

Privy Council Appeal No. 3 of 2000

Observer Publications Limited

Appellant

v.

(1) **Campbell “Mickey” Matthew**)
(2) **The Commissioner of Police and**) *Respondents*
(3) **The Attorney General**)

FROM

**THE EASTERN CARIBBEAN COURT OF APPEAL OF ANTIGUA AND
BARBUDA**

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL OF
14TH NOVEMBER 2000, Delivered the 19th March 2001

Present at the hearing:-

Lord Steyn
Lord Cooke of Thorndon
Lord Scott of Foscote
Sir Patrick Russell
Sir Murray Stuart-Smith

*[Delivered by **Lord Cooke of Thorndon**]*

1. At the conclusion of the hearing on 14th November 2000 their Lordships agreed humbly to advise Her Majesty that the appeal should be allowed and said that they would give their reasons later. This they now do.

2. The appellant, Observer Publications Limited, is a company incorporated in Antigua and Barbuda, which is, as stated in its Constitution of 1981, a unitary sovereign democratic State. In March 1995 the company applied in due form under the Telecommunications Act for a licence to operate a commercial FM radio station. The application was made to the appropriate public official, the Telecommunications Officer. All relevant information was supplied. Some 17 months later the application had not been formally disposed of; and more than five years later that remained the position. At best there has been procrastination. In a letter dated 12 August 1996 from the Permanent Secretary in the Prime Minister's Office the application was said to be "still under consideration"; but the trial judge, Benjamin J., justifiably described this in the light of the history and surrounding circumstances as "a euphemism for a refusal".

3. The Constitution includes provisions, largely in standard form, guaranteeing freedom to disseminate information and ideas by broadcasts, subject to laws reasonably required for various purposes. No specific reason of any kind, technical or otherwise, has ever been given, expressly or impliedly, for denying a licence to the appellant. Violation of the appellant's constitutional rights is therefore plain. Yet the courts of Antigua and Barbuda have refused the appellant constitutional redress, taking the view that no constitutional right has been infringed.

4. By leave granted by the Court of Appeal the appellant appealed to Her Majesty in Council from the decision of that court. At the hearing before the Board the case for the respondents failed comprehensively. The fundamental reason has already been indicated. It is true that no one has an absolute right to establish a broadcasting station. The effect of such provisions as are found in the Constitution of Antigua and Barbuda is, however, that a licence to do so may be refused only on constitutionally justifiable grounds. No such grounds have been demonstrated or can be inferred in this case.

The Constitutional Provisions

5. Freedom of speech and of the press are among the inalienable human rights and freedoms to be guaranteed by the Constitution, as proclaimed in its preamble. Paragraph (e) recites that the People of Antigua and Barbuda –

(e) desire to establish a framework of supreme law within which to guarantee their inalienable human rights and freedoms, among them, the rights to liberty, property, security and legal redress of

grievances, as well as freedom of speech, of the press and of assembly, subject only to the public interest.

6. In Chapter I, The State and the Constitution, Section 2 gives the Constitution in general overriding effect –

2. This Constitution is the supreme law of Antigua and Barbuda and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Section 3 then provides –

3. Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

- (a) life, liberty, security of the person, the enjoyment of property and the protection of law;
- (b) freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association; and
- (c) protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without fair compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

7. As an unlawful search and seizure also feature in the present case, it is to be noted that section 9 contains extensive provisions against unlawful deprivation of property; and that section 10(1) provides that, except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises. Section 10(2) qualifies this by providing that nothing contained in, or done

under the authority of any law, shall be held to be inconsistent with or in contravention of the section to the extent that the law in question makes provision for sundry purposes. These need not be quoted here.

8. It is necessary to quote in full section 12, which renders more particular the freedom of expression affirmed in the earlier provisions –

12(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.

(2) For the purposes of this section the said freedom includes the freedom to hold opinions without interference, freedom to receive information and ideas without interference, freedom to disseminate information and ideas without interference (whether the dissemination be to the public generally or to any person or class of persons) and freedom from interference with his correspondence or other means of communication.

(3) For the purposes of this section expression may be oral or written or by codes, signals, signs or symbols and includes recordings, broadcasts (whether on radio or television), printed publications, photographs (whether still or moving), drawings, carvings and sculptures or any other means of artistic expression.

