#046

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)
A.D. 1996

SUIT NO. 84 of 1996

BETWEEN:

ALBERT DETERVILLE

Applicant

and

1. **WILBERT KING**
2. **EGBERT ANDREW**
3. **JACQUES COMPTON**
4. **ATTORNEY GENERAL**

Respondents

Mr. M. Francois for the Applicant
Mr. P. Compton for the Respondents

1996: June 28;
July 5; and
October 9.

MATTHEW J.

After obtaining leave presumably (because no order has been filed) on May 10, 1996 pursuant to Order 44 Rule 1 of the Rules of the Supreme Court, the Applicant filed an originating motion on May 15, 1996 asking for an order of certiorari to quash the decision by the Telecommunications Advisory Board and the Government of Saint Lucia dated November 15, 1995 refusing to grant him a radio licence to continue broadcasting on the 105.1 FM frequency.

The application was supported by an affidavit filed on March 28, 1996 which had been used in his application for leave.

In that affidavit the Applicant stated that he had been granted a test licence by letter dated August 25, 1989 subject to a payment of $75.00 each year. He stated that on January 11, 1991 he had requested that the test licence be extended and by letter dated January 23, 1991 an extended time was granted pending reply for a permanent licence from the Government of Saint Lucia.

He said on June 15, 1994 a further application for a permanent broadcast licence was made to the Ministry of Communication and Works.

He alleged that on September 7, 1995 the Cabinet of Saint Lucia approved the establishment of a Telecommunications Advisory Board to advise the Ministry of Communications, Works and Transport on the issuing, renewal, amendment and revocation of licences to operate a radio station and that on October 12, 1995 the Board met to consider the application of eight persons including his company, for radio broadcast licences.

He stated that on November 15, 1995 the Ministry informed him that the Government was unable to grant him a radio broadcast licence at this time and that as a result he should cease his broadcast.

He alleged that no reasons were given for the decision and that he had expended a large sum of money in the fair, reasonable and legitimate expectation that he would have been granted a permanent radio broadcast licence.

He alleged that his broadcasts had become very popular with a

large number of listeners throughout Saint Lucia, Martinique and Saint Vincent and a large number of listeners from all walks of life would call and express their views on national issues, including the expression of views sometimes critical of the Government.

He said that he believes that the true reason for not granting him a licence was because of the last statement.

He said he had been informed that of the applicants, only two had been granted radio broadcast licences and he said that neither of the two who are known supporters of the Government of Saint Lucia had undertaken an initial radio broadcasting investment comparable to his.

He said the decision was tainted with bias, malice and extraneous considerations and his fundamental rights and freedoms had been infringed; that the decision was contrary to the rules of natural justice and was unreasonable in all the circumstances.

In reply to a request for further and better particulars he alleged that the particular rights and freedoms infringed were those granted by sections 1, 10 and 13 of the Saint Lucia Constitution. In respect of the rules of natural justice he alleged that the rights infringed were:

a) the right to be heard by an unbiased tribunal;

b) the right to be heard in answer; and

c) the right to be given reasons for the decision.

On May 31, 1996 Wilbert King filed an affidavit in reply. In that affidavit he stated that he was the Permanent Secretary of the Ministry of Communications, Works and Transport and that by virtue of that

office he was the Wireless Officer of the Government of Saint Lucia. He referred to the setting up of the Telecommunications Advisory Board and its subsequent meeting to consider licences on October 12, 1995. He stated that of the nine applicants, four, including the Applicant in this case, were short-listed and were subject to detailed analysis on the basis of established criteria which he set out.

He said the Board was informed by the Telecommunications Officer that notwithstanding the qualifications by all four applicants for a licence, in light of certain technical problems relating to the RF spectrum a maximum of only two licences should be granted at this time.

He said that acting on the technical advice thus offered the Board selected the two applicants which did not include the Applicant in this case.

He stated that by conclusion No.1669 of 1995 dated November 2, 1995 Cabinet approved the grant of licences to Helen Television System and to Samuels and Hinkson.

King, who is a member of the Advisory Board stated that at no time during the meeting, or at any other time were matters other than the criteria in paragraph 6 of his affidavit considered in relation to the applications for licences. These criteria are as follows:

a) technical evaluation;

b) financial/commercial viability;

c) broadcast content; and

d) development potential.

He stated that he had no knowledge of the political affiliations of any of the applicants for a licence and that was never a consideration

in the deliberations of the Board.

The affidavits of two other members of the Advisory Board, Jacques Compton and Egbert Andrew, were closely similar to that of Wilbert King. The Attorney-General also tendered an affidavit. She stated that she is a member of the Cabinet and she was present when the Cabinet, after due deliberations on the recommendations of the Advisory Board, approved the grant of the two licences to operate radio stations to Helen Television System and Messrs Winston Hinkson and David Samuels.

She stated that at no time during its deliberations on the issue were matters other than those raised in the relevant memorandum to Cabinet discussed. She stated that not only is the political preference of the successful applicants unknown to Cabinet, but that preference was completely irrelevant to the decision whether or not to grant a licence.

Perry Mason, the Telecommunications Licensing Officer, also swore to an affidavit filed on June 7, 1996. He stated that he was the Chief Technical Adviser to the Wireless Officer. He stated that at the meeting of October 12, 1995 he made a presentation to the Board on each application and highlighted certain technical features which were to be taken into account in considering the grant of a licence to operate a radio station.

