration of a crime or an act of violence against the person. ...”

Article 41

“1. Everyone has the right to seek, receive and impart information. The exercise of that right may not be directed against the rights and the good name of other citizens, nor against national security, public order, public health or morals.

2. Citizens shall have the right to information from state bodies or agencies on any matter of legitimate interest to them, unless the information is a state secret or a secret protected by law, or it affects the rights of others.”

B. The Telecommunications Act 1998

24. At the material time the Telecommunications Act 1998 (“*Закон за далекосъобщенията*”) regulated all forms of telecommunication, such as telephony and radio and television broadcasting. The main regulatory body having authority under the Act was the STC (renamed Telecommunications Regulation Commission in February 2002). At the relevant time it had the power to, *inter alia*, grant, amend, supplement, freeze, discontinue and withdraw radio and television broadcasting licences, following a decision by the NRTC (section 27(5) of the Act, as in force at the material time).

25. The STC was a collective body attached to the Council of Ministers (section 22(1) of the Act, as in force at the material time). It had five members, nominated by the Council of Ministers and appointed by the prime minister for a term of seven years, renewable once (section 23(1) and (2) of the Act, as in force at the material time). The members could be dismissed prematurely only if they resigned, seriously breached the provisions of the Act, seriously or systematically violated their official duties, committed a wilful publicly prosecutable criminal offence, or were unable to perform their duties for more than six months (section 23(4) of the Act, as in force at the material time). The organisation and the operation of the STC and of its secretariat were laid down in regulations issued by the Council of Ministers (section 26(1) of the Act, as in force at the material time).

C. The Radio and Television Act 1998

26. Under section 105(1) of the Radio and Television Act 1998 (“*Закон за радиото и телевизията*”), as in force at the relevant time, radio and television broadcasting was only allowed under a licence granted by the STC. The application for a licence had to be filed with the STC and accompanied by, as relevant, a programme project, a programme concept, a programme profile and a programme scheme (section 111 of the Act, as in force at the relevant time). A STC official checked the submitted documents and, if he or she found any irregularities, advised the applicant, which then had seven days to rectify them. If the applicant failed to do so, the application was not considered (section 112 of the Act, as in force at the relevant time). The STC was to transmit the accepted application, plus enclosures, to the NRTC (section 113 of the Act, as in force at the relevant time), which then had to make a reasoned decision on the application within one month (section 115(1) of the Act, as in force at the relevant time). The decision was then transmitted to the STC within seven days (section 115(2) of the Act, as in force at the relevant time), which issued the licence, where appropriate, within one month (section 115(4) of the Act, as in force at the relevant time).

27. The NRTC was an independent body responsible for protecting freedom of expression, the independence of radio and television operators and the interests of the audience (section 20(1) of the Act, as in force at the relevant time). Five of its nine members were elected by the National Assembly, and the remaining four were appointed by the President of the Republic (section 24(1) of the Act, as in force at the relevant time). Alongside some consultative powers, it was entrusted with supervising the activities of radio and television operators and granting, modifying and withdrawing broadcasting licences (section 32(1)(1) and (9) of the Act, as in force at the relevant time). In November 2001 the NRTC was renamed the Electronic Media Council.

D. Programme criteria of the NRTC

28. In issue 5/6 of 2000 of its bulletin, the NRTC published its “Programme criteria for the licensing of regional over-the-air radio operators”. They read as follows:

“1. Legal status

1.1. Conformity to the requirements of section 105 of the Radio and Television Act 1998. *Note: compliance with this criterion is mandatory for admitting the applicant to assessment under the remainder of the criteria.*

1.2. Transparency and structure of the [operator's] capital 0 to 5 points

2. Experience in setting up radio programmes

2.1. Degree of legality of the previous experience 0 to 10 points

Note: the assessment is made on an inverse scale; an applicant which has received 0 points is not assessed under criteria 2.2., 2.3. and 2.4.

2.2. Population coverage ratio of the [radio station's] communication 0 to 5 points

Note: the population coverage ratio of the communication is assessed on the basis of the audience for the region in percentage points.