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) that is reasonably required –

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives or persons concerned in legal proceedings and proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of Parliament and the courts, or regulating telephony, posts, broadcasting or other means of communication, public entertainment's, public shows; or

(b) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

9. Section 14 contains elaborate provisions directed against discrimination. These were among the rights unsuccessfully relied on for the company in the courts below. The argument based on section 14 was not repeated on the Privy Council appeal. At a late stage of the hearing it emerged, as a result of a request for information from the Board, that as from 13 January 1997 Grenville Radio Limited had been granted licences until 31 December 2022 to operate the AM radio station ZDK and the FM radio station SUN FM. It is said that ZDK was first licensed about 1970 and the additional FM wavelength authorised about 1994 or 1995. The directors of Grenville Radio Limited in 1995 were Mr. Lester Bird (the Prime Minister and Minister of Communications), and his brothers, Messrs. Ivor and Vere Bird Jr., together with their mother. The only other broadcasting stations permitted to operate in the country are said to be the Government-owned Antiguan Broadcasting Service, ABS, broadcasting on television and medium-wave radio; “Superchannel”, a cable television operation of a company owned and operated by Mr. Vere Bird Jr., which is said to be authorised by a franchise or special licence issued by the Cabinet; and “Caribbean Lighthouse”, a station transmitting religious programmes only. The Cable and Wireless West Indian network has some presence, but the evidence does not particularise this.

10. On 12 August 1996, in the context of a Government proposal to privatise ABS radio and television, the Office of the Prime Minister had announced in a press release that no new licences would be issued for radio and television stations until that exercise had been completed. The exercise has remained uncompleted; it was outlined in a White Paper presented by the Prime Minister and approved by the Cabinet on 24 July 1996. On 23 July 1996 Observer Publications Limited had written notifying an intention to commence broadcasting on 1 September 1996.

11. Their Lordships think that, had the granting of the 25 year licences been discovered earlier, a serious issue of discrimination might have arisen. As it is, the discovery was not made until it was evident that the appeal must succeed on the ground of hindrance in the enjoyment of freedom of communication. Mr. Robertson QC for the appellant presumably and understandably saw no need to resurrect the discrimination point. Consequently an opinion on it is not called for. Nevertheless the homogeneous pattern of the ownership of the authorised broadcasting stations is relevant against any suggestion that the refusal of a licence to

the appellant may have been justified under the Constitution. So is a political aspect of the case, a matter to be opened more fully later.

12. Other provisions of the Constitution invoked in the argument for the appellant include the requirements in section 15(8) and (9) as to fair, public and reasonably timely proceedings for the determination of civil rights. These provisions need not be reproduced here as the Board does not find it necessary to go into that part of the argument. What are important are the first two subsections of section 18 –

18(1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is unlawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

- (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
- (b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3) of this section,

and may make such declaration and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

13. In view of the reasoning of the High Court and Court of Appeal judges and the argument of the respondents on the present appeal, attention must be immediately drawn to the fact that the proviso to subsection (2) is no more than discretionary. It is from an application for redress under section 18 that the proceedings leading to this appeal have arisen.

14. Last, it is as well to reproduce section 19, which reiterates and reinforces the supremacy of the Constitution –

19. Except as is otherwise expressly provided in this Constitution, no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the fundamental rights and freedoms of the individual hereinbefore recognised and declared.

The Telecommunications Legislation

15. The legislation of Antigua and Barbuda relating specifically to telecommunications verges on the exiguous. Most of the provisions of the Telecommunications Act (Cap. 423) were enacted in 1951, being pre-independence legislation. By section 3 the Governor-General may appoint a tele-communications officer for Antigua and Barbuda to carry out the provisions of the Act. On the argument of the present appeal, however, it became common ground that by virtue of section 100 of the Constitution this power is now vested in the Public Service Commission established under section 99. The change appears to have been overlooked in this case in the courts below.

16. Section 4 of the Telecommunications Act prohibits any person from establishing a telecommunications station or installing, working or operating any telecommunications apparatus except under and in accordance with a licence granted under the Act and subject to such conditions and restrictions as may be prescribed by rules made under the Act. Breach of the section is made a criminal offence punishable by penalty (including imprisonment, see section 20) and forfeiture of apparatus.

