

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CvA. NO. 16 of 2004

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

BETWEEN

**CENTRAL BROADCASTING SERVICES LIMITED
SANATAN DHARMA MAHA SABHA OF TRINIDAD & TOBAGO**

APPELLANTS

AND

THE ATTORNEY GENERAL OF TRINIDAD & TOBAGO

RESPONDENT

CORAM:

**R. Hamel-Smith, J.A.
M. Warner, J.A.
A. Mendonca, J.A.**

APPEARANCES:

**Dr. F. Ramsahoye, S.C. and Mr. A. Ramlogan for the Appellants
Mr. R. Martineau, S.C. and Mrs. A. Rambaran for the Respondent**

DATED DELIVERED:

27th January, 2005

Delivered by M. Warner J.A.

JUDGMENT

1. This case concerns the appellants' application for a radio broadcast licence, which was made under Section 3 of the Wireless Telegraphy Ordinance Chap. 36 No. 2 (the Ordinance). The contention of the appellants was that another applicant Citadel Ltd. which had made a similar application, though later in time, was however granted a licence, while there had been no response to their application. Notably, they had not been informed that their application was deficient in any way. They claimed constitutional relief in the circumstances set out below.

2. Best J. held that the appellants had proven that Section 4(b), (the right to equality before the law), and 4(d) (the right to equality of treatment from a public authority), had been infringed and he made declarations and orders in the following terms -

“The Applicant 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.”

Best J. refrained from granting any relief based on the constitutional guarantees of freedom of conscience, or religious belief, and thought and expression, respectively section 4(h) and 4(i).

3. The appellants have appealed in respect of the judge’s failure to grant relief under section 4(h) and 4(i) of the Constitution, and his failure to make ***‘appropriate orders for the grant of a radio broadcasting licence.’*** The respondent contends that the appellants are not entitled to any relief and further, that the judge was wrong to refuse leave to use affidavits filed by the acting Permanent Secretary in the Ministry of Information and the relevant Minister. There is a cross-appeal in this regard.

4. Section 3 of the Ordinance provided as follows –

“(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.”

5. **The constitutional guarantees**

Section 4 of the Constitution states –

“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, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely –

- a.***
- b. the right of the individual to equality before the law and protection of the law***
- c.***
- d. the right of the individual to equality of treatment from any public authority in the exercise of any functions;***
- e.***
- f.***
- g.***
- h. freedom of conscience and religious belief and observance;***
- i. freedom of thought and expression;”***

6. The former Director of Telecommunications, Mr. Winston Ragbir, (the Director), filed an affidavit on the appellants’ behalf. The contents of his affidavit, when considered together with other material in evidence, demonstrate that in the absence of regulations prescribing procedure, the following mode of dealing with applications had been developed and applied -

1. applicants were required to provide certain technical, financial and other information on forms provided for that purpose;
2. applications were considered chronologically;
3. the Director evaluated the applications and made recommendations to Cabinet.;
4. the Cabinet approved and granted licences as it thought fit;

Between the years 1992 and 2001, the Director had dealt with 27 applications and he, the Director, had recommended 12 licences as ***'proper applications.'*** The appellants were among that number. He had not however seen any application on Citadel's behalf.

7. Ms. Mala Guinness was Mr. Ragbir's successor. She, on the respondent's behalf deposed in summary that –

- (1) the relevant department had changed location;
- (2) that applications had been misplaced and the appellants' application may have been one of them;
- (3) the Ministry had been developing a new policy and had taken a decision to halt the grant of licences temporarily.

8. **The appellants' complaint**

At the heart of the appellants' complaint was that the respondent had demonstrated a lack of bona fides in the treatment of their application, and further that although the Ministry of Communications, Information and Technology had by letter of the 5th March 2001 promised to investigate queries about the application "**shortly,**" there had been no response. Citadel on the other hand, had been granted a licence in a relatively short period.

Best J. had refused to permit the respondent to use a supplemental affidavit filed by the relevant Minister, in which the Minister deposed that he requested the Division to expedite Citadel's application because of a situation which had developed. In his principal affidavit however, the Minister deposed that he was not aware of any list of pending applications, nor of any recommendations made by the Director for the grant of a licence to the appellants.

