

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

Civil Appeal No. 16 of 2004  
H.C.A. No. S. 1352 of 2002

**BETWEEN**

Central Broadcasting Services Ltd.  
and Sanatan Dharma Maha Sabha of  
Trinidad and Tobago (incorporated  
under Act No. 41 of 1952)

Appellants

**AND**

The Attorney General  
of Trinidad and Tobago

Respondent

**PANEL: Hamel-Smith, J.A.**  
**Warner, J.A.**  
**Mendonca, J.A.**

**APPEARANCES:**

Dr. F. Ramsahoye S.C. and Mr. A. Ramlogan for the Appellants  
Mr. R. Martineau S. C. and Ms. A. Rambaran for the Defendant

**DATE DELIVERED:** 27<sup>th</sup> January, 2005

**DELIVERED BY MENDONCA J.A.**

1. By notice of motion the Appellants sought declarations that certain of their fundamental rights as guaranteed by the Constitution had been infringed. In particular, the Appellants sought a declaration that:

- (a) they have suffered a denial of equality before the law by the State in dealing with an application made by the Appellants for a radio broadcasting licence pursuant to the Wireless Telegraphy Ordinance Ch. 6 No. 2 contrary to Section 4 (b) of the Constitution;
- (b) they have been denied equality of treatment by the State, in connection with the said application contrary to Section 4 (d) of the Constitution; and
- (c) their rights to freedom of expression and religious belief and observance and their right to freedom of thought and expression have been denied by the dealing by the State with the said application for the radio broadcasting licence, contrary to Sections 4 (h) and (i) of the Constitution.

The Appellants also sought an order directing that they be granted a radio broadcasting licence.

2. After the hearing of the motion the Trial Judge granted the declarations at (a) and (b) above. The Judge however, stated that there was no need to consider the claim for the declarations at (c). The Judge refused the grant of the licence as he considered it “coercing the Cabinet into making a decision” to grant a licence or “usurping Cabinet’s

decision power”. I should mention here that it is not in dispute that the applications are granted under Section 3 (2) of the Wireless Telegraphy Ordinance and are granted by the President as advised by the Cabinet.

3. The Judge also ordered that “redress” for the violation Sections 4 (b) and (d) of the Constitution be adjourned before a Master in Chambers on a date to be fixed by the Registrar.

4. The Appellants have appealed to this Court from that part of the Judge’s order refusing the grant of the licence and the declarations under Section 4 (h) and (i) of the Constitution and the referring of the question of redress to the Master. They contend that the Judge should have granted the declarations that their rights to freedom of religious belief and conscience and observance and freedom of expression had been denied or infringed pursuant to Sections 4 (h) and (i). They also argue that the Judge ought to have made such directions as to ensure that they are granted a radio licence. They further contend that the Judge should have expressly declared the redress to which the Appellants are entitled, instead of referring the question of redress to a Master.

5. There is one other aspect raised by the Appellants, and this is that the Judge ought not to have struck out certain paragraphs of an affidavit of Mr. Satnarayan Maharaj sworn in support of the motion. I will refer to this aspect in the course of this judgment.

6. The Respondent has cross-appealed and has filed a notice under O. 59 r. 9 (1). In the Notice, the Respondent says that the Appellants are not entitled to the declarations which the Judge granted under Sections 4 (b) and (d) of the Constitution that their rights to equal protection of the law and equality of treatment were infringed. This raises a serious question of substantive law, but among the grounds of appeal relied on by the Respondent are included the following:

- (i) the Judge wrongly exercised his discretion in refusing leave to the Respondent to use the affidavit of one Gillian Macintyre and

a supplemental affidavit of Hedwige Bereaux sworn on January 16 and filed on January 19, 2004;

- (ii) the Judge was wrong in treating the Appellants' application for a radio broadcasting licence as two separate applications; and
- (iii) the learned Judge was wrong in finding that the Relevant Authority had approved the applications.