17. By section 4(2) provision is made for the issue by the Cabinet of a special licence. The special power is available “In any case in which it shall appear to the Cabinet that no provision has been made by rules made under this Act for the issue of an appropriate licence, or that the circumstances of the case justify the issue of a special licence.”. It is to be noted that the Act does not expressly give the Cabinet a role in ordinary licensing procedure. Nor does it provide that the Cabinet may direct the Telecommunications Officer to grant or refuse an application for a licence. Section 4(2) provides that a special licence may be issued on such terms and conditions as to the Cabinet may seem fit. These would now have to be consistent with the Constitution.

18. By section 6(1) licences under the Act may be granted by the Telecommunications Officer and by any person duly authorised by the Governor-General (now the Public Service Commission) in that

behalf and shall be for such period and subject to such fees, if any, as the Cabinet may determine. Their Lordships do not interpret this as envisaging *ad hoc* (i.e. particular) determinations in individual cases, but as to be read together with the rule-making powers conferred on the Cabinet by section 18. That is to say, determination of the periods and fees are intended to be made by generally-applicable rules.

19. Section 18(1) confers on the Cabinet a broad rule-making power, while section 18(2) specifies some permissible purposes of the rules. They include (b) the types and forms of licences and (d) the terms on which and the conditions and restrictions subject to which licences shall be granted and the duties of licensees.

20. The only other provision of the Act needing to be noted is section 22, saving the operation of any existing licence granted to Cable and Wireless (West Indies) Limited or its assignee. It has not been suggested that this bears on any issue in the present case.

21. Rules were made under section 18 of the Telecommunications Act 1949 (the forerunner of the Act of 1951) by the Governor in Council. They are to be cited as the Telecommunications Rules 1951 and came into operation on the same day as the Act of 1951. It is common ground that they apply to this case. Rule 10 is the only rule regarding telecommunications broadcasting stations. It provides that applications for a licence shall be in form H of the Schedule and licences in form I. Otherwise it deals only with technical matters. Those two prescribed forms are simple. Apart from particulars of the applicant, they are concerned almost wholly with technical details. A condition in the form of licence prohibits the infringement of copyright. Otherwise the only noteworthy condition requires observance of the International Telecommunications Convention 1947 and the Radio Regulations annexed thereto. There is nothing in the current Radio Regulations preventing the granting of the licence sought by the appellant. Indeed, on the evidence of the first respondent, Mr. Matthew, who was the Telecommunications Officer from April 1987 to 27 July 1996, FM signals are admittedly not regulated by the International Telecommunications Union. In each country the licensing of FM stations is a local responsibility.

22. The evidence of Mr. Matthew, given on affidavit, cross-examination and re-examination, is considerable in extent but mainly general in content. The necessity of orderly regulation of the radio spectrum, which is obvious enough, is one of its prominent themes. There is much also about the irrelevant topics of AM and medium wave transmission. The appellant applied in form H for a station at Fort Road with repeater at Scotts Hill, with

transmission power of 10,000 watts on a frequency of 91.1 megahertz. There is nothing in Mr. Matthews' evidence to the effect that this is unavailable or in any way technically unsatisfactory. At one point in cross-examination he is recorded as saying that in his view there were no problems with the information supplied and the application whatsoever. Later he is recorded as saying that by telephone he raised a strong objection after the applicant company had informed him of the frequency of 91.1 mhz recommended to it by the Chief Engineer of Cable and Wireless. The meaning of this is not clear, but it may be a complaint that Cable and Wireless were being treated as the allotting authority, for he went on to repeat that he had said he had no problems with the application.

23. He also testified that the discussion with the applicant never went as far as the selection of a frequency; and that the application is decided on before the allocation of a frequency. There is nothing in the judgments of the High Court and Court of Appeal to assist on these technical matters, nor was counsel for the respondents able to point to any technical objection to the appellant's proposal. In all the circumstances any realistic possibility that the application could properly be rejected for technical reasons can safely be ruled out.

24. As regards the legislation, it remains to mention that the Telecommunications (Licences and Fees) Order, made in 1994 under section 6 of the Telecommunications Act, provides that licences granted under that section and renewals thereof shall be made in the month of January in each year and every such licence or renewal shall expire on the 31st day of December in the year for which it is taken out. The relevant prescribed annual fee is \$96. Their Lordships express no opinion on the validity or otherwise of the surprising 25-year licences now discovered to have been issued to Grenville Radio Limited, as it is not an issue calling for adjudication on this appeal.