2.3. Uniqueness of the form of communication 0 to 3 points

2.4. Societal function 0 to 3 points

– information and commentary

– culture and education

– programming for disadvantaged groups

2.5. Previously established violations of the [Radio and Television Act] 0 to 5 points

Note: the assessment is made on an inverse scale, on the basis of a report by the NRTC's monitoring department.

3. Programme aims

3.1. Justification of the selected programme profile 0 to 10 points

Note: [If awarded] 0 points the applicant is not assessed under the other criteria.

3.2. Uniqueness (for the region) of the programme profile 0 to 10 points

3.3. Conformity with the audience's expectations 0 to 5 points

3.4. Regional targeting of the programme 0 to 5 points

3.5. Societal function 0 to 10 points

– information and commentary

– culture and education

– programming for disadvantaged groups

4. Capacity to produce the programme

4.1. Professional resources 0 to 5 points

4.2. Technological resources 0 to 5 points

4.3. Business perspective 0 to 10 points

5. Setting up of radio networks in more than one region

5.1. Programme capabilities for supra-regional communication

5.2. Regional targeting of the individual programmes

Note: the assessment under [criteria] 5.1. and 5.2. is from 0 to 3 points and is made by multiplying the two results.

The maximum number of points under all criteria is 100.”

E. Judgment no. 10 of 1999 of the Constitutional Court

29. On 25 June 1999 the Constitutional Court gave judgment (*peu. № 10 от 25 юни 1999 г. по к.д. № 36 от 1998 г., обн. ДВ, бр. 60 от 2 юли 1999 г.*) in proceedings brought by fifty-two members of Parliament who considered that a number of provisions of the Radio and Television Act 1998 should be declared contrary to the Constitution. The court held, as relevant:

“Under the Telecommunications Act [1998], licences are granted by the STC and approved by the Council of Ministers. Whereas this licensing relates to the setting up of telecommunication networks and to the use of the radio frequency spectrum and its allocation, the NRTC's decision under the [Radio and Television Act 1998] relates to the content of the services which will be broadcast. The provisions of the [Telecommunications Act 1998] relate to licensing for the setting up of telecommunications networks and the provision of services through the radio frequency spectrum. Supervision of the preparation, creation and broadcasting of radio and television programmes ... falls outside the competence of the STC.

As regards the media, and radio and television in particular, there exists the instruction [implicit] in Article 40 § 1 of the Constitution that they be transformed into autonomous public institutions, freed of the tutelage of a specific government agency. For this reason the regulation of radio and television is entrusted ... to the NRTC, which is not a government agency.

Over recent years Bulgarian law has for the first time differentiated between the regimes for establishing telecommunications operators and those for establishing radio and television operators. The licensing of telecommunication operators is governed by the [Telecommunications Act 1998], whereas the licensing in respect of programme content is governed by the [Radio and Television Act 1998]. These are two differing types of activity: the first mainly monitors compliance with technological requirements under the [Telecommunications Act 1998], whereas the second monitors aesthetical and artistic qualities under the [Radio and Television Act 1998]. At the same time, the media law does not allow the independence of the procedure for issuing radio and television licences to be called into question, because section 115 of the [Radio and Television Act 1998] instructs the NRTC to make a reasoned decision on each application for a licence for electronic media broadcasting. If the NRTC's decision is to allow the application, it encloses the draft licence. The assertion ... that 'the STC is not bound by the decision of the NRTC [and that i]t may grant a licence or deny one irrespective of the positive decision of the NRTC' is unfounded. The [STC] has no right to review compliance with the criteria laid down in the [Radio and Television Act 1998]. All questions relating to the granting, modification, or withdrawal of radio and television broadcasting licences, respectively to guaranteeing freedom of expression through the media, fall within the mandate of the NRTC.