7. I think it is convenient at this stage that I deal with the grounds of appeal at (i) to (iii) above.

8. With respect to (i) i.e. the use of the affidavits, the Judge ought to have exercised his discretion in allowing the use of the supplemental affidavit of Hedwige Bereaux. There was really no prejudice to the Appellants by allowing the use of this affidavit. With respect to the affidavit of Gillian Macintyre, the position, as I see it, is however different. This affidavit raised for the first time that the application of the first Appellant was not a complete application, and that there were "further essential details" required before the application could be successfully considered. Reference was made to correspondence passing between the parties subsequent to the filing of the constitutional motion in which certain information was requested by the relevant Ministry. The Appellants had replied to the correspondence without prejudice to the constitutional motion. But it was the first indication by that affidavit that the Appellants intended in these proceedings to take that position. This was in stark contrast to the position enunciated by Mr. Ragbir, who at the material time was the Director of Telecommunications and who had sworn an affidavit on behalf of the Appellants, that the application of the first Appellant had been evaluated and had met all the necessary criteria. If the Respondents were allowed to use the affidavit of Ms. Macintyre, that, at least, would have necessitated the obtaining of further instructions by the Appellants and the filing of further affidavits. As the affidavit was produced on the morning when the

matter was scheduled to begin, the use of the affidavit would have resulted in the adjournment of the matter.

9. The Appellants' constitutional motion was filed since August 16, 2002 and approximately a year and a half thereafter, it was still pending. The matter had in fact been listed on four occasions before the Respondent had filed any affidavits. On the last of these occasions, namely July 3, 2003, Smith J. had given the Respondent until August 29, 2003 to file his affidavits and the Judge directed that in default of the filing of the affidavits the matter was to proceed upon the affidavits of the Appellants which were then filed. The Respondent filed affidavits on August 29, 2003.

10. At a Cause List hearing in November 19, 2003 the parties had indicated that they were ready to proceed, and the Judge fixed three days for the hearing of the matter, namely January 19, 20 and 21 2004. In accordance with the practice, those days would have been dedicated to the hearing of this matter. An adjournment of the matter would not only have resulted in a further delay in the hearing of the matter, but in a waste of considerable court time. In all the circumstances, I cannot say that the Judge wrongly exercised his discretion in refusing leave to use the affidavit of Ms. Macintyre.

11. As regards (ii) Counsel for the Appellants contend that there were two applications and that the Judge was correct to say so. But I am not too certain that Counsel was prepared to pursue that argument with any degree of enthusiasm. It cannot be doubted that two applications were submitted. But it is, however, clear on the evidence that it is only the application of the first Appellant which was evaluated and recommended and that application was treated as the application of the Appellants. Mr. Ragbir's statement that there were no deficiencies in either applications and both were approved and recommended, is not supported by the contemporaneous documentary evidence. In a memorandum dated March 15, 2001 from the then Director of Telecommunications, Mr. Ragbir, to the Permanent Secretary of the relevant Ministry, he stated that the application of the second Appellant was sent to the Permanent Secretary under the name of the first Appellant. When Mr. Ragbir had compiled a list of

applications, only the application of the first Appellant was listed. Similarly on a list of pending applications which he prepared, there is only the application of the first Appellant. In the circumstances, I think that the Trial Judge should have treated the applications as one application; that of the first Appellant.

12. With regard to (iii) the Judge found that the application was approved by the Director of Telecommunications, who he referred to in his judgment as the “Relevant Authority”. The argument of the Respondent appears to be that the evidence is that the application was “recommended” by the Director. But there is also evidence that he “approved” as well as recommended the application. The Respondent presented no evidence that this was not the function of the Director. Indeed the evidence clearly shows that it was the function of the Director to evaluate applications, request further information if he thought it necessary and recommend the applications to the Minister. I think it is an argument in semantics to say that what the Director did, did not amount to an approval of the application. It is of course to be viewed in the context where licences are granted by the President on the advice of the Cabinet.

13. I think that the main issue raised on the cross-appeal, whether the Judge was right to grant the declarations under 4(b) and (d) of the Constitution should be first considered before the issues raised by the appellants, but before I do so I will set out the relevant facts which are not in dispute.

