

TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
(SUB REGISTRY, SAN FERNANDO)**

H.C.A. No. S 1352 of 2002

**IN THE MATTER OF THE CONSTITUTION OF THE
REPUBLIC OF TRINIDAD AND TOBAGO BEING THE
SCHEDULE OF TRINIDAD AND TOBAGO
CONSTITUTION ACT CHAPTER 1:01**

Between

**CENTRAL BROADCASTING SERVICES LTD. &
SANATAN DHARMA MAHA SABHA OF
TRINIDAD AND TOBAGO
(incorporated under Act No. 41 of 1952)**

Applicants

AND

**THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO**

Respondents

Before The Honourable Mr. Justice Best.

Apearances:

On 19th, 20th and 21st of January 2004.

Dr. F. Ramsahoye S.C. with Mr. Ramlogan for the Applicants.

Mr. R. Martineau S.C. with Ms. Braithwaite for the Respondent.

JUDGMENT .

On 16th August 2002 the Applicants filed a Notice of Motion herein. They claimed inter alia:

“(a) A declaration that the Applicants have suffered a denial of equality before the law by the State in its dealing with an application made by the applicants on or about the 1st day of December 1999 and on the 10th day of August 2000 for radio broadcasting licences pursuant to the provisions of the Wireless Telegraphy Ordinance, Chapter 6 No. 2 of the 1950 edition of the Laws of Trinidad and Tobago contrary to the provisions of section 4 (b) of the Constitution of Trinidad and Tobago:

(b) A declaration that the Applicants have been denied equality of treatment by the State in connection with the said applications for radio broadcasting licences contrary to the provisions of section 4 (d) of the Constitution of Trinidad and Tobago:

(c) A declaration that the right of the Applicants to freedom of conscience and/or religious belief and or observance and the right to freedom of thought and expression have been denied by the dealings by the State with the said application for radio broadcasting licences contrary to the provisions of sections 4 (h) and 4 (i) of the Constitution of Trinidad and Tobago by the failure and/or refusal to consider the applications or to grant a licences;

(d) A declaration that the Applicants have been denied the right to such procedural provisions as are necessary to give effect to the said provisions in section 4 contrary to the provisions of section 5 (h) of the Constitution;

(e) An order directing the grant of radio broadcast licences to the Applicants for the reason that there is no lawful impediment upon which the State may rely to refuse the grant of same and upon such terms and conditions as apply to other licences already granted or renewed under the said Ordinance;

(f) All such further orders and directions as are necessary and/or appropriate to enforce the rights guaranteed by the provisions of section 4 and 5 of the Constitution which are mentioned and referred to herein including order for discovery and inspection."

An affidavit of Mr. Satnarayan Maharaj, the Secretary- General of the second-named Applicant and that of Mr. Winston Ragbir, were filed in support of the said Notice of Motion.

In opposition thereto, the Respondent filed an affidavit of Mr. Hedwidge Bereaux and that of Ms. Mala Guinness, the Deputy Director of Telecommunications.

The operation of the Wireless Telegraphy Ordinance: from the colonial to the Republican legal system.

The Applicants herein have applied for radio licences to be issued to them under section 3 (2) of the **Wireless Telegraphy Ordinance Chapter 36 No. 2** (hereinafter called the Act).

The Act at section 3 states inter alia:

" (1) No person shall install or use in the Colony any wireless apparatus unless he is in possession of a valid licence in that behalf granted to him either in accordance with regulations made under this Ordinance or in accordance with subsection (2) of this section, or otherwise than in conformity with the terms and conditions specified in his licence.

(2) In any case in which it shall appear to the Governor in Council that no provision has been made by regulations made under this Ordinance for the issue of an appropriate licence, or that the circumstances of the case justify the issue of a special licence, the Governor in Council may issue a special licence for the installation and using of wireless apparatus on payment of such fees and on such terms and conditions as to the Governor in Council may seem fit."

The **Constitution of the Republic of Trinidad and Tobago** (hereinafter called the Constitution) at section 6 (1) (a) states:

" 6 (1) Nothing in section 4 and 5 shall invalidate-

(a) an existing law;...

Further at subsection 3, the words 'existing law' are defined as:

" ...a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1);... "

With its date of commencement as 17th December 1936, there can be no dispute that the Act was a law in force immediately before the commencement of the Constitution on 1st August 1976.

In the matter of **Balkissoon Roodal v The State (Privy Council Appeal No. 18 of 2003)** at paragraph 08 Lord Steyn stated:

“The Constitution, statute law and common law coalesce in one legal system. The Constitution has a direct effect on statute law and common law as well as a radiating influence on both. It is therefore ultimately not possible to consider the Interpretation Act divorced from the constitutional dimension.”