25. The validity of the rather skeletal and dated primary and secondary legislation regarding telecommunications falls to be assessed in the light particularly of section 12 of the Constitution. In general the meaning and importance of section 12 is plain enough on its face. Comparable provisions have been considered recently by the Judicial Committee in *Cable and Wireless (Dominica) Limited v Marpin Telecoms and Broadcasting Company Limited* (Appeal No. 15 of 2000; judgment 30 October 2000) 9 B.H.R.C.486 and *Benjamin v Minister of Information and Broadcasting, Anguilla* (Appeal No. 2 of 1999; judgment 14 February 2001). Significant authorities in various other jurisdictions are reviewed in those judgments. It is unnecessary to traverse the same ground again in the present judgment. It is

clear that, within the meaning of section 12(1), (2) and (3), the refusal of a broadcasting licence such as the appellant seeks is a hindrance of freedom of expression and freedom to disseminate information and ideas without interference. It may nevertheless be upheld under section 12(4) to the extent that the law in question makes provision that is reasonably required for certain of a range of purposes. The onus upon those supporting the restriction is to show that it is so reasonably required. If the latter onus is discharged, the burden shifts to the complainant to show that the provision or the thing done is not reasonably justifiable in a democratic society. There is a presumption of constitutionality, but this is “but a particular application of the canon of construction embodied in the Latin maxim *magis est ut res valeat quam pereat* which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations.”. (*Attorney-General of the Gambia v Momodou Jobe* [1984] A.C. 689, 702 per Lord Diplock delivering the judgment of the Privy Council; followed in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 A.C. 69, 77-78 per Lord Clyde delivering the judgment of the Privy Council.).

26. What has to be justified by the respondents under section 12(4) is the law in question. It is settled that to qualify as a “law” for this purpose the measure must contain criteria sufficient to provide a standard for guidance. One of the contentions for the appellant is that the licensing regime is not sufficiently certain to qualify as law and that the relevant provisions of the Telecommunications Act are void and of no effect. On this point it is material to consider more fully the judgment of the Board in the *de Freitas* case, a decision on the same section 12 of the Constitution and incidentally on section 13 (freedom of assembly).

27. In that case the applicant for constitutional redress was a civil servant who had participated in peaceful demonstrations against Government corruption. The Permanent Secretary of the Ministry in which he worked claimed that he had acted in breach of a provision of the Civil Service Act forbidding the communication by civil servants of any information or expressions of opinion on matters of national or international political controversy. The relevant effect of sections 12 and 13 of the Constitution was that, while freedom of expression and peaceful assembly and association were guaranteed, restrictions on public officers were permitted if reasonably required for the proper performance of their functions, except to the extent that the restrictions were shown not to be reasonably justifiable in a

democratic society. Evidently it was not in any doubt that the Civil Service Act provision was *prima facie* unconstitutional. The issue was whether the restrictions were reasonably required and justifiable. The Eastern Caribbean Court of Appeal had sought to save them by applying the presumption of constitutionality and holding that there should be treated as implied in them some such words as “when his forbearance from such publication is reasonably required for the proper performance of his official functions.”. The Judicial Committee rejected that solution and upheld the first instance grant of relief to the applicant, basically on the ground that the suggested implication was too vague.

28. In the course of the judgment Lord Clyde referred at p.78 to the principle of legal certainty: that legal provisions which interfere with individual rights must be formulated with sufficient precision to enable a citizen to regulate his conduct. An implication such as that proposed by the Court of Appeal did not satisfy this test as it simply echoed the constitutional description of the kind of provision which might lawfully be made.

29. That approach does not of course preclude all suggested implications. Much depends on the subject-matter. In the field of radio station licensing the principle of legal certainty is not transgressed by an implication that a licence may properly be refused if to grant it would result in overcrowding of the radio spectrum or would otherwise be objectionable for technical reasons. Their Lordships accept that obvious implication in the legislation of Antigua and Barbuda. Accordingly they do not accept the argument for the appellant that there is no valid licensing system at all. But this does not advance the case for the respondents, as no valid technical objection has been identified.

30. In his affidavit sworn in December 1996, Mr. Matthew also says that any regulating authority has to be concerned with and give due consideration to the nature and type of material intended to be broadcast to the general public, such as material affecting law and order, public morality and any of the other matters referred to in section 12(4)(a) of the Constitution. It may be possible to infer an implication that a licence may properly be refused on such grounds as that there is reasonable cause to believe that the applicant will broadcast pornography or treasonable or otherwise unlawful material; but, as no ground of that kind has been relied on here, the Board does not enter into the subject further.