14. In December 1999, the second Appellant submitted an application to the appropriate body, namely the Telecommunications Division for a radio broadcast licence. At that time the Telecommunications Division fell under the Ministry of Information, Communications, Training and Distance Learning. The application was received on December 14, 1999.

15. By August 2000 the second Appellant had received no response to the application. It then decided to incorporate the first Appellant for the purpose of submitting a second application. The first Appellant was duly incorporated and

submitted an application dated September 1, 2000 for a broadcast licence. This application was received by the Telecommunications Division on September 4, 2000.

16. By letter dated September 18, 2000 the First Appellant wrote to the Director of Telecommunications providing certain material and information which had been requested by the Director. By memorandum dated October 10, 2000, the Director, who at the time was Mr. Winston Ragbir, wrote to the Permanent Secretary in the Office of the Prime Minister under which responsibility the Telecommunications Division had then fallen, forwarding the First Appellant's application and advising, inter alia, that the application had been evaluated and had met all necessary criteria for a broadcasting station.

17. It appears that no word of this had been communicated to the Appellants and they made enquiries as to the status of the application.

18. By March 2001 responsibility for the Telecommunications Division had again changed. By then it fell under the Ministry of Communications and Information Technology. On March 5, 2001, the Permanent Secretary of that Ministry wrote to the Second Appellant acknowledging receipt of certain correspondence and indicating that the matter would be investigated. By memorandum dated March 15, 2001, the Director of Telecommunications wrote to the Permanent Secretary advising him that "the application from the Second Appellant "was sent to you under the Company's name Central Broadcasting Services Ltd. (First Appellant) with my recommendation".

19. Nothing more was done with the application. Mr. Ragbir went on pre-retirement leave with effect from November 29, 2001 and retired on April 12, 2002. Ms. Mala Guinness, the Deputy Director of Telecommunications, in an affidavit filed on behalf of the Respondent states that after Mr. Ragbir left the Telecommunications Division that there was difficulty in locating files and in some instances the Division only became aware that certain applications may have been made when an applicant communicated

with the Division. The Appellants' files may have been one of the files that could not be located.

20. Mr. Ragbir, in an affidavit filed on behalf of the Appellants, deposes that between 1992 and 2001, when he ceased to deal with applications, there were pending 27 applications for radio and other licences. The first Appellant's were among the 27. He had recommended approximately 12 of them as proper applications and none he had recommended had been granted up to the time he went on pre-retirement leave.

21. Mr. Ragbir states that on or about October 30, 2001, at the request of the relevant Minister, he compiled a list of outstanding applications and submitted it to the Minister. On the list there were 7 outstanding applications for radio broadcasting licences, two of which predated the first Appellant's application.

22. Sometime prior to Mr. Ragbir going on pre-retirement leave, Mala Guinness advised the Permanent Secretary that recommendations for broadcast licences should be made in the context of a broadcast policy. Pending the establishment of the policy, the Telecommunications Division ceased to make recommendations on the granting of broadcast licences. It seems that work on the broadcast policy began and was completed after the retirement of Mr. Ragbir. This Court was informed that in 2004 that several of the pending radio broadcasting applications were granted. The first Appellant's application was not among them. However, it appears that for a number of years prior to that, no application had been granted with the exception of the application of Citadel Ltd. to which I will now refer.

23. On April 8, 2002, the Telecommunications Division received a covering letter dated January 16, 2002 from Mr. Louis Lee Sing, Executive Chairman of Citadel Ltd., addressed to the then responsible Minister, Minister Breaux, to which was annexed an application for a broadcast licence dated March 13, 2001 in the name of Citadel Ltd. By letter dated June 12, 2002, Mr. Lee Sing wrote to the Permanent Secretary stating that he was advised that the application could not be found and attaching a copy of the

application. In accordance with the procedure at that time, only Part 1 of the application was sent. The Permanent Secretary replied requesting that Mr. Lee Sing submit the remaining parts of the application. The letter also stated that “it should be noted also that, in the interest of fairness to all applicants, applications are processed in the order in which they are received”. The remaining parts of the application was sent by Citadel, under cover of a letter dated July 24, 2002. It is common ground between the parties that the application was granted to Citadel that year, not later than October 2002. According to Minister Breaux, who at the time was the responsible Minister, he had requested that the application be expedited. He stated that a situation had developed, which he considered needed to be resolved quickly, and therefore requested the Telecommunications Division to expedite consideration of Citadel’s application.