He stated that because the RF Spectrum had become exceptionally crowded he advised that until some solution to the problem was arrived at only two applications should be granted.

He too stated that at the meeting only technical matters were raised and the political affiliation of an applicant was never a consideration in the decision to grant a licence.

He said the Applicant last had an experimental licence issued to him on January 28, 1991 which was valid until December 31, 1991 and his failure to obtain and pay for a further extension of the experimental licence meant that for nearly five years he was operating illegally.

He stated that no concessions were granted to the Applicant for the importation of broadcast equipment and so the Ministry did not in any way support or encourage the Applicant's decision to purchase broadcasting equipment.

On June 14, 1996 the Applicant filed a lengthy affidavit in reply to that of Perry Mason. In that affidavit he alleged that the Telecommunications Advisory Board is illegal. He stated that he proceeded to purchase necessary equipment for the general operation of a public broadcasting station by virtue and in pursuance of the authority granted to him in a letter by the Wireless Officer dated January 23, 1991.

He denied the allegation of Mason that the political affiliation of an applicant was not a consideration in the grant of a licence and he alleged that the decision not to grant him a licence was motivated by bias, malice and extraneous considerations.

On June 25, 1996 the Applicant filed a shorter supplementary affidavit presumably in answer to the other affidavits filed on behalf of the Respondents. In that affidavit he stated that until the time he was requested to close down his radio station, the station had become very popular in its daily programming and he tendered a petition by about 10,931 persons who were regular listeners and/or callers to the station. He stated that the station was about to grow and expand and that the "Friends of Radyo Koulibwi" had already made an offer to invest in the station and in particular to purchase a new transmitter and other equipment.

The above represent the pleadings in this case. There is no doubt that the Applicant is disappointed in not being able to continue to operate his radio station and I do not for one moment doubt that he had a number of listeners and/or callers. It would be fanciful to imagine that one's political affiliation is not sometimes a real factor in arriving at a particular decision but that is not always easy to establish with a degree of certainty and it is also true that whenever one is unsuccessful in a particular venture he cries out politics. In his affidavit filed on March 28, 1996 the Applicant has made a number of allegations which I consider to be unfounded and some are purely conjecture. I refer in particular to paragraphs 16, 18 and 19.

But these proceedings will not be decided essentially on the pleadings and must turn on the legal submissions and authorities advanced at the hearing.

Legal Submissions

Learned Counsel for the Applicant submitted that this case raises four questions as follows:

a) Whether the Telecommunications Advisory Board acted within the jurisdiction of the Wireless Telegraph Ordinance 1953, Chapter 146.

b) Whether the Board was bound to have regard to the principles of natural justice, that is to say, to give the Applicant notice of what was alleged against him if any, and an opportunity of being heard in answer. And whether the principles of natural justice were in fact observed in this case.

c) Whether in all the circumstances of this case the decision of the Board was reasonable.

d) Whether in arriving at their decisions the fundamental rights and freedoms of the Applicant as guaranteed to him under the Constitution of Saint Lucia were in fact infringed.

Counsel elaborated on the above stated four questions and in the process relied on the following authorities:

1. An **Introduction to Administrative Law** by Peter Cane, Second Edition.

2. **Council of Civil Service Unions v Minister for Civil Service** 1984 3 W.L.R. 1174;

3. **R v Baldwin** 1963 A.C. 40;

5. **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** 1948 1 K.B. 223;

6. **Hinds v The Queen** 1977 A.C. 195, 213.

Learned Counsel for the Respondent made submissions in reply on the four questions. He dealt with the authority of the Advisory Board, at length on natural justice including the aspect of legitimate expectation, the constitutional points taken and the issue as to whether the Board acted fairly and he submitted that it did.

Counsel submitted that certiorari is a discretionary remedy and the Court is not bound to grant it even where it is found that there is a breach of natural justice. Counsel submitted that to grant the order requested would be to open the flood gates to dissatisfied persons and that would hamper good administration.

In the course of his submissions Counsel referred to the Council of Civil Service Unions case, the Criminal Injuries Compensation Board case and R v Baldwin which were cited by learned Counsel for the Applicant. In addition he referred to that excellent work by S.A. DeSmith on Judicial Review, Fifth edition, and following the practice of the last Solicitor-General with whom he no doubt worked closely, he cited an abundance of authorities exceeding twenty which it is unnecessary to set down. I shall follow my practice with his former colleague - to refer to the cases cited only where necessary.

I must now go on to consider the four questions that arise in this case.

Legality of the Telecommunications Advisory Board

Learned Counsel for the Applicant submitted that the Telecommunications Board is illegal and that the Executive had legislated in creation of the Board. In that context he referred to sections 10 and 120 of the Constitution of Saint Lucia. Counsel referred to section 14 of the Wireless Telegraphy Ordinance and submitted that sub-section (3) was of most concern. Counsel referred to paragraph 3 of the affidavit of Wilbert King and the Memorandum which went to Cabinet in relation to the establishment of the Board. In that Memorandum the

Minister had told Cabinet that the creation of the Board was consistent with certain provisions of a draft Bill for intended legislation on telecommunications.

Counsel also referred to Peter Cane's book on Administrative Law at pages 105, 117 and 123.

Learned Counsel for the Respondent referred to the executive power of the State as conferred by section 59(2) of the Constitution and submitted that the Board was a creature of the Executive and that section 14(3) of the Wireless Telegraphy Ordinance had nothing to do with the establishment of the Advisory Board.