The History of the Case

31. Before applying in March 1995 for a telecommunications licence the appellant obtained the licence also necessary under the Business Licence Act, 1994, paying the prescribed annual fee for radio and television stations of \$1,000. In the evidence the first recorded effect of the application for a licence under the Telecommunications Act was a letter from Mr. Matthew as Telecommunications Officer to Mr. Samuel Derrick of the applicant company dated 19 April 1995. It requested detailed information on a number of matters, some being outside the scope of the particulars prescribed in form H. For instance, the company was asked for a comprehensive business plan for the first five years of proposed operation, and for the precise goals and objectives of the proposed station. In reply two letters were written, dated 19 May 1995, one by Mr. Samuel Derrick and the other on behalf of his legal adviser, Mr. Sydney Christian QC. The latter made the point that, while willing to supply some of the additional information, his client was not obligated to do so under the law. A comprehensive business plan would not be supplied but the intention was to have regular programming of music, news and interviews and to ensure that there was more variety in the programme schedule. For his part Mr. Derrick wrote of an intention “to provide the Nation with literate radio station that can provide the Nation with news, views, interviews and music for the education and enjoyment of the public.”. And again, “to provide an environment where literate people can listen to the news, express their views, participate in interviews and enjoy great music, free from indecent and abusive language.”. He said that since the Government would be their main competitor, giving information about the business plan would provide the Government with an unfair advantage. The format would be provided, however, in due course. “We have gone to a great deal of trouble and expense to answer all your questions as fully as possible despite the fact that we are of the opinion that your letter is only a device to stall our application for as long as possible. We hope that our opinion is wrong.”. He asked for an answer within 14 days.

32. A laconic answer was given by the Telecommunications Officer by letter dated 9 June 1995. Apart from thanks for the additional information, the letter said only “. . . this is to inform you that there is no policy to support the licensing of Private Broadcasting Stations at this time.”. As well as being difficult to reconcile with the treatment of Grenville Radio Limited, this intimation evidently refers to Government policy, which under the Constitution has no place in such a controlling regime as is established by the Telecommunications Act and subordinate legislation.

33. More than a year went by, apparently without any progress. Then on 23 July 1996 Mr. Samuel Derrick wrote on behalf of the

company to Mr. Matthew notifying an intention to commence transmission on 91.1 megahertz from 6 a.m. [1] September 1996. "This letter is sent for your information to enable you to give notice to any international agencies that may deal with the allocation of frequencies or otherwise.". This letter did evoke a prompt response. On 25 July 1996 as Telecommunications Officer Mr. Matthew wrote advising that the operation of radio apparatus in the radio frequency spectrum without the necessary authority was illegal.

34. On 6 August 1996 Mr. Derrick wrote to the Prime Minister and Minister of Communications referring to the intention of Observer Radio to commence test broadcasting on 1 September 1996 and saying that they were given to understand that as Minister of Broadcasting he might have some objection. "If indeed you do have any objections, we would be pleased to hear from you as to precisely what those objections are. We would like to assure you that Observer Radio intends to adhere to the highest moral and ethical standards of the broadcasting industry.". An immediate reply was sought, and the letter concluded "If we do not hear from you, we presume that you have no objections.". A reply, dated 12 August 1996, was received from the Permanent Secretary in the Prime Minister's Office. It repeated the warning of illegality contained in Mr. Matthews' letter; but it added "I should like to remind you however that your application for a licence is still under consideration.". The euphemistic nature of that statement has been mentioned at the outset of the present judgment. Mr. Winston Derrick, another director, retorted in a letter dated 14 August 1996 "We wish to record our pleasure that the Prime Minister has no objection to the opening of our FM Radio Station 91.1.".

35. Observer Radio did begin broadcasting on Sunday 1 September 1996. According to the uncontradicted evidence of Mr. Winston Derrick in an affidavit sworn in September 1996, on that day he was visited at his house by a party of three police officers headed by Deputy Commissioner Truehart Smith. They asked Mr. Derrick about the station and he invited them to come with him to Scotts Hill where he would show them the equipment. He explained to them that he had nothing to hide and showed them the business licence.

36. On 2 September 1996 nine police officers led by Mr. Smith arrived at Scotts Hill with a search and seizure warrant signed by the Chief Magistrate Murrio Ducille. The warrant recited that evidence on oath had been given on the same day by McKenzie Joseph, Inspector of Police, that there was reasonable cause to believe that telecommunications apparatus alleged to have been concealed was at the Observer Radio Station, in the occupation of

Winston Derrick and Samuel Derrick, situated at Scotts Hill. No resistance was offered to the police. They ordered the transmitter to be switched off and seized equipment, supplying Mr. Winston Derrick with an inventory at his request.