24. Minister Breaux has deposed to the fact that the list which was prepared by Mr. Ragbir, indicating that the first Appellant was among a number of outstanding applications, was not seen by him. He stated that he was not aware and was never informed that Mr. Ragbir had recommended the first Appellant’s application as being proper for the grant of a licence. He further stated that he himself had requested a list from the Permanent Secretary of the Ministry of all outstanding applications for radio and other broadcast licences. Pursuant to his request he obtained a list of 5 applications. The application of the first Appellant was not among those named in the list.

25. I will now consider whether the Judge was entitled to grant the declarations under Sections 4 (b) and (d) of the Constitution.

26. It is well established that an aggrieved party who alleges inequality of treatment must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons. The comparison must be such that the relevant circumstances in the one case are the same or are not materially different in the other (see Privy Council Appeal 45 of 2003 *Bhagwandeem v The Attorney General of Trinidad and Tobago* at para. 18). Here the Appellants allege that they were treated differently from Citadel Ltd. who was a party similarly circumstanced. The latter’s

application for a licence was processed and granted in the matter of a few months. The First Appellant's application on the other hand was made since September 2000 and was recommended since October, 2000, but it has not yet been considered by Cabinet. It was argued by Counsel for the Respondent that Citadel Ltd. is not similarly circumstanced and there is therefore justification for the differential treatment. Counsel submitted that Citadel Ltd. was not similarly circumstanced for the reasons:

- (a) that the first Appellants' application was not submitted to Minister Beraux as outstanding, whereas Citadel Ltd. was;
- (b) Mr. Lee Sing, the alter ego of Citadel Ltd., had previously operated a radio station; and
- (c) Citadel Limited's application was complete, whereas the application of the First Appellants was not.

With respect to (a) while the application was not listed on the list requested by Minister Beraux, as an outstanding application, the evidence shows that the first Appellants' application was recommended and sent for consideration by the Minister. It was in fact placed on a list of outstanding applications prepared by Mr. Ragbir. I cannot accept that the fact that the first Appellants' application was not placed on a list of outstanding applications prepared by the Ministry at another point in time whereas Citadel Ltd.' was, is relevant to determining whether the parties are similarly circumstanced. As regards (b) what can be gleaned from the affidavits is that Mr. Lee Sing operated a station I92FM for and on behalf of a licensed operator and at some stage Citadel Ltd. was incorporated, like the first Appellant, for the purpose of applying for a licence. That surely did not place Citadel Ltd. in any better or different position over the first Appellant for a grant of a licence. Both were applicants under the Ordinance and equally entitled to be considered for the grant of a licence. With respect to (c) the only evidence that the application was incomplete and could not be considered, is contained in the affidavit of Ms. Macintyre which the Judge did not permit the Respondent to use, and which I think he was entitled

so to do. In the absence of that affidavit, there is no evidence on which this point can be agitated. As I mentioned the evidence is that the First Appellants' application had met all the necessary criteria and was recommended.

27. Apart from establishing unequal treatment when compared with a party similarly circumstanced, there are two principles that seem to me be well established in this jurisdiction when dealing with the equality provisions of the Constitution. The first is that there is a presumption that public officers will discharge their duties honestly and in accordance with the law. This presumption was held by Bernard J. (as he then was) to exist in *Smith v L. J Williams* (1982) 32 WIR 395, which was the first case in which Sections 4 (b) and (d) were considered in detail. In *A.G. v K.C. Confectionery Ltd.* (1985) 34 WIR 387, the Court of Appeal accepted the existence of such a presumption. Indeed this was the unanimous position of the Court. Bernard J. A. in the *KC Confectionery* case restated his opinion as to the existence of the presumption in these terms:

I would like to turn to the question relating to the presumption of regularity in the acts of public officials which did not find favour with the trial judge. In *Attorney General v Lopinot Limestone Ltd.* (1984) ..., I made the observations referred to in the main judgment in support of my stand that the presumption is part of the law of this Republic. And in order to show that it was well founded I referred to a number of decisions in various jurisdictions in which the presumption has been acknowledged. The presumption is a salutary and sensible concept of Government action. Were it to the contrary, great difficulty and burdens could arise in proof of the bona fide exercise of day-to-day executive action, and this could well lead to chaos or uncertainty. Unless it is established to the contrary, it is, in my view essential to our democratic system of Government that confidence and trust must prima facie be reposed in public officials, and more particularly senior ones. It has never been considered to be morally

right that one should condemn the whole for the misdeeds of a few; hence the presumption of regularity in their acts for which I contend.

28. The other principle is that for an aggrieved party to successfully establish that his right to equality before the law or to equal treatment has been infringed by administrative action, it is necessary for him to establish mala fides on the part of the public official. In the K.C. Confectionery case, supra, Bernard J.A. stated (at p. 415):

Having held that the presumption of regularity in the acts of public official exists in this jurisdiction, I entertain the view that it could only be discharged by proof of mala fides on a balance of probability. In this connection mala fides may be express or the other hand it may be implied from the overt acts of public officials.

29. Kelsick J.A. ( in the K.C. Confectionery case) was of a similar opinion when he stated ( at p. 424-425) :

Lack of bona fides or the presence of mala fides on the part of the Minister must be satisfactorily proved for his decision to be lawfully impugned as a violation of the respondent's right to equality of treatment .... Moreover the onus of proof of mala fides is on the respondents, and this has not been discharged.

30. The other member of the Court was Persaud J.A. He was of a similar opinion and I will come to this later.

31. In relation to establishing mala fides, it is not necessary to prove an "evil eye" but there should at least an element of deliberateness. This can be seen from the following

In the KC Confectionery case Persaud J.A. stated (at p. 401)

There can be no quarrel with the governing principles which have been enunciated from time to time: but there must be positive evidence of unequal treatment. In regard to this aspect of the matter, while I agree with counsel for the Attorney-General, that to succeed the aggrieved party must prove an intentional and purposeful act of unequal act of treatment, I do not accept that such proof must be beyond reasonable doubt.

32. Bernard J. in KC Confectionery case, stated (p. 415)

... mala fides may be express or on the other hand it may be implied from the overt acts of the public official. With regard to the latter, I adhere to the view which I expressed in *Smith v L. J. Williams Ltd.* (1980) 32 WIR 395 at p. 411 that, so long as it can be demonstrated by evidence that the act of the public official or organ was a hostile act, or an intentional and irresponsible act, that, in my view, will in fact be enough to rebut the presumption of regularity and to infer mala fides.

33. In Civ. App. 102 of 1999 *Boodhoo and Jagram v Attorney General, de la Bastide* C.J. stated the law in these terms ( at p. 11):

It is well established that the right to equality before the law may be infringed either by the legislature in making laws which discriminate between persons on an irrational basis or by administrative action. It is also well established that if the complaint of infringement of this right is made with respect to administrative acts, then it is incumbent on the person complaining to establish some form of “mala fides” in the person committing the act. In India, it has been said that the person must have acted “with an evil eye and an uneven hand”. It has been accepted in

Trinidad and Tobago that there must be some element of deliberateness in the selection of a person for different treatment.

34. The law therefore in this jurisdiction is that for an aggrieved person to successfully establish that his right to equality before the law and equal treatment has been infringed by administrative act, he must establish mala fides in the person committing the act. This requires at least proof of an intentional and purposeful or irresponsible act or as de la Bastide C.J. expressed it “some element of deliberateness in the selection of a person for different treatment”. It is not the law that once inequality of treatment is found that the onus is on the State to provide some explanation for it. That was the approach that the trial judge took in the K.C. Confectionery case and it was rejected by the Court of Appeal. This was also the approach the Trial Judge took in this case. He found evidence of mala fides to be exiguous but stated:

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.