Counsel referred to the case **R v Criminal Injuries Compensation Board** ex parte **Lain** 1967 2 AER 770.

Section 14(1) of the Wireless Telegraphy Ordinance confers a permissive power on the Governor in Council to make regulations in respect of any matter and for any purpose relating to wireless telegraphy and for more effectually carrying into effect the objects of the Ordinance and sub-section (3) states how such regulations when made shall have force or effect.

Subsection (1) states that the Governor-in-Council may make regulations. The Governor-in-Council is not bound to make regulations. This understanding though not requiring elaboration is implicit from a reading of subsection (2) of section 3 of the Ordinance. The subsection makes provision in a case where regulations had not been made under the Ordinance.

It is conceivable that the Governor-in-Council could under its regulation making power create a Telecommunications Advisory Board

and if that was done the procedure laid down in subsection (3) that is, approval by resolution of Parliament and publication in the Gazette, would have to be followed. But the Governor-in-Council made no such regulations.

If I understand the Applicant, he is saying to the Governor-in-Council since you have the power to create a Telecommunications Advisory Board, you should have done so and followed the procedure under section 14(3) and because you did not do that the Board is illegal.

This does not follow. The correct question to ask is whether there is any provision in the Ordinance which says that no board can be create other than by regulations made under section 14. I do not see any such provision and none was directed to my attention.

Section 59 of the Constitution of Saint Lucia is as follows:

> "(1) The executive authority of Saint Lucia is vested in Her Majesty.
>
> (2) Subject to the provisions of this Constitution, the executive authority of Saint Lucia may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him."

In **Attorney-General of Trinidad and Tobago v Phillip** 1995 1 A.C. 396 which dealt with the attempt to overthrow the Government of Trinidad and Tobago, *Lord Woolf*, at page 410 speaking of the power of pardon said it was an executive act of the State. He said in England its authority is derived from the prerogative and in Trinidad and Tobago its authority is dependent upon the Constitution.

I am of the view that the Telecommunications Advisory Board could lawfully be established under the executive authority of the

State.

In **R v Criminal Injuries Compensation Board** ex parte **Lain** 1967 2 A.E.R. 770 a police constable was shot in the face by a suspect, whom he was about to question, and became blind in the left eye. Not many days later he was found dead, his death being at his own hands but attributable to the original injury. The case pertained to compensation under the Criminal Injuries Compensation Board.

The scheme was not statutory but was debated in Parliament and, after amendment, was announced in both Houses of Parliament. The members of the Board were appointed by the Secretary of State and administered on behalf of the executive moneys granted by Parliament to the Crown.

The authority of the Board to grant compensation derived, therefore, from the prerogative act of the Crown. It is to be noted that in determining what compensation, if any, to award to an applicant the Board was performing a quasi-judicial function affecting the public.

Lord Parker C.J. in his judgment at page 777 letter E stated:

> "I can see no reason either in principle or on authority why a board, set up as this board were set up, should not be a body of persons amenable to the jurisdiction of this court. True the board are not set up by statute but the fact that they are set up by executive government, i.e., under the prerogative, does not render their acts any the less lawful."

And *Lord Justice Diplock* at page 779 letters C-D stated:

> "The board's authority to do so is not derived from any agreement between Crown and applicants but from instructions by the executive Government, that is, by prerogative act of the Crown. The appointment of the board and the conferring on the board of jurisdiction to entertain and determine applications, and of authority to make payments in accordance with such determinations, are acts of government, done without statutory authority but none the less lawful for that."

The case just referred to establishes that the Executive can set up a board which had quasi-judicial functions affecting the public. The Telecommunications Advisory Board as its title suggest had no decision making powers.

In the course of his submissions learned Counsel for the Applicant referred to the case of **Council of Civil Service Unions v Minister for the Civil Service** 1984 3 WLR 1174, House of Lords; and especially to page 1196, letters C-D. This case decided among other things that certain members of the Civil Service, the applicants in the case, would, apart from considerations of national security, have had a legitimate expectation that unions and employees would be consulted before the Minister for Civil Service issued his instructions which altered the terms and conditions of service staff.

At page 1196 *Lord Diplock* stated:

> "Judicial review has, I think, developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality" the second "irrationality" and the third "procedural impropriety."

The learned law Lord then went on to describe illegality and this was the passage referred to by learned Counsel for the Applicant:

> "By "illegality" as a ground for judicial review I mean the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable"

Here lies the Applicant's problem. The Telecommunications Advisory Board is not a decision maker. The reference to page 105 of

Peter Cane's Introduction to Administrative Law is equally misconceived for it deals with whether the decision maker had authority to embark on the process.

I do not understand the Applicant to be challenging the authority of the Ministry of Communications, Works and Transport and/or the Cabinet in granting the appropriate licences to the two successful applicants. I understand him to be challenging under this head only the legality of the Board.

Perhaps the Wireless Telegraph Ordinance Chapter 146 of the Laws of Saint Lucia does need some overhauling. I do not see any provision requiring Cabinet to approve the granting of licences. The Act came into effect presumably on April 11, 1953. Section 3(2) seems to give power to the Governor in Council to issue licences in certain circumstances and section 13 clearly gives the Wireless Officer and any person duly authorised in writing by the Governor so to do, the power to grant licences under the Ordinance. As indicated above these powers are not challenged. It seems therefore that licences can be issued without the need for any advice from an advisory board. But does the fact that an advisory board gave advice to the decision maker affect the decision at all? Such an issue came before the High Court of Justice in Tortola in the case of **Omar Wallace Hodge vs John Mark Ambrose Herdman** and **Hamilton Lavity Stoutt** No. 41 of 1988 decided on January 27, 1989.