This court has many times ruled on the relations between the communications rights and the regulatory bodies in the information field. The connection between freedom of speech and the powers of the STC were examined in judgment no. 33 of 1998 [(*решение № 33 от 8 декември 1998 г. по к.д. № 30 от 1998 г., обн., ДВ, брой 147 от 15 декември 1998 г.*)], whose reasoning is also applicable in the instant case. This judgment states: 'As already found by [this court] in its judgment no. 7 of 1996 [(*решение № 7 от 4 юни 1996 г. по к.д. № 1 от 1996 г., обн., ДВ, брой 55 от 28 юни 1996 г.*)], State interference in the allocation of the radio frequency spectrum is inevitable. It follows that the freedom of the electronic media under Article 40 § 1 of the Constitution does not exclude State interference. The underlying principles of Article 40 § 1 may be complied with by making the licensing conditions and procedure public, accessible and preordained.'”

F. Judicial review of the decisions of the STC and the NRTC

30. Under section 25(3) of the Telecommunications Act 1998, the decisions of the STC were subject to review by the Supreme Administrative Court.

31. Section 38 of the Radio and Television Act 1998, as worded at the material time, provided that the NRTC's decisions to grant, amend or withdraw a broadcasting licence were also subject to review by the Supreme Administrative Court.

32. Under section 41(3) of the Administrative Procedure Act 1979 (“Закон за административното производство”), which at the material time regulated, *inter alia*, the procedure for judicial review of administrative decisions, the reviewing court had to verify whether an administrative decision was lawful, that is, made by a competent body in due form, in compliance with the relevant procedural and substantive rules, and in conformity with the object and purpose of the law. Similarly, section 12 of the Supreme Administrative Court Act 1997 (“Закон за Върховния административен съд”), as in force at the relevant time, provided that the grounds for annulling administrative decisions were lack of competence of the body which had made the decision, its failure to make the decision in due form, a material breach of the rules of administrative procedure, a breach of the substantive law or non-conformity with the object and purpose of the law.

III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

33. On 20 December 2000 the Committee of Ministers of the Council of Europe adopted Recommendation no. R (2000) 23 to Member States on the independence and functions of regulatory authorities for the broadcasting sector, in which it recommended that the Member States, *inter alia*, “include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation”.

34. The guidelines, featuring as an appendix to the recommendation, provide, as relevant:

“...

3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.

4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:

- regulatory authorities are under the influence of political power;
- members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.

5. Furthermore, rules should guarantee that the members of these authorities:

- are appointed in a democratic and transparent manner;
- may not receive any mandate or take any instructions from any person or body;
- do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.

...

13. One of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of broadcasting licences. The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law.

14. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity.

...

27. All decisions taken and regulations adopted by the regulatory authorities should be:

- duly reasoned, in accordance with national law;
- open to review by the competent jurisdictions according to national law;
- made available to the public.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicants complained under Article 10 of the Convention that the authorities' refusal to grant Glas Nadezhda EOOD a broadcasting licence had not been justified under paragraph 2 of that Article.

36. Article 10 provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. The parties' submissions

37. The Government conceded that the denial of a broadcasting licence to Glas Nadezhda EOOD had amounted to an interference with the applicants' freedom to impart information and ideas. In their view, however, this interference had been authorised under the third sentence of paragraph 1 of Article 10 of the Convention. The licensing of radio broadcasters had been specifically envisioned by the Radio and Television Act 1998. It had been entrusted to a special body, the NRTC, charged with protecting freedom of expression. Moreover, the law regulating licensing had been sufficiently clear in its terms. The NRTC's decision had been based on quite detailed and publicly announced criteria. The NRTC had clearly indicated, as could also be seen from the judgment of the Supreme Administrative Court of 21 March 2002, which of those criteria had not been met by Glas Nadezhda EOOD. Some of the criteria were formal, while others had related to the utility and the feasibility of the proposed radio station. This could not be seen as unlawful, arbitrary or discriminatory, as indicated by the former Commission in its decision in the case of *Verein Alternatives Lokalradio Bern et Verein Radio Dreyeckland Basel v. Switzerland* (no. 10746/84, Commission decision of 16 October 1986, Decisions and Reports 49). The decision to refuse the licence had been based on the failure by Glas Nadezhda EOOD to meet a number of the announced criteria. This decision

had been the result of a detailed examination and had been reviewed by two levels of court.