35. The Judge seemed to suggest that he was justified in taking that approach because of the following passage in the judgment of Persaud J.A. in the K.C. Confectionery case (at p. 404 to 405);

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 in 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 the 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.

36. I do not think that any justification for the approach of the Trial Judge can be gained from that passage. There is nothing there to suggest that mere evidence of inequality is sufficient to cast a burden on the State to justify it. What Persaud J.A. was there referring to as a case where proof of mala fides did not arise was a case where the allegation was that the official merely contravened the law. In a case such as that all he says that needs to be proved is the deliberate and intentional exercise of the power not in accordance with the law. This is not that kind of case. But even in such a case it was necessary to prove the "deliberate and intentional exercise of the power, not in accordance with the law". I think that Persaud J.A. was clear, that in a case such as this, where what is alleged is unequal treatment by a public official in the administration of an Act, that what has to be proved is an intentional and purposeful act of unequal treatment. Evidence of inequality without more therefore, according to Persaud J.A. was not sufficient to shift the onus. He said (page 405):

In the instant case, the complaint was of inequality of treatment. 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 applicant 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 justifiably made”

is subsumed the presumption of the rectitude of the acts of officials, I do not find any fault.

Of course the onus could not be shifted where the presumption is subsumed on mere evidence of inequality. What has to be established is an intentional and purposeful act of unequal treatment “which in turn connotes mala fides” (see pages 401 and 403).

37. Persaud J.A. was so understood by the Privy Council in *Bhagwandeem v. The Attorney General*, supra. In giving the judgment of the Board, Lord Carswell referred to the need under our law as it now stands to establish a deliberate intention to discriminate and stated ( at para. 23):

The Court of Appeal of Trinidad and Tobago accepted in the *Attorney General v. K.C. Confectionery Ltd.* that a party complaining of discrimination must prove, in the same terms as it was formulated in the US authorities, “intentional and purposeful” acts of unequal treatment. Persaud JA said at page 403 that the complainant must show a clear and intentional discrimination, “which in turn connotes mala fides”.

38. In fact the need to prove mala fides against the background of a presumption of regularity was accepted by the parties before this Court, and it was accepted also that we were bound by that. Unless and until the law is altered, we must apply it. Of course, the comments of the Privy Council in the *Bhagwandeem* case, supra, that the law in this jurisdiction may require further consideration were expressly brought to the Court’s attention and were noted. But the Privy Council refrained from coming to any definite conclusion on the correctness of the law as applied in this jurisdiction. Before this Court, the parties accepted that we were bound, and there was really no detailed argument on whether the law has been correctly understood and applied and if not, what is correct. In

those circumstances, I do not think it appropriate to express any view on whether the law as it now stands needs to be altered and in what way.

39. The onus is therefore on the aggrieved party to establish mala fides. The mala fides need not be express, but it may be inferred from overt acts. The material question then becomes whether the Appellant has established a case of mala fides. The Judge found that evidence of hostility or intentional and irresponsible acts on the part of the Cabinet and directed toward the Appellants was exiguous. But the enquiry of intentional and irresponsible acts need not have focused solely on the Cabinet.

40. As I mentioned the first Appellant's application for the licence was made since September 2000. Further information was requested by the Director of Telecommunications which was provided also in September 2000. The application was evaluated and recommended in October 2000. But to date the application has not been considered by Cabinet. The application of Citadel Ltd. on the other hand was made by an application dated March 13, 2001, which did not appear to have come to the attention of the Telecommunications Division until April 2002. The application in fact was not completed until July 2002 but yet was granted no later than October 2002. That is clearly evidence of differential or unequal treatment, but proof of such treatment per se does not amount to discrimination within the equality provisions of the Constitution. The Appellant as I said must go further to establish mala fides.

41. The Appellants in order to do so have sought to say that Mr. Lee Sing, who it appears is the person behind Citadel Ltd., was a well known financier and supporter of the political party, which was then, as it is now, in power. To establish this, the Appellants sought to rely on an article appearing in a newspaper. But on an application by Counsel for the Respondent, the Trial Judge struck out the relevant parts of the affidavit. I think the Judge was correct to do so. In any event there is no evidence, that if Mr. Lee Sing is a well known financier and supporter of the ruling party, that this was the reason that the application of Citadel Ltd. was considered ahead of the other applicants. The same could be said of the statement that Mr. Lee Sing had previously operated a

radio station that exhibited a political bias favourable to the ruling party. There is no evidence that this motivated the rapid consideration of the licence.