9. Best J. accepted the submissions of the respondent's counsel that evidence of hostility and irresponsible acts on the part of the Cabinet directed towards the appellants were exiguous. I interpret the learned judge's finding to mean that mala fides was not present. The learned judge however, held that where there was cogent evidence of unequal treatment, the onus shifted to the State to show that the differential treatment was justified and reasonable in the circumstances.

10. **Construction of Section 4 (b) and 4(d)**

It is useful to cite the case of **Matadeen and others v M.G.C. Pointu and others (Mauritius) [1998] UK PC 9 (18th February 1998)**, in which the Privy Council endorsed some useful guidelines for construction of Bills of Rights.

11. Their Lordships cited with approval the following statement of Lallah Ag. C.J. in **The Union of Campement Sites Owners and Lessees v The Government of Mauritius [1984] M.R. 100, 107 -**

“Constitutions are formulated in different terms and must each be read within its own particular context and framework. The American and Indian Constitutions were drafted in a different age and have tended, particularly with regard to fundamental freedoms of the individual and to a greater extent than more modern Constitutions, to make broad and wide-ranging formulations which have necessitated a number of amendments and specific derogations or else have required recourse to implied concepts of eminent domain or police powers in order to keep literal interpretations of individual rights within manageable limits. We should be very cautious, therefore, in importing wholesale into the structure and framework of our Constitution a complete article of the kind that Article 14 of the Indian Constitution or the 14th Amendment of the American Constitution are.”

Their Lordships continued in **Matadeen** –

“Their Lordships consider that these observations, coming as they do from a judge with great experience in the international jurisprudence of human rights, should be borne carefully in mind. It is open to a democratic constitution to entrench a general principle of equality, as in the United States and India; to ‘entrench’ protection against discrimination on specific

grounds, as in New Zealand, or to entrench nothing, as in the United Kingdom. In order to discover into which of these categories the Constitution of Mauritius falls, it seems to their Lordships that there is no alternative to reading the Constitution. It is therefore to the language of section 3 that their Lordships next turn.”

I shall therefore adopt that approach, recognising as well that for decades, all the States mentioned above have striven and continue to strive to combat discrimination in their respective jurisdictions which according to one jurist is sometimes “***subtle, but always insidious***”

12. It is accepted that the case of **Smith v L.J. Williams [1982] 32 WIR 395** was the first case in this jurisdiction, in which breaches under sections 4(b) and 4(d) were considered, both at first instance and then in this court. Needless to say, since then, the jurisprudence has developed over the last two decades as new situations arise.

In the Trinidad and Tobago Constitution, it is now recognized that the expression ‘***protection of the law***’ in 4(b), is free standing and is capable of being breached without improper differentiation, however based, and whether in law or official treatment. In **Boodhoo and Jagram v The Attorney General CvA. No. 102 of 199 (unreported)**, this court held that the right to protection of the law enshrined in section 4(b) might well encompass breach by a court’s delay in delivering a judgment, if the delay was of such an order as would make a mockery of the person’s right to have a determination of a matter by the competent court or tribunal. In the Privy Council (Privy Council

Appeal 8 of 2003), their Lordships endorsed this view. They agreed with this court that the appellants' case was not proven and dismissed the appeal.

13. In **Boodhoo** (supra) de la Bastide C.J. cited **L.J. Williams** and **K.C. Confectionery**. In referring to alleged breaches of section 4(b) he stated -

“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 that person must have acted ‘with an evil eye and an uneven hand.’ It has been accepted in Trinidad and Tobago that there must at least be some element of deliberateness in the selection of a person for different treatment. See Bernard J. in Smith v L.J. Williams Ltd. [1981] 32 W.I.R. 395 at 413(d) and The Attorney General v K.C. Confectionery Ltd. [1986] 34 W.I.R. 387.”

14. In **L.J. Williams** (supra), at first instance, Bernard J., as he then was, accepted the submissions of Counsel that the Chief Immigration Officer acted in derogation of the law, and/or governmental policy, and according to his own caprice, as though there were no limitation to the exercise of his powers. In his dealings with the complainant company, the officer adopted a totally different approach from that which he applied to their competitors. It was clear that the complainant company's case was founded on mala fides. Officer Smith was cross-examined extensively. The principles of law which Bernard J. applied to those proven facts were in the main culled from the Indian jurisdiction. Bernard J.A. held that the burden of proof was on the aggrieved party to establish mala fides.