In this case the Plaintiff who was the Deputy Chief Minister was dismissed by the Governor, Mr. Herdman, on the advice of the Chief Minister, Mr. Stoutt because of impropriety. Before tendering his

advice a commission of inquiry was set up to look into the alleged acts of impropriety. The one man commission comprised Mr. Justice Charles A. Ross, a retired judge from Jamaica. The Commissioner made unfavourable findings against the Deputy Chief Minister in these terms:

> "There has been serious misconduct on the part of Minister who has enriched himself by his false representation and also attempted to implicate the Chief Minister whose name was apparently thrown in to add weight to his request for a donation. Such conduct is quite reprehensible and my first recommendation must therefore be that the Minister concerned should be relieved of his ministerial responsibility without delay."

In one of his many submissions learned "Silk" advanced the argument that after the incident the Chief Minister could have made his own inquiry and ought to have tendered his advice to the Governor to resolve the appointment based on his own inquiry and his own judgment. I answered the submission at page 27 of the judgment as follows:

> "What this submission boils down to is that if the day after the Chief Minister heard the incident involving the Plaintiff he had advised the Governor to revoke the appointment of the Plaintiff there would have been no cause for concern, but if he is more cautious and wants a person trained in these matters to inquire into the facts before he acts, and then later acts based on the findings and/or recommendations of that person he has acted unconstitutionally. This submission is untenable."

The Court of Appeal of the day had no difficulty in upholding the judgment.

I find that the Telecommunications Advisory Board is not illegal and that its establishment is not contrary to the provisions of Section 14 of the Wireless Telegraphy Ordinance. I find too that sections 10 and 120 of the Constitution are not relevant to the determination of the legality of the Telecommunications Advisory Board.

Natural Justice

In a reply to a request for further and better particulars learned Counsel for the Applicant submitted that the aspects of natural justice with which he was concerned in this case were the following:

(i) the right to be heard by an unbiased tribunal;

(ii) the right to be heard in answer;

(iii) the right to be given reasons for the decisions.

I do not think there had been any serious submission that the decision maker in not granting the Applicant a licence was biased. In any case there was no evidence to support such an allegation.

In his submission under this head, learned Counsel for the Applicant referred to paragraphs 1-7 and 13 of the Applicant's affidavit and submitted that the Applicant was being encouraged to broadcast and to invest in equipment and so he had a fair, reasonable and legitimate expectation that he would be granted the licence.

In support of his submission Counsel referred to portions of Peter Cane's book at pages 19, 44, 52 and 178. He also made reference to the following cases:

R v Criminal Injuries Compensation Board 1967 2 Q.B. 864; 880

C.C.S.U. Minister for Civil Service 1984 3 WLR 1174, 1194.

In reply learned Counsel for the Respondent also referred to the Council of Civil Service Union's case, 1984 3 AER 935 at page 949 and submitted in essence that the Applicant could not have had a legitimate expectation of obtaining a licence.

Counsel submitted that what the Applicant had was a mere hope and that is not reviewable. Counsel in addition cited the following authorities:

1. **Judicial Review of Administrative Action,** Fifth Edition by DeSmith, Woolf and Jowell; pages 424/425;

2. **McInnes v Onslow Fane** 1978 3 A.E.R. 211;

3. **Attorney-General Trinidad and Tobago v Lopinot Limestone Ltd** (1983) 34 W.I.R. 299;

4. **Attorney-General Trinidad and Tobago v K. C. Confectionery Ltd** (1958) 34 W.I.R. 387.

Learned Counsel for the Applicant correctly stated during his submissions that judicial review is concerned with the decision making process and not the decision. This means that the Court ought not to question the decision not to grant the Applicant the licence but only how the decision maker went about making the decision.

In **Council of Civil Service Unions v Minister for the Civil Service** 1984 3 A.E.R. 935 there was a branch of the civil service whose main functions were to ensure the security of the United Kingdom military and official communications. All the staff of the Government Communications Headquarters, as the branch was known, had a long standing right to belong to national trade unions and most of them did. There was an established practice at Government Communications Headquarters of consultation between the management and the unions about important alterations in terms and conditions of employment of the staff. On seven occasions between 1979 and 1981 industrial action was taken at Government Communications Headquarters causing disruption. On December 22, 1983 the Minister for the Civil Service issued an oral instruction to the effect that the terms and conditions of civil servants at Government Communications Headquarters would be revised so as to exclude membership of any trade union other than a departmental staff association approved by the director of

Government Communications Headquarters. The appellant applied for judicial review of the Minister's instruction seeking, inter alia, a declaration that it was invalid because the Minister had acted unfairly in removing their fundamental right to belong to a trade union without consultation.

The House of Lords held that an aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he had been permitted to enjoy and which he could legitimately expect to be permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal.

The House held that the appellant's legitimate expectation arising from the existence of a regular practice of consultation which the appellant could reasonably expect to continue gave rise to an implied limitation on the Minister's exercise of the power, namely an obligation to act fairly by consulting the Government Communications Headquarters staff before withdrawing the benefit of trade union membership. The Minister's failure to consult *prima facie* entitled the appellant to judicial review of the Minister's instruction.