38. The applicants submitted that the manner in which the NRTC had applied its criteria for evaluating candidates for broadcasting licences had been arbitrary. Firstly, those candidates had had no direct contact with the NRTC, which had engendered delay and confusion. Secondly, the points system adopted by the NRTC had not been properly operated. It was natural to expect that each candidate would be allotted a certain number of points, that later a ranking would be made, and that the candidate obtaining the highest number of points would be granted a licence. However, the NRTC had eschewed such allotting of points, instead merely informing the candidates that they would or would not be granted a licence. The procedure followed had not been public and transparent. The NRTC had not disclosed the reasons for its decisions and the candidates had not been told why some of them had been approved and others not. Their evaluations had never been made public. These deficiencies had not been addressed or remedied in the ensuing judicial review proceedings, which had deprived judicial review of all practical meaning. For all these reasons, the applicants were of the view that the interference with their freedom of expression had not been prescribed by law.

39. The applicants further argued that the NRTC's decision in their particular case had exemplified the flaws outlined above. The decision had also failed to strike a proper balance between the various interests at stake. The decision had found that Glas Nadezhda EOOD had not met a number of the NRTC's criteria. However, some of these criteria had not been legitimate requirements in a democratic society, while others had been clearly unfounded. Thus, the requirement of "regional targeting" had been unclear. The requirement of "business perspective" had been inapposite, as the radio station had not been envisaged as a business venture. The requirement to serve a "societal function", as set out in the NRTC's programme criteria, had not been a legitimate one in a democratic society. The NRTC's programme criteria had specified this to mean that the radio had to provide "information and commentary", "culture and education" and "programming for disadvantaged groups". As the NRTC's decision had not elaborated on how Glas Nadezhda EOOD had failed to meet these requirements and as the applicants could not obtain information on the NRTC's deliberations, they inferred this to mean that religious programming had been deemed unacceptable in itself. In their view, such a policy would be in breach of both Articles 9 and 10. Finally, the finding that the radio's programme would lack uniqueness had been clearly unfounded, as no Christian religious radio existed on the territory of Sofia or anywhere in Bulgaria, despite sociological evidence that the audience would welcome such broadcasting.

B. The Court's assessment

1. Admissibility

40. The Court notes at the outset that it was only the applicant company, Glas Nadezhda EOOD, which applied for and was denied a licence (see paragraphs 8 and 10 above). The issue thus arises whether the second applicant, Mr Elenkov, who is its sole member and manager, may himself claim to be a victim within the meaning of Article 34 of the Convention. The Court notes that in the case of *Groppera Radio AG and Others v. Switzerland* it found that the sole shareholder and statutory representative of a company could also be considered as a victim as regards a ban on broadcasting (see *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 21, § 49). Since the case at hand is indistinguishable in this respect, the Court considers that Mr Elenkov may also claim to be a victim of a violation. Indeed, the Government did not dispute this.

41. The Court further finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It also considers that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Has there been an interference with the applicants' freedom of expression?

42. The refusal to grant Glas Nadezhda EOOD a broadcasting licence constituted an interference with both applicants' freedom to impart information and ideas (see *Verein Alternatives Lokalradio Bern et Verein Radio Dreyeckland Basel*, cited above, p. 126; *Informationsverein Lentia and Others v. Austria*, judgment of 24 November 1993, Series A no. 276, p. 13, § 27; *Radio ABC v. Austria*, judgment of 20 October 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2197, § 27; *Leveque v. France* (dec.), no. 35591/97, 23 November 1999; *Brook v. the United Kingdom* (dec.), no. 38218/97, 11 July 2000; *United Christian Broadcasters Ltd v. the United Kingdom* (dec.), no. 44802/98, 7 November 2000; and *Demuth v. Switzerland*, no. 38743/97, § 30, ECHR 2002-IX; and also, *mutatis mutandis*, *Groppera Radio AG and Others*, cited above, p. 22, § 55; *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A no. 178, p. 23, § 47; *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. 32240/96, § 24, 21 September 2000; and *Murphy v. Ireland*, no. 44179/98, § 61, 10 July 2003).