15. In **K.C. Confectionery** (supra), briefly, the case was founded on lack of bona fides. The challenge was to the relevant authority's failure to have the importation of confectionery restricted, that is to say, placed on the negative list. The judge at first instance held that this resulted in a lack of protection for the applicant's products, and so amounted to denial of equality of treatment. The court reversed the judge's decision. Chief Justice Kelsick and Bernard J.A. agreed with findings of fact and conclusions of law arrived at by Persaud J.A. I shall return to this case later in this judgment.

16. In **Police Service Commission v Wayne Hayde CvA. No. 12 of 1999** Sharma J.A., as he then was, observed that a claim that a public authority has violated a citizen's right to equal treatment must be supported by cogent evidence. Sharma J.A., repeated his observations in **Crane v Rees** regarding '**holders of high office.**' Where he said -

"It is of utmost importance for us to assume that those who hold high office would act with the greatest constitutional propriety. Were it otherwise, it would also be a recipe for disaster. It is expected that holders of high office (who after all in most instances are appointed by the President after consultation with the Prime Minister and the Leader of the Opposition – in other words, by the people of Trinidad and Tobago) would act with probity and rectitude at all times in the discharge of their function."

(See also **CvA. No. 10 of 2004 The Director of Personnel Administration v Cooper and Others (unreported)** delivered on 19th January 2005).

17. With those principles in mind, I shall now examine the affidavit of the applicant filed in support of the application.

Paragraph (1) set out the composition of the Sanatan Dharma Maha Sabha (SDMS).

Paragraphs (3) to (5) - related that applications were made on the 1st December 1999 and August 2000.

Paragraphs (6) to (9) dealt with the outcome of General Elections held in Trinidad and Tobago in the year 2001.

Paragraph (10) pertained to certain perceptions held by the applicant as to the political leanings of Citadel Ltd.

Paragraph (11) relates to the grant of a radio licence to Citadel Ltd.

18. As I have already indicated the Director's affidavit set out the relevant procedure and the fact that he had evaluated and recommended the appellants' application.

19. The Minister in his principal affidavit deposed that -

- (1) he had never seen the list of applications to which the Director had referred.
- (2) no one communicated with him with reference to the list of applications.
- (3) he was not aware of the pending applications; nor did the Director show him the list of applications; nor did he inform him that he had recommended twelve of the applications or that the appellants' application could properly be granted.

There is no evidence as to whether copies of these lists were left on the files in the Ministry. In the absence of cross-examination, and in the context of the serious allegations of breach of the equality provisions, I will not be willing to draw a conclusion that mala fides has been made out. (See later ***Bhagwandeem v The Attorney General Privy Council Appeal 45 of 2003.***)

This was a case in which a Police Officer claimed that the Police Commissioner had treated him unfairly when he refused to recommend him for promotion. His appeal was dismissed both in this court and in the Privy Council).

20. **Sections 4(h) and 4(i)**

It seems to me that the appellants cannot claim to have been deliberately selected for unfair treatment, when there were several other applications pending. It was, therefore, not open to the appellants to allege discrimination on account of the personal characteristics of the group of persons which he represented. Further, it seems to me that a right such as the right to freedom of religion, must attach to a natural person.

I do not agree with the finding of Best J. that there has been a constructive refusal of the licence. In fact, there has been no evidence that the application has been placed before the Cabinet for its consideration. I therefore conclude that there has been no denial of the right to freedom of expression. I note that the appellants did not pursue these arguments before us with much force.

21. **The failure of the High Court to give directions for the grant of a licence**

In this regard, there is an interesting case coming from the Indian jurisdiction in which it was decided that where a petitioner claims that the terms of Article 14 of the Constitution of India have been breached in relation to him, in that different treatment was extended to others similarly circumstanced, he must first trace that the treatment extended to those persons, is valid in law.