At first instance the Judge granted the application on the ground that the Minister ought to have consulted the staff before issuing the instruction. The Minister appealed to the Court of Appeal who allowed the Minister's appeal on the grounds of national security. The appel-

lant appealed to the House of Lords who held that once the Minister produced evidence that her decision not to consult the staff before withdrawing the right to trade union membership was taken for reasons of national security that overrode any right to judicial review which the appellant had arising out of the denial of his legitimate expectation of consultation. They dismissed the appeal of the appellant.

I have dealt with this case in some detail for learned Counsel for the Applicant submitted that he was relying heavily on that case in these proceedings.

At page 949 *Lord Diplock* stated:

> "Judicial review, now regulated by Rules of the Supreme Court Order 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-maker' or else a refusal by him to make a decision.
>
> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than 'a reasonable expectation'."

Where does this Applicant fall? Did the decision alter his rights or obligations which are enforceable by him in private law? I do not think learned Counsel for the Applicant is contending any such thing. So we

are restricted to class (b) of *Lord Diplock's* classification of subjects for judicial review.

Is the Applicant being deprived of some benefit or advantage which he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn? Hardly.

Is the applicant being deprived of some benefit or advantage which he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to enjoy until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment?

To answer this last question one would need to determine what benefit or advantage that the Applicant had been permitted to enjoy. It is not denied that he was granted a test licence for the year 1991. But the subject of inquiry is the denial of a grant of a permanent broadcast licence which he never had.

I shall suspend the answer to the last question for the time being. Learned Counsel for the Applicant cited extensively from Peter Cane's **Introduction to Administrative Law**. The learned author at the top of page 53 states as follows:

> "A legitimate expectation may arise when a government agency, by its words or conduct, leads a citizen reasonably to expect that it will act in a particular way. If the agency then acts differently it may be held to have acted unfairly and illegally, at least if it has not given the citizen a chance to make representations as to why he or she should be treated in the way expected."

The Court would need to investigate what words or conduct by the decision-maker led the Applicant to expect that the decision-maker would act in a way which it did not act. I think the Applicant is saying that he was encouraged to broadcast and to invest a large sum of money in broadcasting equipment. The Court will need to say something about that.

In the **Fifth Edition** of **Judicial Review of Administrative Action** by *De Smith, Woolf and Jowell* the learned authors speaking of the nature of the representation in the legitimate expectation state at pages 424 as follows:

> "An expectation will be derived from either:
> (1) an express promise or representation; or
> (2) a representation implied from established practice based upon the past actions or the settled conduct of the decision-maker".

At page 425 they say: "Whether the representation is express or implied, it must be clear, unambiguous and devoid of relevant qualification".

In **McInnes v Onslow Fane** 1978 3 AER 211 the Plaintiffs application for a boxing manager's licence was refused by the British Boxing Board of Control and the Plaintiff sought a declaration that the Board had acted in breach of natural justice. *Megarry V.C.* held *inter alia* that in view of the fact that the Plaintiff had already made five unsuccessful applications for a manager's licence he could only hope, and was not entitled to expect to be granted a manager's licence, and in those circumstances the Board's duty to act fairly was no more than a duty to decide the application honestly and without bias or compromise. He held that the Plaintiff had not shown that the Board had acted unfairly

and he dismissed the claim. In the course of his decision the Vice Chancellor considered three kinds of cases:

(a) the forfeiture cases;
(b) the application cases; and
(c) the expectation cases.

He states that in the forfeiture cases there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or a licence revoked. He states that at the other extreme there are the application cases where the decision merely refuses to grant the applicant the right or position that he seeks, such as membership of the organisation, or a licence to do certain acts. The intermediary category, the expectation cases, differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted.

Learned Counsel for the Applicant has cited **Ridge v Baldwin** 1963 AC 40 in support of his contention, but Megary has clearly put this case under the forfeiture cases. Megarry states at page 218:

> "It seems plain that there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases there is a threat to take something away for some reason; and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges (which, in **Ridge v Baldwin,** *Lord Hodson* said were three features of natural justice which stood out) are plainly apt.
>
> In the application cases, on the other hand, nothing is being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges. Instead, there is the far wider and less defined question of the general suitability of the applicant for membership or a licence. The distinction is well recognised, for in general it is clear that the courts will require natural justice to be observed for expulsion from a social club, but not on application for admission to it. The intermediate category, that of the expectation cases, may at least in some respects be regarded as

> being more akin to the forfeiture cases than the application cases: for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for the membership or licence for which he was previously thought suitable."

Do not the facts of this case more resemble an application case than a legitimate expectation case?

In his affidavit filed on March 28, 1996 the Applicant stated that he received a test licence in 1989 and after diverse communications between himself and the office of the Prime Minister and the Ministry of Communications and Works in relation to concessions for broadcasting equipment he commenced radio broadcasting. He does not state the results of the communications and does not state that he was granted concessions. He referred to a letter dated January 23, 1991 by the Wireless Officer in reply to his earlier letter of January 11, 1991 informing him that an extended time was granted to him in respect of his test broadcast licence pending a reply on his application for a permanent broadcast licence.

He stated that he made another application for a permanent broadcast licence on June 15, 1994.