43. It must therefore be determined whether this interference was “prescribed by law”, pursued one or more legitimate aims under the third

sentence of paragraph 1 of Article 10 or under paragraph 2 thereof, and was “necessary in a democratic society”.

44. When doing so, the Court will bear in mind that under the third sentence of Article 10 § 1 States are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. The grant of a licence may also be made conditional on such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. However, the compatibility of such interferences must be assessed in the light of the requirements of paragraph 2 (see *United Christian Broadcasters Ltd*; and *Demuth*, §§ 33-35, both cited above).

(b) Was the interference justified?

45. The first step in the Court's inquiry is to determine whether the denial of a broadcasting licence was “prescribed by law”, within the meaning of Article 10. According to its settled case-law, this expression, which is also used in Articles 9 and 11 of the Convention, and the expression “in accordance with the law”, used in Article 8 of the Convention, not only require that an interference with the rights enshrined in these Articles should have some basis in domestic law, but also refer to the quality of the law in question. That law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among many other authorities, *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I).

46. Domestic law must also afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI). It must furthermore provide adequate and effective safeguards against abuse, which may in certain cases include procedures for effective scrutiny by the courts (see, *mutatis mutandis*, *Lupsa v. Romania*, no. 10337/04, § 34, 8 June 2006).

47. Turning to the present case, the Court notes at the outset that the interference with the applicants' freedom of expression stemmed entirely from the NRTC's decision, which by law was considered binding on the

STC (see paragraphs 12, 14 and 29 above). The Court may thus confine its examination to that decision.

48. The Court observes that the grant or refusal of a broadcasting licence was premised on the applicants' compliance with a number of criteria published by the NRTC in its bulletin. Some of these criteria – such as the requirement to have sufficient “experience in setting up radio programmes” and “technological resources” – seem quite clear, while others – such as the serving of a “societal function” – less so (see paragraph 28 above). Most of the criteria could, despite the points system adopted, be subject to a highly subjective assessment.

49. The Court is prepared to accept that these criteria were, in the special context, sufficiently accessible and precise to comply with the Convention requirement of lawfulness (see, *mutatis mutandis*, *Groppera Radio AG and Others*, cited above, p. 26, § 68). However, it must further verify whether the manner in which the NRTC applied them in the licensing process provided sufficient guarantees against arbitrariness.

50. In this respect, the Court notes that the NRTC did not hold any form of public hearings and that its deliberations were kept secret, despite a court order to provide to the applicants a copy of the minutes of these deliberations (see paragraphs 8 and 19-22 above). Furthermore, in its decision the NRTC did not give reasons why it considered that Glas Nadezhda EOOD did not correspond or only partially corresponded to a number of its criteria; it merely stated that this was so (see paragraph 8 above). The applicants or the public were thus not made aware on what basis the NRTC had exercised its discretion to deny a broadcasting licence.

51. This lack of reasons was not made good in the ensuing judicial review proceedings, because the Supreme Administrative Court held that NRTC's discretion was unreviewable (see paragraphs 16 and 18 above). This, coupled with the somewhat vague purport of certain of the NRTC's programme criteria, denied the applicants legal protection against arbitrary interferences with their freedom of expression. In this connection, the Court notes that the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for open and transparent application of the regulations governing the licensing procedure and specifically recommend that “[a]ll decisions taken ... by the regulatory authorities ... be ... duly reasoned [and] open to review by the competent jurisdictions” (see paragraphs 33 and 34 above).

52. In view of the foregoing considerations, the Court concludes that the interference with the applicants' freedom of expression did not meet the Convention requirements of lawfulness. That being so, it is not required to determine whether this interference pursued a legitimate aim and, if so, whether it was proportionate to the aim sought to be attained.