37. The warrant does not specify any source of authority but is said to have been in the standard form prescribed by form 6 of the Magistrate's Code of Procedure Rules and it indeed begins "Form 6". The respondents rely on section 14 of the Telecommunications Act, and the courts in Antigua treated that section as the empowering one –

15. (1) If a Magistrate is satisfied by information on oath that there is reasonable ground for supposing that a telecommunications station has been or is being established without a licence in that behalf or that any telecommunications apparatus has been installed, worked, operated or concealed in any place in Antigua and Barbuda or on board any ship or aircraft registered in Antigua and Barbuda without a licence in that behalf or contrary to the provisions of this Act or any rules made thereunder or of any licence granted under this Act, he may grant a search warrant authorising the telecommunications officer or any police officer with such assistance as may be necessary to enter, inspect and search at any time of the day or night the station, place, ship or aircraft, and to seize any apparatus which appears to him to be used or intended to be used for telecommunications.

(2) All telecommunications apparatus that may be found upon any such search may, by order of a Magistrate, be forfeited to Her Majesty.

38. For some reason not disclosed by the evidence the warrant does not purport to be based on the alternative that there is reasonable ground for supposing that a telecommunications station has been or is being established without a licence in that behalf. It has not been claimed in evidence that this was merely a mistake. On the other hand the allegation that the apparatus was concealed is absurd. If the police inspector gave evidence to that effect on 2 September 1996, it cannot have been probed by the issuing Magistrate to the extent appropriate to justify interference with the constitutional rights to protection from arbitrary search and seizure: see *Attorney-General of Jamaica v Williams* [1998] A.C. 351. Unlike that case, this is not a case of trivial excess of power without substantive abuse. Two of the learned judges in Antigua, Benjamin J. at first instance and Matthew J. A. (Ag) in a dissenting judgment in the Court of Appeal, held the warrant invalid. For these constitutional reasons their Lordships agree with that conclusion. Furthermore, the constitutional invalidity of

the refusal of the company's application for a broadcasting licence would itself invalidate the warrant also.

39. On 6 July 1995 Observer Publications Limited had filed in the High Court an application for leave to apply for an order of mandamus directed to Mr. Matthew as Telecommunications Officer and requiring him to hear and determine the licence application according to law. In an affidavit filed in reply, dated 10 August 1995, Mr. Matthew said among other things that he did not have the power to grant broadcasting licences since he was never appointed to his post by the Governor-General. In his affidavit in the constitutional proceedings, dated 3 December 1996, he says similarly that in discussions he informed Mr. Samuel Derrick that such was his understanding and that he had subsequently been so advised by Senior Crown Counsel in the Ministry of Justice and Legal Affairs. Before the Board Mr. Astaphan S.C. for the respondents emphatically dissociated himself from that advice. Apparently it overlooked that the effect of section 100 of the Constitution is to transfer the power of appointment to the more independent Public Service Commission. Mr. Matthew has produced as exhibits to his later affidavit full evidence of his appointment by the Commission. Surrendering his responsibilities through mis-apprehension, his practice was to forward all applications for broadcasting licences to the Minister of Public Works and Communications, who in turn secured the decision of the Cabinet.

40. Although leave to apply for mandamus was granted, the substantive mandamus proceeding was never heard. On the hearing of the motion for constitutional redress Mr. Christian said that the mandamus proceeding had been absorbed or subsumed into it and did not require adjudication. The Board considers that this was a reasonable approach. The pith and strength of the applicant's case arose from the Constitution. Moreover, it was doubtful whether mandamus to the Telecommunications Officer could provide an adequate remedy in the light of the claim by Mr. Matthews that he should have but had not been appointed by the Governor-General, a contention not abandoned until the case reached the Privy Council hearing.