It must be noted that up to June 1994 the Applicant was applying for a permanent licence. In 1995 the decision-maker agreed not to grant him a licence. It is clear from the proceedings that there are two kinds of licences and Perry Mason, the Telecommunications Officer, says so in his affidavit filed on June 7, 1996. He further states that to the best of his knowledge there is no nexus between an experimental licence and the grant of a permanent licence. Mason states in his

affidavit that the Applicant last had an experimental licence issued to him for the year 1991 and that in fact he had no authority to be on the air after December 31 of that year. He stated that the grant of an experimental licence does not require the acquisition of elaborate equipment. He said that no concessions were granted to the Applicant and the decision-maker did not in any way support or encourage the decision by the Applicant to purchase broadcasting equipment.

In the C.C.S.U. case *Lord Fraser* of Tullybelton at page 939 found that until the events with which the appeal was concerned, there was a well established practice of consultation between the official side and the trade union side about all important alterations in the terms and conditions of employment of the staff. I ask myself what is the well established practice that this Applicant is relying on to found his legitimate expectation?

He was never promised a permanent licence. He was not granted concessions to buy equipment necessary when one has been granted a permanent licence. He had not as in the case of Attorney-General of Trinidad and Tobago v Lopinot Limestone Ltd (1983) 34 W.I.R. 299 given a legitimate expectation that the decision-maker would fulfil any undertaking that had been given.

The Applicant could only have had a legitimate expectation that his application would be considered fairly and he is not able to show that was not the case. The proceedings show that out of nine applicants he was one of the four considered by the Advisory Board for further consideration.

I am of the view that this case can be correctly considered as an application case. In **Attorney-General of Trinidad and Tobago v K.C. Confectionery Ltd** (1985) 34 W.I.R. 387 the Court of Appeal mentioned the three types of decisions characterised by *Sir Robert McGarry* in the **McInnes** case and said that the rules of natural justice which include the right to be heard and to be given reasons for a decision relate only to the last two categories, that is, forfeiture cases and reasonable expectation cases.

In the seventh edition of **Administrative Law** by Wade and Forsyth the authors list under the exceptions to the right to a fair hearing where there is an absence of legitimate expectation and also the refusal of remedies in discretion. At page 224 of **McInnes's** case the Vice Chancellor stated:

> I cannot see how the obligation to be fair can be said in a case of this type to require a hearing. I do not see why the Board should not be fully capable of dealing fairly with the Plaintiff's application without any hearing. The case is not an expulsion case where natural justice confers the right to know the charge and to have an opportunity of meeting it at a hearing. I cannot think that there is or should be any rule that an application for a licence of this sort cannot properly be refused without giving the applicant the opportunity of a hearing, however hopeless the application, and whether it is the first or the fifth or the fiftieth application that he has made."

I adopt the words of the distinguished Vice Chancellor in respect of the facts of the case before me.

At page 541 of this seventh and 1994 edition of their book, the authors, Sir William Wade and Dr. Christopher Forsyth state:

> "The principles of natural justice have not in the past included any general rule that reasons should be given for decisions. There appears to be no such rule even in the courts of law themselves and it has not been thought suitable to create one for administrative bodies. Nevertheless, there is a strong case to be made for the giving of reasons as an essential element of admin-

istrative justice."

At page 219 letter h, Megarry stated:

> I think it is clear that there is no general obligation to give reasons for a decision. Certainly in an application case where there are no statutory or contractual requirements but a simple discretion in the licensing body there is no obligation on that body to give their reasons."

In **Regina v Secretary of State for the Home Department,** Ex parte Doody 1993 3 WLR 155, House of Lords, *Lord Mustill* at page 172 said:

> "I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances, be implied, and I agree with the analyses by the Court of Appeal in **Regina v Civil Service Appeal Board 1991** 4 A.E.R. 310 of the factors which will often be material to such an implication."

I am of the view that all the Applicant had was a hope, and was not entitled to expect to be granted a permanent broadcast licence, and in those circumstances the decision-makers's duty to act fairly was no more than a duty to decide the application honestly and without bias or caprice.

The Applicant has not shown that either the Telecommunications Advisory Board or the Ministry of Communications and Works and Transport and/or the Cabinet acted unfairly towards him in the decision to grant two licences to others and not to grant the Applicant the required licence.

Reasonableness of Decision

Learned Counsel for the Applicant referred to the passage by *Lord Diplock* at page 1196 of the Weekly Law Revision report of the C.C.S.U. case where the distinguished Law Lord stated:

> "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'..... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

In support of the contention that the decision is irrational or unreasonable in the sense indicated above learned Counsel for the Applicant drew attention to the parts of the Applicant's affidavit which indicated that by letter dated November 15, 1995 he was notified that the Government of Saint Lucia was unable to grant him a radio broadcast licence at the time and he was advised that he should discontinue his broadcast on the 105.1 Frequency; that no reasons were given for the decision and that he had spent large sums of money on equipment in excess of a million dollars. Counsel also relied on the Applicant's affidavit in reply filed on June 25, 1996 which indicated that at the time of closure his radio station had become very popular in its daily programming and that the station was about to grow and venture capital was about to be sourced.

These allegations had to be considered against those of Perry Mason. At paragraph 15 of his affidavit Mason advised the Board that since the deregulation of radio broadcasting by the French authorities, the RF spectrum, which St.Lucia shares with neighbouring Martinique,

had become exceptionally crowded and that even the two long established radio stations in Saint Lucia had applied for frequency changes because of interference with their signals by other stations. He said in consequence he advised that until some solution to the problem was arrived at only a maximum of two applications should be granted.