42. There is however no denying that there was a request by the relevant Minister to expedite Citadel Ltd.'s application. It is fair to say that pursuant to this request the application was dealt with by the Telecommunications Division contrary to their own position that applications at that time would not be processed until a broadcast policy was established. It is also fair to assume that the Minister's conclusion that the application be expedited led to its speedy consideration by Cabinet. It has been said, and it is difficult to disagree with it, that one of the aims of the equality provisions of the Constitution is to "strike down curry favour" and other unfair practices on the part of those who manage and operate the wheels of justice (see *Smith v L. J. Williams Ltd.*, supra, at page 412). If someone is singled out for favourable treatment, that is of course an act of discrimination, and if it is without justification someone similarly circumstanced who is entitled to be treated similarly can complain. As was said in *Snowden V. Hughes*, 321 US 1 (1945):

... the unlawful administration by State officers of a State statute fair on its face resulting in its unequal application to those who were entitled to be treated alike is not a denial of unequal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or a class over another not to be inferred from the action itself.

Further if someone is singled out for different treatment, albeit favourable treatment, that is evidence from which *mala fides* may be inferred. It is on the face of it arbitrary which may provide evidence of *mala fides*. As Bernard J.A. said in the case *K.C Confectionary* case (at page 415) evidence of an "intentional and irresponsible act ... will be enough to rebut the presumption of irregularity and infer *mala fides*". "An irresponsible act" is a

synonym for an arbitrary act. The evidence need not be therefore to the effect that the aggrieved party was selected or targeted for victimization. As has been said “equal protection means the right to equal treatment in similar circumstances, both in privileges conferred and in liabilities imposed by law (see *Bhagwandeem v. the Attorney General*, Civil Appeal No. 23 of 2001). If it were the case that it was fortuitous that the application of Citadel Ltd. was considered with alacrity, then the position may be different. The position here however is that Citadel Ltd. was selected by the Minister. He was of the view that its application ought to be expedited and clearly it was. Without an explanation for dealing with Citadel Ltd. differently, that on the face of it is unreasonable and arbitrary. It is evidence of an intentional and irresponsible act which without justification will be enough evidence to rebut the presumption of regularity and infer mala fides.

43. The Minister explained his reason for requesting that the application of Citadel Ltd. be expedited in these terms:

The Telecommunications Division had been considering the application of Citadel Ltd. However developments involving the use by certain principals of Citadel of the frequency FM 92.5 by agreement with Tobago Broadcasting Systems Limited led to a situation that I considered and concluded needed to be resolved quickly. I therefore requested the Division to expedite consideration of Citadel’s application. A Broadcast Licence was granted to Citadel and not Mr. Lee Sing.

44. With all due respect, that really says nothing. That explanation simply does not assist in determining the reasonableness of the act. What is the situation that led to the Minister’s intervention that needed to be resolved quickly? Why would a dispute between two persons regarding the use of a frequency necessitate or justify ministerial intervention to expedite Citadel’s application? I am not satisfied that what is said in that paragraph provides any justification for the different treatment granted to Citadel Ltd.

45. Nor does it serve as an explanation for the selection of Citadel Ltd. that the files of the Appellants may have been lost or that its name was not on a list of outstanding applications or that there were changes in the location of the office of the Telecommunications Division and the Ministry under which it came or that there were personnel problems at the Division. Those explanations do not provide a reason why Citadel Ltd.'s application was selected for differential treatment.

46. In my judgment therefore the Appellants were entitled to the declarations which the Judge granted and the cross-appeal fails. However in view of the finding that the only relevant application was the application of the first Appellant the declarations ought to be in favour only of the first Appellant and I order that the order of the Trial Judge be varied accordingly.