In **Singh v Delhi Municipal Co. AIR [1996] 1175**, briefly, a municipal corporation let shops in a complex to some holders at a concessional rate and without zoning restrictions, while other allotments were let at a higher rate and with restrictions. It was held inter alia that -

“The guarantee of equality before law is a positive concept and it cannot be enforced by a citizen or Court in a negative manner. To put it in other words, if an illegality or irregularity has been committed in favour of any individual, or a group of individuals, the others cannot invoke the jurisdiction of the High Court or of the Supreme Court, that the same irregularity or illegality be committed by the State or an authority which can be held to be state within the meaning of Art. 12 of the Constitution. So far such petitioners are concerned, on the reasoning that they have been denied the benefits which have been extended to others although in an irregular or illegal manner. Such petitioners can question the validity of orders which are said to have been passed in favour of persons who were not entitled to the same but they cannot claim orders which are not sanctioned by law in their favour on principal of equality before the law. Neither Art. 14 of the constitution conceives within the equality clause this concept

nor Art. 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continuance and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioners that his claim being just and legal has been denied to him. While it has been extended to others and in this process there has been a discrimination.”

I accept and adopt this reasoning.

22. In my view therefore, even if the supplemental affidavit of the Minister is admitted, in which he deposed that he requested that Citadel’s application be expedited, the appellants cannot, in my view, rely on acts which they regard as irregular to establish a case for a grant of a licence in the light of the procedure established by the regulatory authority. On that ground therefore, I do not agree that this court ought to direct the grant of a licence to the appellants.

23. **K.C. Confectionery revisited**

In the case of **Bhagwandeem v The Attorney General of Trinidad and Tobago** (above) the Privy Council although it dismissed the appellant (**Bhagwandeem’s**) appeal has raised two matters which I think I ought to face frontally -

1. that these courts have held that to establish a case of discrimination by a public official it is necessary to prove mala fides on his part. Their Lordships have cited the case of **James v Eastleigh Borough Council [1990] 2**

AC 751 as demonstrating that in the United Kingdom there is no such requirement.

2. that there may have been, in this court, a degree of confusion between two distinct concepts namely, the presumption of regularity and the necessity for proof of deliberate intention to discriminate.

24. With respect to the first proposition, Dr. Ramsahoye has commended to us the **Eastleigh Borough Council** case. In this case, the impugned legislation was Section 27 (1) of the Social Security Act 1975 which fixed the pensionable age at 60 years for women and 65 for men. The plaintiff and his wife were both 61. They both went to a public swimming pool where, the wife, being of pensionable age was admitted free of charge; the husband plaintiff had to pay 75p. for admission. This was a test case brought with the support of the Equal Opportunities Commission. The provisions of the Sex Discrimination Act 1975 provided that a person discriminates against a woman if he treats her less favourably than he treats or would treat a man. This provision applied equally to men.

The statute defines discrimination and prohibits discriminatory conduct in specified areas. The Act was specifically directed to gender discrimination.

25. In this context, now however, I ought to mention the case of **Relaxion Group plc v Rhys-Harper [2003] 4 All ER 1113**. In this case, three consolidated appeals engaged the attention of the House of Lords. The principal question raised was whether discriminatory acts done by an employer

after termination of an employees' contract of employment were outside the scope of the Sex Discrimination Act 1975 Section 6(2), the Race Relations Act 1976 and Section 4(2) of the Disability Discrimination Act. Lord Hope had this to say at page 1135 -

“It is a remarkable fact that, although discrimination on whatever grounds is widely regarded as morally unacceptable, the common law was unable to provide a sound basis for removing it from situations where those who were vulnerable to discrimination were at risk and ensuring that all people were treated equally. Experience has taught us that this is a matter which can only be dealt with by legislation, and that it requires careful regulation by Parliament. The Community has adopted the same approach in its promotion of the principle of equal treatment as part of its social action programme. The fact is that the principle of equal treatment is easy to state but difficult to apply in practice. In the result the legislation which is under scrutiny in these appeals is designed to be specific and particular rather than universal in its application, and it is still being developed incrementally. It must, of course, be construed purposively, as Waite LJ said in Jones v Tower Boot Co. Ltd [1997] 2 All ER 406 at 413, [1997] ICR 254, 261-262. But the scope to be given to the legislation is essentially a matter for Parliament.”
(Emphasis Added)

26. The test applied in Eastleigh was objective -

“Would the plaintiff, at the age of 61, have received the same treatment as his wife, but for his sex?”