So Mason is in effect saying the reason why the Applicant was not granted a licence was purely technical and that the Applicant could apply again, or his application would be considered when a solution to the problem was found. Of course, the Applicant's answer seems to be whether there was a problem he should have been one of the two successful applicants.

At page 208 of **Peter Cane's** book it is stated:-

> "Irrationality is more often referred to as unreasonableness. The inherent vagueness in this term creates a great difficulty in expounding the law on this topic: how unreasonable does a decision or rule have to be before it is liable to be quashed? The classic answer to this question is that of *Lord Greene MR* in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation:** if an authority's decision was so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. The court does not decide what the reasonable authority could do. In other words, a court should not strike down a decision or rule on substantive grounds just because it does not agree with it. In GC Headquarters *Lord Diplock* said that an irrational decision is one "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

In **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** 1948 2 A.E.R. 680 the Corporation had imposed a condition that children under the age of fifteen years should be excluded from Sunday theatres. The company sought to challenge the condition on the ground that it was unreasonable and that in consequence was *ultra vires* the corporation.

The Court of Appeal held that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to have taken into account, or, conversely, has refused to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, has come to a conclusion so unreasonable that no reasonable authority could ever have come to it, and in such a case the court can interfere. The Court dismissed the company's appeal.

In this case the Applicant had only a test licence and the evidence is that this licence expired on December 31, 1991. Nevertheless he continued to broadcast after that date. I have no doubt that the Applicant had a good coverage judging from the list of persons who apparently signed a petition in his favour to "**Save Radyo Koulibwi**".

The Telecommunications Advisory Board consisting of a group of mainly, if not all, civil servants met to consider applications and advise the political directorate. I would assume that civil servants are generally impartial politically unless proved otherwise. They considered four applicants of which the Applicant was one and based on the advice of an expert they recommended two applicants which did not include the Applicant. The decision-maker adopted the recommendation. The Telecommunications Officer deposed that when the Telcommunications Advisory Board met on October 12, 1995 he made a presentation to the Board on each of the four short listed applicants in

which he highlighted the following features:

(a) plan presented for the overall operation of the station;
(b) type of equipment proposed to be used;
(c) potential of the station, if licence granted, to cause interferences to other radio operators and to residents in the vicinity of broadcast station; and
(c) availability of space on the RF spectrum (the FM radio board).

I presume that on the basis of the consideration of these matters the Board tendered their advice which was accepted.

I cannot say that the conclusion arrived at was so unreasonable that no reasonable authority could ever have come to it.

Infringement of Fundamental Rights and Freedoms

In reply to a request for further and better particulars learned Counsel for the Applicant alleged that the rights and freedoms infringed were contained in sections 1, 10 and 13 of the Saint Lucia Constitution.

Let me observe straight away that section 1 of the Constitution does not confer rights on any body. It simply states in general what are those rights and freedoms which are described in detail in succeeding sections. In **Francis v Chief of Police** 1973 2 A.E.R. 251, a case originating from St. Kitts, where the Judicial Committee of the Privy Council held that the control of the use of loudspeakers at public meetings did not infringe the fundamental right of the Appellant to freedom of expression and communication guaranteed under section 10(1) of the Constitution, *Lord Pearson*, who delivered the judgment of the Board had this to say of section 1 of the Constitution which is similar to section 1 of the Saint Lucia Constitution. He said at page

256:

> "A preliminary question arises as to the effect of section 1 of the Constitution which is set out above. An almost identical provision in the Constitution of Malta was considered by the Judicial committee in **Olivier v Buttigieg** and in giving the judgment *Lord Morris* of Borth-y-Gest said: 'It is to be noted that the section begins with the word 'whereas'. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. ..... The section appears to proceed by way of explanation of the scheme of the succeeding sections."

Section 13 deals with protection from discrimination on the grounds of sex, race, place of origin, political opinions, colour or creed. Perhaps the relevance of this arises from paragraph 19 of the Applicant's affidavit filed in support of his motion where he said: "I have been informed and verily believe that the said two applicants are known supporters of the government of Saint Lucia."

Is that all one says if he is alleging that there has been discriminatory treatment given to him? He certainly has not said that he is a supporter of some other entity and that is why he was discriminated against. As I will state later there is a presumption of constitutionality and if one is alleging treatment in a discriminatory manner it is incumbent on him to establish that. The Applicant has not done so in this case.

I think the only provision which the Applicant can seriously contend as affecting his fundamental rights and freedoms is section 10. This section is in similar terms to section 10 of the Constitution of St.Kitts which was considered by the Judicial Committee of the Privy Council in **Francis v Chief of Police**. Section 10(1) states:

> "Except with his own consent, a person shall not be hin-

dered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence."

But the section does not end here. As was stated by *Davis C.J.* in a case I shall mention below:

> By reason of section 1 of the Constitution and the very definition of the rights themselves contained in Chapter 1, there is no such thing as an absolute, unqualified, fundamental right guaranteed by the Constitution. The entitlement to the fundamental rights and freedoms of the individual is guaranteed 'subject to respect for the rights and freedoms of others and for the public interest'. The enjoyment of rights and freedoms may be regulated for the purpose of ensuring that their enjoyment by an individual does not prejudice the rights and freedoms of others and of the public interest."