Further, in the matter of **The Director of Public Prosecutions v Kurt Mollison (No2) (Privy Council Appeal No.88 of 2001)** Lord Bingham of Cornhill quoted de la Bastide CJ in case of **Roodal v The State (unreported) (17th July 2002)** with approval:

‘Having made this review of the authorities, we are now in a position to assess the purport and effect of section 5(1) of the 1976 Act. The first thing we can say about that section is that though it speaks of existing laws being’ construed’, the type of’ construing’ which is involved is not the examination of the language of existing laws for the purpose of abstracting from it their true meaning and intent nor is it attributing to existing laws a meaning which, though not their primary or natural meaning, is one that they are capable of bearing. In fact, the function which the court is mandated to carry out in relation to existing laws under this section, goes far beyond what is normally meant by “construing’. It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some of some provisions in a statute or a rule of common law. Mr. Daly’s submission that the section should be regarded as conferring very limited powers is, I am afraid, a brave but unavailing attempt to turn the clock back.’ In the light of this authority the Board concludes, in agreement with the majority of the Court of Appeal, that section 4(1) gives the court power to modify section 29 so as to bring it into conformity with the constitution.”

In the view of this Court, the Act should now be read in conformity with the Constitution and the law. In that respect, the term: “Governor in Council” as found in the Act should now be replaced by the constitutionally correct term of “the President as advised by the Cabinet.”

Thus a special licence to operate on a radio frequency may be granted under section 3(2) of the Act by the President, on such terms and conditions as advised by the Cabinet. However, the issuance of that licence must be consistent with the Constitution and the law.

Is the grant or failure to make such a grant immune from challenge in a constitutional court?

Section 4 of the Constitution states, inter alia:

"It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, colour, religion or sex, the following fundamental human rights and freedoms, namely-

- (b) the right of the individual to equality before the law and the protection of the law;*
- (c) the right of the individual to equal treatment from any public authority in the exercise of any functions;*
- (h) freedom of conscience and religious belief and observance;*
- (i) freedom of thought and expression..."*

The Applicants have come before this court with a complaint that they have not been treated with equality before the law in their applications for a special licence under section 3 (2) of the Act, in that the Cabinet has failed to respond to their applications, despite the fact that the Director of Telecommunications (hereinafter called the Relevant Authority) had recommended the grants.

Learned Counsel for the Applicants has submitted that his clients' case is strengthened by the fact that the second-named Applicant represents a large sector of the national community; by its desire to propagate and spread of its religion/culture and by its successful forage into the field of primary and secondary education.

In the matter of **Observer Publications Limited v Campbell; the Commissioner of Police and the Attorney General (Privy Council Appeal No. 3 of 2000)** Lord Cooke of Thorndon indicated that no one has a right to a broad casting licence. The airwaves are a national treasure and of necessity there must be an *"...orderly regulation of the radio spectrum..."*

In the case of **Matadeen v Pointu and The Minister of Education and Science (1988) WLR 18** Lord Hoffman indicated that the judgment of the Supreme Court of Mauritius was based upon an interpretation of section 3 of Mauritius' Constitution to the effect that it contained a general justiciable principle of equality. This principle was described at page 24G as:
"...a constitutional requirement, enforceable by the courts, that the law, or administrative action under the law, should treat everyone equally unless there was a sufficient objective justification for not doing so".

Further, His lordship stated at page 26H:

"...But what counts as a valid reason for treating then differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve , as they do in this case, questions of social policy on which views may differ...the fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle-that it should always be the judges who have the last word on whether the principle has been observed...In many countries...the constitution deliberately places certain rights out of reach of being overridden even by the majority decision and confers upon the court the power to decide whether the protected right has been infringed...leaving it to the courts to categories forms of discrimination on a case by case basis..."

A reading of the equity provisions of the Constitution, reveals that Parliament has recognised and entrenched a general justiciable principle of equality in respect of certain categories of discrimination; the alteration of which said provisions cannot be achieved without a final vote in each House of not less that two thirds of all members of each House. (Section 54 of the Constitution). However, the determination, as to whether the said provisions have been breached, has been left by Parliament, in its wisdom, to the Supreme Court to determine '*...on a case by case basis*'.

Thus, this Court finds no difficulty enquiring into whether the Cabinet had '*...sufficient objective justification...*' for failing to respond to the Applicants applications for special licences in the light of the alleged preferential treatment accorded to Citadel Ltd, a company which was similarly circumstanced.

The Facts.

On or about 01st December 1999, the second-named Applicant submitted an application for a radio licence to the Relevant Authority for evaluation.

There has been no response to this application.

In the month of August 2000, the second-named Applicant incorporated a limited liability company (the first-named Applicant) for the purpose of submitting a second such application.

A second application was submitted on 10th August 2000.