47. With respect to the declarations sought under Sections 4 (h) and 4 (i) of the Constitution, the Judge did not consider them. He did not think it necessary to do so, as he found breaches under Sections 4 (b) and (d) of the Constitution and granted declarations and other relief. Counsel for the Appellants submitted that the Judge ought to have considered the alleged breaches under 4 (h) and (i). Counsel for the Respondent, on the other hand submitted that the Judge was entitled to take the position that he did. He referred to the case of Benjamin and Others v. the Minister of Information and Broadcasting [2001] 4 LRC 272. In this case the applicant claimed that his right to freedom of conscience, freedom of expression, and freedom from discrimination as guaranteed by the Constitution of Anguilla was contravened by the suspension by government of a call-in radio programme. The judge at first instance found that the right to freedom of expression had been infringed and awarded damages to Mr. Benjamin. The judge, however, rejected the claim that the applicant's claim to freedom from discrimination had been violated, but did not consider it necessary to consider the alleged breach of freedom of conscience. On appeal to the Privy Council, the Board agreed with the judge.

48. The Benjamin case is not authority for the proposition that in every case where the Court finds a breach of one provision of the Constitution, it need not consider alleged breaches of other provisions. The Court's business is to administer justice. If on the finding to which the Court has come, it cannot grant adequate relief that meets the justice of the case, it should go further. Of course, if on the finding it has reached adequate relief can be granted that meets the justice of the case, the judge cannot be criticized if he does not consider other claims. I think the Benjamin case is one where adequate relief was granted on the breach as found in relation to freedom of expression. The alleged breach of the freedom of conscience was so intimately related to the freedom of expression that in the context of the case it would have made no difference to the applicant, if there was also a breach of the freedom of conscience. In this case, the position is, in my judgment, similar. In the context where the breach relates to the failure to consider the first Appellant's application, I see no need to consider if that also amounts to the other breaches as claimed. It should make no practical difference to the Appellants as adequate relief can be granted on the breach as found. I therefore agree with the Judge that there is no need to consider the other breaches alleged.

49. With respect to the other relief granted to the Appellants referring "redress" to the Master, I agree with Counsel for the Respondent that the Judge must have intended by that order that damages be assessed for the breaches which he found of the Appellants' constitutional rights. However the order does not expressly say so and as it stands may lead to difficulties. I think it should be expressly stated that the matter is referred to the Master for the assessment of damages on a date to be fixed by the Registrar.

50. With respect to the grant of the licence, the Appellants relied heavily on the case of *Observer Publications Ltd. v. Matthew and others* (2001) 58 W.I.R. 188. This was a case out of Antigua and Barbuda. The Board held that the refusal of a broadcast licence which the appellant sought in that case was a hindrance to the freedom of expression guaranteed by the constitution unless it could be justified on the grounds expressly authorized by the constitution or obviously implied therein. The Board held that the licence was refused without justification on any of the authorized grounds and ordered

that the appellant be granted a licence. In this jurisdiction the position is somewhat different. The grounds on which a licence may be refused are not expressed in the Constitution. Broadcasting licences are granted under the Wireless Telegraphy Ordinance, an existing law. It has been accepted that for the better enjoyment of the radio airwaves or spectrum, that it needs to be regulated. The Ordinance in regulating of the spectrum gives to the President on the advice of Cabinet, a discretion to grant or refuse licences. This may be done in accordance with a rational policy. In this case, Cabinet has not considered the first Appellant's application and there has been no refusal of it. I do not subscribe to the view that there has been a constructive refusal of the application on the facts of this case. I think therefore that Cabinet ought to consider the application of the first Appellant and I would direct that the matter be placed before Cabinet for its consideration within 28 days of the date hereof.

51. I may mention that there is another consideration in ordering the grant of a licence. Although some 13 applications were granted in 2004, they do not include the two which appeared on the list prepared by Mr. Ragbir as predating the application of the First Appellant. I cannot without more say that the first Appellant be granted a licence in priority to those applications.

52. With respect to costs I would allow 50% of the Appellants' taxed costs of the appeal and the cross appeal to be borne by the Respondent.

Allan Mendonca  
Justice of Appeal