53. There has therefore been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

54. The applicants complained under Article 9 of the Convention that the authorities' refusal to grant Glas Nadezhda EOOD a broadcasting licence had substantially restricted their possibility to communicate their religious ideas to others and had thus infringed their freedom to manifest their religion. In their view, this refusal had not been justified under the second paragraph of that Article for the same reasons as the ones indicated under paragraph 2 of Article 10 of the Convention.

55. Article 9 provides:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

A. The parties' submissions

56. The Government submitted that the criteria on which the NRTC had based its denial of a broadcasting licence had not included a religious element. Nor had the NRTC grounded its decision on the religious nature of the radio's proposed programme. On the contrary, it could be seen from the documents in the file that the authorities with competence for religious issues had endorsed Glas Nadezhda EOOD's licence application. However, that application, like any other, had to comply with the criteria published by the NRTC. The denial of the licence on the basis of its failure to meet these criteria had not amounted to an interference with the applicants' right to manifest their religion or belief.

57. The applicants relied on the same arguments as those presented under Article 10 of the Convention.

B. The Court's assessment

58. The Court notes that this complaint is linked to the one examined above. It must therefore likewise be declared admissible.

59. However, having regard to its findings under Article 10 (see paragraphs 42-53 above), the Court considers that it is not necessary to additionally examine whether there has been a violation of Article 9 of the Convention (see *United Christian Broadcasters Ltd*; and *Murphy*, §§ 60 and 61, both cited above).

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

60. The applicants complained under Article 13 of the Convention in conjunction with Articles 9 and 10 about the refusal by the Supreme Administrative Court to review the merits of the decisions of the STC and the NRTC. They also claimed that they had been denied an effective remedy on account of the need to go through two separate sets of proceedings.

61. Article 13 provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. The parties' submissions

62. The Government submitted that in the domestic proceedings Glas Nadezhda EOOD had not pleaded an infringement of its religious rights, but solely of its freedom of expression. Its grievances in this respect had been examined twice by two levels of court. The Supreme Administrative Court had not proceeded any differently than in any other case submitted to it – it had reviewed the legality of the administrative decision in line with the relevant criteria. It was a well-known fact that judicial review concerned solely the lawfulness of an administrative decision. This had been done by all levels of court which had examined the case.

63. The applicants submitted that the refusal by the domestic courts to examine the merits of the application for judicial review of the NRTC's decision had deprived them of an effective remedy. They referred to the Court's judgment in the case of *Hasan and Chaush v. Bulgaria* (cited above), and argued that the Supreme Administrative Court's holding that the competent bodies enjoyed unreviewable discretion when examining applications for licences had been contrary to Article 13 of the Convention, which required a remedy allowing full examination of the necessity of the interference with their Article 9 and Article 10 rights.

B. The Court's assessment

1. Admissibility

64. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. *Merits*

65. According to the Court's settled case-law, Article 13 guarantees the availability of a remedy at national level to enforce – and hence to allege non-compliance with – the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. However, such a remedy is only required in respect of grievances which can be regarded as “arguable” in terms of the Convention (see, among many other authorities, *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52).

66. In light of the finding of a violation of Article 10 above, the complaint is clearly arguable. The Court must thus verify whether the applicants had a remedy at national level to enforce the substance of their Convention rights.

67. In this connection, the Court notes that in the first set of judicial review proceedings the Supreme Administrative Court held that it was precluded from examining the lawfulness of the NRTC's decision and could only scrutinise the STC's decision (see paragraphs 12 and 14 above). This may be seen as problematic, in that the NRTC's decision was never officially communicated to Glas Nadezhda EOOD on account of the two-tier procedure under domestic law (see paragraphs 8 and 26 above). However, the Court considers that the obtaining situation did not fall foul of Article 13, as the applicants were later able to challenge the NRTC's decision in direct review proceedings (see paragraphs 15-18 above). In certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13 (see, among many other authorities, *Leander v. Sweden*, judgment of 26 March 1987, Series A no. 116, p. 30, § 77).