Between the years 1999 and 2001, there were 27 such applications, that received the consideration of the Relevant Authority. Among those 27 applications were the two submitted by the Applicants.

The Secretary-General of the second-named Applicant made several enquires about the status of his applications from the relevant Ministry.

On 05th March 2001, the Acting Permanent Secretary of the relevant Ministry wrote the said Secretary-General, indicating receipt of correspondence relative to the applications, promised to investigate the matter and revert. Up to the date of filing the motion herein, no further communication was had from the relevant ministry.

On 15th March 2001 the Relevant Authority wrote the Permanent Secretary of the relevant Ministry indicating that the application of the second-named Applicant was forwarded, with his recommendation under the first-named Applicant's name.

Further, the Relevant Authority indicated that up to November 2001, he did not see at the relevant Ministry nor did he deal with an application for a radio licence from a company entitled Citadel Limited or from its Executive Chairman, Mr. Louis Lee Sing, a known supporter of the ruling party.

Ms. Mala Guinness, the deputy Director of Communications, indicated that since November 2001 and for some months thereafter, the Telecommunication Division experienced difficulty in locating applications and with its system of record keeping. Further, she indicated that prior to November 2001, she advised the Permanent secretary that recommendations for broadcast licences should be made in a context of a Broadcast Policy. In addition, the Division suffered serious staff shortages subsequent to November 2001.

These administrative problems at the Telecommunication Division had its effect on the application by Citadel Ltd. On 08th April 2002, the Division received a covering letter dated 16th January 2002 to which was attached an application for a radio/television licence from Citadel Ltd dated 13th March 2001. On 12th June 2002, Mr. Lee Sing wrote the Permanent Secretary and noted that his application could not be found and attached a copy of a previous copy that he had submitted.

On 18th July 2002, the Permanent Secretary acknowledged receipt of Mr. Lee Sing's application on behalf of Citadel Ltd and required further documentation to complete the application. This was achieved on 24th July 2002 by a letter to the said Permanent Secretary from Citadel Ltd.

Inequality of treatment: defined.

In the matter of **Smith and another v L.J. Williams Ltd (1980) 32 WIR 395.** the issue of inequality of treatment was before the court.

Bernard J. (as he was then) drawing upon the learning found in Basu's *Shorter Constitution of India (1976) (7th Edn.) Vol. 1* at page 29 provided a definition of equal protection:

"Equal protection means the right to equal treatment in similar circumstances both in privileges conferred and in liabilities imposed by the law."

At page 407(c) of the said judgment, His Lordship divides the possible discrimination under the equal protection provisions into two divisions: Discrimination by the legislature and discrimination in the administration of the law.

In the extant matter, there is no issue of discrimination by the legislature and it need not bother us any more.

His Lordship continued at page 407(d):

"2. When the statute itself is not discriminatory and the charge of violation of equal protection is only against the official who is entrusted with the duty of carrying it into operation the charge will fail if the power has been exercised in good faith within the limitation imposed by the Act and for

the achievement of the objects the enactment had in view; if however the person who alleges discrimination succeeds in establishing that the step was taken intentionally for the purpose of injuring him, or in other words that it was a hostile act directed against him, the executive act complained of must be annulled even though the statute itself be not discriminatory. In short, if the Act is fair and good, the authority who has administered it will be generally protected. To this rule, however, there is an exception, which comes into play when there is evidence of mala fides in the application of the Act."

The presumption of regularity.

Bernard J. continued to quote from *Basu's Shorter Constitution of India* at page 407(j):

"...such mala fide administration is never presumed, but has to be proved. On the other hand the presumption is that public officials will discharge their duties honestly and in accordance with the law; ... this presumption is heightened when the law vests a discretion in high officials or authorities as distinguished from minor officials or in the Government itself."

Bernard J. (as he then was) concluded at page 409 (d):

"I take the view that in this jurisdiction there is the presumption of regularity in the acts of officials and that the evidential burden is upon him who asserts the contrary."

Thus, in accordance to the maxim ***omnia praesumuntur rite esse acta***, the Cabinet would be presumed to have acted within the requisites of the Constitution and the law with respect to the applications made by the Applicants.

Displacement of the presumption – onus of proof.

In the matter of the **Attorney-General v K.C. Confectionery Limited (1985) 34 WIR 387** at page 400G, Persaud J.A. sounded the warning that:

"...mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause."

Further, in the matter of **The Police Service Commission and the Attorney General of Trinidad and Tobago v Wayne Hayden** Sharma J.A. stated at page 08:

"A claim that a public authority has violated a citizen's right to equal treatment is one that must be supported by cogent evidence."