Davis C.J. in **St. Luce v Attorney-General** (1975) 22 W.I.R. 536 was also dealing with a case pertaining to section 10 of the Constitution of Antigua which again is in similar terms as the provisions of section 10 of the Constitution of Saint Lucia. Thus subsection (2) of section 10 of the Constitution of Saint Lucia states:

> "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 in the interests of defence, public safety, public order, public morality or public health;
>
> (b) that is reasonable required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or
>
> (c) 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 re ably justifiable in a democratic society."

From a reading of subsection (2) it would appear that the Wireless Telegraphy Ordinance is intra vires the constitution and section 10(1) in particular.

Learned Counsel for the Respondent has referred to the presumption as to constitutionality. In **St. Luce v Attorney-General**, *Morris C.J.* at pages 540-541 stated:

> "While I would accept that in the formulation adopted the law impugned must, prima facie, be shown to be reasonably required, I think that the court must also bear in mind the presumption in favour of constitutionality, and that normally the burden must lie on those challenging the legislation."

And again in **Attorney-General v Antigua Times** 1975 21 W.I.R 560 P.C. where one of the questions was whether the word "person" in section 15 under which the respondent initiated proceedings includes artificial persons *Lord Fraser* of Tullybelton who delivered the judgment of the Board stated as follows:

> "In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required."

But I do not think the Applicant is attacking the Wireless Telegraphy Ordinance as being unconstitutional. The submission stated as follows:

> "Applicant is saying this decision is not reasonably justifiable in a democratic society and in such cases the Court can interfere. Decision is a law which has the force of law. It is not justifiable."

It seems to me that the onus is on the Applicant to show that the decision by the Ministry and/or the Cabinet not to grant him a licence is a thing done under the Ordinance which is not reasonably justifiable in a democratic society. Apart from his Counsel saying so, nothing else has been shown in that respect. The Applicant submitted three affidavits and in none of those affidavits has he deposed anything specifically stating that the decision is not reasonably justifiable in a democratic society.

I do not agree that the fundamental rights and freedoms of the Applicant has been in any way infringed.

This is enough to dispose of this matter but before ending I wish to say something about the remedy of *certiorari*. It is trite law that the remedy is discretionary. This is brought out in an article by *Professor Keith Davies* on the subject of **Administrative Law** in the 1989 All England Review. At page 5 the distinguished Professor stated:

> "Here we have a 'normal' - i.e. 'legitimate - expectation', which does not give the citizen in question a 'right' as in private law but does give him 'sufficient interest' or locus standi in public law: he is not a 'busybody or crank' and should be given leave to apply for judicial review. Whether he succeeds is quite another matter. It depends first on proof of ultra vires conduct by the public authority that he is challenging ('illegality', 'irrationality' or 'procedural impropriety'). If he succeeds on that substantive issue he still needs a decision of the court that justice as between the public interest and his private interest requires that discretion to grant a remedy ought to be exercised in his favour. Arbitrary conduct by public authorities, of whatever kind, is ultra vires, but not every ultra vires act ought to be overturned."

In **Caswell v Dairy Produce Quota Tribunal for England and Wales** 1990 2 WLR 1320 the applicants, having failed to qualify for a whole-sale quota in respect of milk production, claimed relief under the exceptional hardship provisions set out in the Dairy Produce Quota

Regulations 1984. In February 1985 the Dairy Produce Quota Tribunal, in their construction of the Regulations dismissed the claim. Initially unaware of a remedy, the applicants took no step to challenge the tribunal's decision until 1987 when they applied for and obtained ex parte leave to move for judicial review. On the hearing of the substantive application the applicants conceded before the judge that there had been 'undue delay' within the meaning of section 31(6) of the Supreme Court Act 1981 and R.S.C. Order 53 Rule 4(1) but they resisted an assertion by the tribunal that since there had been a number of other unsuccessful applications to which the same provisions applied, the grant of relief would be detrimental to good administration. The Judge held that the tribunal had erred in the construction of the Regulations but, accepting the tribunal's evidence, he declined to grant relief.

The Court of Appeal dismissed the applicants' appeal.

Before the House of Lords the appeal was also dismissed. The House of Lords held, inter alia, that not withstanding the lateness of the application the court could grant leave to apply, by extending the time, where the court thought that there was good reason to exercise the power; ..... and that, even if the court considered that there was good reason for the delay, it might still refuse leave, or if leave had been granted, refuse substantive relief, where in the court's opinion the granting of such relief was likely to cause hardship or prejudice within section 31(6), or would be detrimental to good administration independently of hardship or prejudice.

At page 528 of the Seventh edition of Administrative Law by Wade and Forsyth the learned authors state:

> "Closely akin to the subject of the foregoing paragraphs and overlapping it in some cases, is the question of the court's discretion. The remedies most used in natural justice cases - certiorari, prohibition, mandamus, injunction, declaration - are discretionary, so that the Court has power to withhold them if it thinks fit; and from time to time the court will do so for some special reason, even though there has been a clear violation of natural justice."

It would be an unenviable task if every citizen who when refused a licence such as this could establish that he had a legitimate expectation to be granted a licence and apply for judicial review.

For the reasons stated above and in the exercise of my judicial discretion this motion is dismissed with costs of $500.00 to the Respondents.

A.N.J. MATTHEW
Puisne Judge.