68. Turning to the proceedings against the NRTC's decision, the Court observes that the Supreme Administrative Court made it clear that it could not scrutinise the manner in which that body had assessed the compliance of Glas Nadezhda EOOD's programme documents with the relevant criteria, that assessment being within the NRTC's discretionary powers (see paragraphs 16 and 18 above). It thus refused to interfere with the exercise of NRTC's discretion on substantive grounds and did not examine the issues going to the merits of the applicants' Article 10 grievance.

69. The Court was faced with comparable situations in the cases of *Smith and Grady v. the United Kingdom* and *Peck v. the United Kingdom*. In these cases, the English courts had not taken into account the applicants' arguments based on the Convention, but had confined their inquiry to whether the authorities which had interfered with their Convention rights had acted in an “irrational” manner in exercising their discretion (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 136 and 137, ECHR 1999-VI; and *Peck v. the United Kingdom*, no. 44647/98, § 105, ECHR 2003-I). The Court held in both cases that this approach fell short of

the requirements of Article 13, because the effective remedy required by this Article was one where the domestic authority examining the case had to consider the substance of the Convention complaint. In these cases that meant an examination of whether the interferences with the applicants' rights had answered a pressing social need and had been proportionate to the legitimate aims pursued (see *Smith and Grady*, § 138; and *Peck*, § 106, both cited above). In the more recent case of *Hatton and Others v. the United Kingdom* the Court found a violation of Article 13 because the scope of review by the domestic courts had been limited to the classic English public-law concepts, such as irrationality, unlawfulness and patent unreasonableness, and had not allowed consideration of whether the measures impinging on the applicants' Convention rights had amounted to a justifiable limitation (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 141, ECHR 2003-VIII). Similarly, in the case of *Hasan and Chaush v. Bulgaria* the Court found a breach of Article 13 because, *inter alia*, in reviewing an administrative decision the former Bulgarian Supreme Court had refused to study the substantive issues, considering that the authority which had interfered with the applicants' Convention rights had enjoyed full discretion (see *Hasan and Chaush*, cited above, § 100).

70. In the light of the foregoing, the Court concludes that, as in the cases just cited, the approach taken by the Supreme Administrative Court in the instant case – refusing to interfere with the exercise of NRTC's discretion on substantive grounds – fell short of the requirements of Article 13 of the Convention.

71. There has therefore been a violation of this provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

73. The applicants claimed 10,000 euros (EUR) in respect of non-pecuniary damage. They submitted that the setting up of a religious radio station had been intended not as a business, but as a not-for-profit initiative. Eight proponents of this initiative had donated their time and efforts to prepare the documents for obtaining a broadcasting licence for this radio. The authorities' unwarranted denial of such a licence, accompanied

by the impossibility to meaningfully challenge that denial, had frustrated all of them, as well as many other supporters of their religious community.

74. The Government did not express an opinion on the matter.

75. The Court notes that in awarding just satisfaction it can only take into account the damage sustained by the applicants, not by third parties. Having regard to the circumstances of the case and its case-law concerning claims for non-pecuniary damages made on behalf of legal persons or organisations (see *Supreme Holy Council of the Muslim Community v. Bulgaria*, no. 39023/97, § 116, 16 December 2004, with further references), the Court considers that an award under this head is appropriate to both Mr Elenkov and Glas Nadezhda EOOD. The unjustified denial of a radio broadcasting licence, followed by the refusal of the domestic courts to examine the substance of the applicants' grievances, must have caused non-pecuniary damage to both applicants. Deciding on an equitable basis, the Court awards them jointly EUR 5,000, plus any value-added or other tax that may be chargeable.

B. Costs and expenses

76. The applicants sought the reimbursement of EUR 3,600 for the costs and expenses incurred before the Court. They submitted a fees agreement between them and their representative and a time-sheet.

77. The Government did not express an opinion on the matter.

78. According to the Court's case-law, applicants are entitled to reimbursement of their costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,500, plus any value-added or other tax that may be chargeable.

C. Default interest

79. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there is no need to examine separately the complaint under Article 9 of the Convention;
4. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 10;
5. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 11 October 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President