In the matter of **Smith v L.J.Williams Ltd (1980) 32 WIR 395** at page 411 , the issue of the burden of proof when one complains of unequal treatment was discussed by Bernard J. and I quote in extenso:

" in so far as official acts are concerned , the nub of the matter is ...that the section both guarantees and is intended to ensure that where parties are similarly placed under the law they are entitled to like treatment under that law. However, there is a presumption of regularity in the acts and conduct of officials. Consequently, the burden of proof is upon the aggrieved party to establish mala fides in the administration of the enactment. Of course, mala fides particularly in cases of this sort is not normally expressed. However, it can be and is usually to be implied from overt acts. In this connection it is not necessary ...to prove an evil eye' although I do not doubt that in some cases the evidence may be such that the act complained about can be seem to transcend both the concept of the 'unequal hand ' and an 'evil eye' at the end of the day. In my opinion, so long as it can be shown that the act was a hostile act or an intentional and irresponsible act, i.e. an act done deliberately and without justification that will be enough evidence to rebut the presumption of regularity."

However, the above must considered in the light of a discussion on the onus of proof by Persaud J.A., at page 404 in the matter of the **Attorney – General v K.C. Confectionery Ltd (1985) 34 WIR 387:**

"The question canvassed before this court is whether the complainant must prove mala fides when he complains of a breach of his constitutional rights? It seems to me that we must start off with the presumption that public officials will discharge their duties honestly and accordance with the law; this is another way of saying

that 'there is a presumption of regularity in the acts of officials' and that the burden of proving the contrary rests on him who alleges otherwise. If this is correct, then two situations may arise. If complaint is made that the official has been dishonest in the discharge of his duties, or that he has acted out of spite towards the complainant, clearly mala fides is alleged, in which event it must be proved; and perhaps it is unnecessary to observe that the onus of proof rests on the complainant. If on the other hand, the allegation is that the official has merely contravened the law in his discharge of his functions, mala fides may not necessarily form part of the complainant's case, in which event the question of its proof does not arise. All that needs to be proved in such a case is the deliberate and intentional exercise of the power, not in accordance with law, which results in the erosion of the complainant's right the entitlement to which may become vested in him either from the Constitution itself or from an Act of Parliament.

*In my judgment, therefore, proving mala fides must depend on the nature of the allegation being made, always bearing in mind the presumption referred to above. So if to the trial judge's statement to the effect that upon the true construction of section 4(d) of the Constitution where-
'an application makes out a prima facie case upon proof of unequal treatment...the onus shifts to the State to show that such differential treatment was reasonably and justifiable made'
is subsumed the presumption of the rectitude of the acts of officials, I do not find any fault."*

Where there is cogent evidence of overt acts of mala fides, in the form of hostility or intentional and irresponsible acts directed against a complainant, the onus lies upon him who alleges.

Learned Counsel for the Respondent has submitted that evidence of hostility or intentional and irresponsible acts on the part of Cabinet directed towards the Applicants is exiguous and I agree with him.

However, where there is cogent evidence of unequal treatment, the onus shifts to the State to show that the differential treatment was justified and reasonable in the circumstances.

It is has not been denied that the Applicants had submitted two applications for licences on 1st December 1999 and 10th August 2000 and that by 15th March 2001 the Relevant Authority had approved the said applications.

Further, from the said date of approval to the date of filing of the Notice of Motion herein on 16th August 2002, save for an acknowledgement from the Relevant Authority, there had been no response from the Cabinet with respect to the grant of the licences.

In the opinion of this Court, this inaction on the part of the Cabinet constitutes a constructive refusal of the licences and is a prima facie case of unequal treatment, in the circumstances of an application by Citadel Ltd for a licence on 13th March 2001 and the approval by the relevant Ministry of broadcasting on the frequency F.M. 95.5 M Hz subsequent to 24th July 2002.

The lack of staff and inefficiency in the Public Service; change of venue, political directorate and policy, in the view of this Court, should not be allowed to stand as justification for the differential treatment meted out to the Applicants herein.

The conclusion.

The Applicants have, I so hold, successfully displaced the presumption of regularity and are entitled to the declarations listed at (a) and (b) of their Notice of Motion filed herein. In the circumstances, there is no need to go further and consider the Applicants' claims at (c) and (d) of their said Notice of Motion.

With respect to the Applicants' claim at (e), this Court considers it legally perverse that it be asked to make an order that can be interpreted as either coercing the Cabinet into making a decision or usurping the Cabinet's decision power.

The issue of redress for the violation of section 4 (b) and (d) of the Constitution, as it relates to the Applicants herein, is hereby adjourned before a Master in Chambers on a date to be announced by the Registrar of the Supreme Court.

Costs.

The costs of this Application is to be taxed and paid by the Respondent to the Applicants, certified fit for Senior and Junior Counsel.

Dated this day of February 2004.

Carlton Best,
Judge.