The affirmative answer was inescapable. It was these circumstances that the majority, Lord Griffiths and Lord Lowry dissenting, held that the gender-based criterion was unlawful.

With respect, I do not think that it is helpful to urge the dicta in **Eastleigh** (supra), where the legislation defined discriminatory treatment. I would therefore be cautious in the application of this case to the instant facts.

As regards the second matter to which their Lordships have drawn attention in the **Bhagwandeem** case, the application of the common law presumption of regularity is raised.

The maxim '*omnia praesumuntur rite et solemniter acta donec probetur in contrarium*' means that everything is presumed to be rightly and duly performed unless the contrary is shown (Co Litt 232). In **Broom's Legal Maxim 10th Edition at page 642** the following illustration of the maxim is set out -

In the absence of proof to the contrary, credit should be given to public officers who have acted prima facie within the limits of their authority for having done so with honesty and discretion.

This formulation appears to have been taken from the dicta of Willes J. in **Earl of Derby v Bury Improvement Commissions [1849] 4LR Ex 222 at page 226.**

It would, in my view, follow that proof of mala fides is one way of providing "***proof to the contrary.***" With respect, that is as far as I am prepared to go on the instant facts. These issues will no doubt be settled at the appropriate time.

27. In my respectful view, while the **Eastleigh Borough Council** case may not be directly applicable to these facts, however, as Hamel-Smith J.A. has pointed out, in the **K.C. Confectionery** case, Persaud J.A. had then highlighted situations where mala fides did not form part of a complainant's case. In that case, Persaud J.A. examined the case of **The State of West Bengal v Anwar Ali Sankar [1952] SCR 284** and he concluded that two situations may arise. He said -

"If it is being complained that the official has been dishonest in the discharge of his duties, or that he has acted out of spite towards the complainant, then clearly an allegation of mala fides is being made, 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 before vested in him either from the Constitution itself or from an Act of Parliament."
(Emphasis Added)

28. Kelsick J.A. and Bernard J.A. concurred with Persaud J.A.'s expositions of fact and law. There is no indication that there were reservations regarding Persaud J.A.'s analysis. In fact Mr. Martineau did submit to us that he was not advancing that the breach arose only if there was mala fides. Counsel submitted that if one pleaded that there was mala fides, it would have to be

proved; but if mala fides was not advanced, one would have at least to prove intentional and purposeful discrimination.

In **Boyce and Another v R Privy Council Appeal 99 of 2002** Lord Hoffman speaking for the majority in the Privy Council observed that the Constitution text is a living instrument where terms in which it is expressed in their context invite and require periodic examination of its application to contemporary life. Further, that Judges were not doing work of repair by bringing an obsolete text up to date..... on the contrary they are applying the provisions of the Constitution according to their true meaning. Their Lordships also noted that not all parts of a Constitution allowed themselves to be judicially adapted, for example, where they are not expressed in general or abstract terms.

In my view therefore, the dicta in **K.C. Confectionery** may be revisited legitimately, without breaching the stare decisis rule.

29. The other case cited by the appellants was **Observer Publications Ltd. v Matthew and Others [2001] 58 WIR 188** concerned the refusal of a radio broadcast licence. It was an appeal to the Privy Council from the Court of Appeal of Antigua and Barbuda. A case based on discrimination was not pursued in Privy Council, but during the hearing it emerged that a radio station in which the Prime Minister of Antigua, who was also the Minister of Communications and his brothers and mother had been granted a 25 year licence. Their Lordships observed that had the licences been discovered

earlier, a serious case of discrimination might have arisen. The case however, was not decided on the equality provision. The facts in brief were as follows -