41. As already mentioned, on 24 July 1996 (being the day after the date of Mr. Samuel Derrick's letter advising of the intention to begin broadcasting on 1 September) the Cabinet approved a White Paper presented by the Prime Minister as Minister with responsibility for public information. A copy of it is annexed to a brief affidavit sworn on 5 December 1996 by Mr. Lounel Stevens, Permanent Secretary in the Ministry of Information and Cabinet Secretary. Described as a Paper on Privatisation of ABS Radio/TV, it begins with statements on the theme that Antigua and

Barbuda's media are among the most free in the Caribbean and most of the world, and that the print media are controlled by opposition parties who publish freely. There follows, under the heading Freedom and Responsibility, a section on the theme that "Largely, it is abuse [of freedom] that characterises the Press in Antigua.". Particular attention is focussed on the Daily Observer, also owned by Observer Publications Limited –

2.1 Over the last 20 years, and in the wake of the restrictive Newspaper Act introduced by the PLM Government and repealed by the ALP Government in 1976, the press – particularly the *Outlet* and now the *Daily Observer* have abused the freedom enjoyed by the Press as a result of the actions of the ALP Government.

2.2 Freedom has been interpreted as a licence to write and print anything about anyone without regard to the right of privacy, the laws of libel, the necessity for truth and the importance of objectivity. The press has concentrated on unsubstantiated sensationalism and character assassination. In the case of the *Daily Observer*, there is also now a creeping tendency to lurid sex and related stories.

42. The company admits only that the newspaper has been critical of some of the Government's policies. The Board is unable to assess the weight of the criticisms in the White Paper or the extent to which they may have contributed to the treatment of the company's application for a broadcasting licence, because no attempt has been made at any stage of the present proceedings to justify the treatment on such grounds. It would now be far too late to attempt to do so.

43. Both Mr. Matthews in his affidavit of 3 December 1996 and Mr. Stevens in his affidavit assert that at no time were the opinions or affiliations of Observer Publications Limited considered in relation to the licence application and the policy. This is curious in the light of the references to the newspaper in the White Paper. The deponents even say that they have no knowledge of the applicant's political opinions or affiliations.

44. The White Paper goes on to propose the re-organisation of the Government information service and the privatisation of ABS Radio/TV, which as well as reducing Government expenditure "will also remove the accusation that the Government owns and therefore 'controls' ABS Radio/TV.". Two companies, one for radio and one for television, are proposed, with extensive conditions including that "no owners of any existing media may purchase shares (in order to prevent monopolies)". The time schedule proposed includes the issuance of shares to purchasers by 20 June 1994.

45. It was shortly after the White Paper that the policy of issuing no new licences until privatisation is completed was announced by the Government. The policy is confirmed in the affidavit of Mr. Stevens, who says that the Government is seeking expert assistance from named international organisations.

46. At the time of the Privy Council hearing in late 2000 nothing appears to have publicly eventuated from the White Paper. The respondents say that the broadcasting legislation of Antigua and Barbuda requires modernising. That may readily be accepted but is not an excuse for a refusal of or excessive delay in dealing with applications for licences in the meantime: see *Informationsverein Lentia v Austria* (1993) 17 E.H.R.R. 93; *Radio ABC v Austria* (1997) 25 E.H.R.R. 185, 194, PARA. 31; *Tele 1 Privatfernsehgesellschaft mbH v Austria* (Application 32240/96, 21 September 2000) 1325, para. 35. The authorities just cited are European, but it would not be consistent with the largely locally-originated Constitution of Antigua and Barbuda, with its strong and elaborate affirmations of freedom of speech, to distinguish them on that account. And the history of this case furnishes no encouragement to do so.

47. European jurisprudence places much weight on the goal of pluralism in the media. As recognised in *Cable and Wireless (Dominica) Limited v Marpin Telecoms and Broadcasting Company Limited*, cited earlier, the same emphasis is not always realistic in relatively small (the population of Antigua and Barbuda is about 68,000) and in some respects less developed countries. But a policy motivated by a desire to suppress or limit criticism of the Government of the day is never acceptable in a democratic society. While the evidence in this case does not go far enough to enable the Judicial Committee to reach any positive conclusion, it has to be said that there appears to be some cause for concern on this score.

The Judgments in Antigua

48. The notice of motion for constitutional redress was filed in the High Court in September 1996, supported by an affidavit by Mr. Winston Derrick. The affidavits of Mr. Matthew and Mr. Stevens were filed in reply. Mr. Matthew was named as first respondent, but he states that he has ceased to be the Telecommunications Officer and since 28 July 1996 has been a telecommunications Consultant in the Prime Minister's Office. No one has replaced him as Telecommunications Officer to his knowledge. The second respondent was the Commissioner of Police and the third the Attorney-General as representing the Government. The case came on for hearing before Benjamin J. in December 1996. Mr. Matthew was cross-examined and re-examined, and legal argument was heard. Judgment was delivered on 27 November 1997.

49. Benjamin J. cited authorities from a number of countries standing for the proposition that no one has a right to a broad-casting licence. As a general proposition that is unquestioned. The airwaves are public property whose use has to be regulated and rationed in the general interest. But none of the authorities cited supports any proposition that a broadcasting licence may be refused on grounds inconsistent with the Constitution or without any stated or apparent grounds. The judge does not seem to have given that aspect separate consideration. He regarded the presumption of constitutionality as an insuperable obstacle in the applicant's way, describing it as imposing a heavy burden on a litigant. He cited *Mootoo v Attorney-General for Trinidad and Tobago* [1979] 3 W.I.R. 411, 415, where the Privy Council did indeed say as much in relation to claims that Parliamentary legislation is invalid. This is true, inasmuch as the courts will strive, in pursuance of such provisions as are found in sections 2 and 19 of the Constitution of Antigua and Barbuda, to read down legislation, if sufficiently precise implications may be articulated, so as to make it conform to the Constitution. The approach will be much the same in the United Kingdom under section 3 of the Human Rights Act 1998. That is why the Board is not now holding that the telecommunications legislation of Antigua and Barbuda is unconstitutional. Constitutionally acceptable grounds for declining licences, for technical reasons at least, can fairly be read in.

50. The judge also rejected the arguments for the applicant based on discrimination and legitimate expectation. There is no need to go into those subjects at this stage. But he did hold the warrant for search and seizure invalid, and quashed it, reserving liberty to the company to apply for the assessment of damages for trespass occasioned by the unlawful entry upon its premises.

51. The company appealed and the respondents cross-appealed on the warrant issue. The Court of Appeal heard the case on 13 April 1999 and gave judgment on 14 May 1999. The company's appeal was unanimously dismissed, and by a majority of two to one the court held the warrant valid. On the main issue the reasons of the judges of appeal were given by Redhead J. A.

52. In so far as he relied on the absence of a right to a broadcasting licence and the presumption of constitutionality, Redhead J. A.'s reasoning was like that of the trial judge already discussed. But the primary ground of the learned appeal judge's judgment was that, in his view, the appellant had an administrative, not a constitutional, problem and that the proper remedy would have been mandamus. He denied that ". . . by just merely shrieking breach of a fundamental right one can knock on and disturb the sanctity of the constitutional door.". He quoted Lord Diplock in *Harrikissoon v Attorney-General of Trinidad and Tobago* [1980] A.C. 265, 268:

The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

53. The last words of that passage are not to be put aside. With respect, the image of the Constitution as secluded behind closed doors is not one which their Lordships adopt. Nor would it be right to think of the Constitution as if it were aloof or, in the famous phrase of Holmes J., “a brooding omnipresence in the sky.” On the contrary human rights guaranteed in the Constitution of Antigua and Barbuda are intended to be a major influence upon the practical administration of the law. Their enforcement cannot be reserved for cases in which it is not even arguable that an alternative remedy is available. As Lord Steyn said, delivering the judgment of the Privy Council in *Ahnee v Director of Public Prosecutions* [1999] 2 A.C. 294, 307 “ . . . bona fide resort to rights under the Constitution ought not to be discouraged.” Frivolous, vexatious or contrived invocations of the facility of constitutional redress are certainly to be repelled. To that extent their Lordships agree with the judgments delivered in Antigua. But, by contrast, the right of freedom of communication is at the heart of this case. On the evidence it has been denied without justification on any of the extensive constitutional grounds authorised in section 12(4), and the appeal must succeed.

54. Pursuant to section 18 of the Constitution the appellant should have a declaration that the provisions of sections 12, 9 and 10 have been contravened in relation to it, and an order that forthwith a radio broadcasting licence shall be issued to it as applied for or on such other frequency as the High Court, on prompt application by the Attorney-General, may approve.

business licence must also be issued. The seized equipment should be returned forthwith. Leave is reserved to the appellant to apply to the High Court for the assessment and award of damages in the event that the equipment has suffered any damage, counsel for the appellant having indicated that no further relief by way of damages is sought. Leave is also reserved to the appellant to apply to the High Court for any orders incidental to the foregoing. The respondents must pay the appellant's costs in the courts of Antigua and Barbuda and before the Board.