The appellant applied in 1995 for a broadcasting licence to operate a radio station under the Telecommunications Act 1951. He already had a business licence for this station. He supplied all relevant information to the Telecommunications Officer, who, more than two years later, still had not processed the application. The appellant did not receive any reason for the delay and there were no technical reasons for it. In 1996, the appellant notified the Telecommunications Officer, and the Prime Minister and the Minister of Broadcasting that he intended to commence broadcasting later that year. The Permanent Secretary and Telecommunications Officer advised him that without necessary authority this would be illegal. Although he requested it, the appellant did not receive notice of any specific objections to his intent to broadcast or to his application for a licence. Therefore, he proceeded to broadcast, leading to a search of his radio station and seizure of his equipment on the first day of transmission. The warrant authorising the search was denied by the Magistrates' court but granted by a majority decision in the Court of Appeal based on the reasonable belief that telecommunications apparatus was concealed at the radio station. The appellant applied for constitutional redress on the basis that his freedom of expression had been violated contrary to s. 12 and that the search and deprivation of his property was unlawful contrary to ss 9 and 10.

30. In allowing the appeal it was held inter alia that –

“there was no fundamental right to establish a broadcasting station. However, freedoms of speech and of the press are inalienable constitutional freedoms with the result that any refusal of a licence must be on constitutionally justifiable grounds.”

The facts of the instant case are far different. In the Observer case, not only were the decision-makers competitors in the field, but the company was family owned, and the family comprised government officials of the highest order. Their Lordships expressed grave concern that there was a policy by the Government of the day motivated by a desire to suppress or limit criticism. This is not the case here.

31. To return to the facts of this case, the failure to respond was discourteous and demonstrated indifference. I would therefore repeat the stricture of Persaud J.A. in **K.C. Confectionery** (supra) case at page 207 -

“Public officers who deal with the public (and a substantial number do) are well advised first of all to acquaint themselves with the law under which they are required to perform their functions, and to apply that law with fairness and with dispatch. They are not permitted to lead members of the public in attempts at propitiation to believe that they enjoy certain rights when the law clearly does not bestow such rights. Nor are they entitled to ignore representations made by members of the public, or to deal with those representations in their own sweet time. To do these things may very well expose their departments to severe embarrassment, and may culminate in unnecessary litigation. These observations apply with equal force to all persons who though strictly speaking not part of the Public Service, are nevertheless charged with the duty of performing public function and are

required to make decisions from time to time affecting members of the public.”

32. As I have indicated, if the appellants are claiming that the Minister’s intervention was wrong then they cannot rely on this irregularity to bolster or ground their case. At the end of the day, there were other applications earlier in time than both Citadel’s and the appellants, which the Director had recommended and which had not been put before the Cabinet.

33. **The case for equality**

The entire foundation of the appellants’ case has not however, in my view, been destroyed. The relevant authority had established a procedure in accordance with powers vested in it under the Ordinance. While I would not presume to hold that the Minister is not empowered to request that an application is expedited, the relevant authority had dealt with the comparator (Citadel) an entity similar circumstanced, with expedition, but had not applied the same standard to the appellants’ application. (See para. 26 above). It is no excuse that the application ‘***may have been lost,***’ or that there was a shift in the Ministry’s location.

34. This type of situation, it appears to me, has always come within the sweep of Section 4(d), as Persaud J.A. has demonstrated. Accordingly, there will be no departure from the rule of stare decisis when I find a breach of the equality provision on this limb.

I also bear in mind the observations of Lord Wilberforce in **Minister of Home Affairs v Fisher [1980] AC 319 PC at page 328** that constitutional guarantees –

“call for a generous interpretation avoiding ‘the austerity of tabulated legalism’ suitable to give individuals the full measure of the fundamental rights and freedoms referred to.”

35. In summary therefore, I hold -

- (1) that the appellants have not proved acts of mala fides on the part of the respondent, but have made out a case to have their application placed before the Cabinet for its consideration, with expedition. (See paras. 19, 21 and 22 above).
- (2) The appellants are not entitled to an order directing the grant of a licence. (See para. 21 above).
- (3) the appellants have not proven that the freedom of conscience and religion or the freedom of thought and expression have been infringed. (See para. 20 above).

36. I agree that the respondent’s cross-appeal be dismissed in so far as the State has appealed against the order of Best J. granting a declaration under Sections 4(b) and 4(d) of the Constitution.

For the above reasons, I agree with the orders and directions proposed
by Mendonca J.A.

Margot Warner,
Justice of Appeal