

Central Broadcasting Services Ltd & Anor v. Attorney General of Trinidad and Tobago (Trinidad and Tobago) [2006] UKPC 35 (4 July 2006)

Privy Council Appeal No 49 of 2005

(1) Central Broadcasting Services Ltd	
(2) Sanatan Dharma Maha Sabha of Trinidad and Tobago	<i>Appellants</i>
v.	
The Attorney General of Trinidad and Tobago	<i>Respondents</i>

FROM

**THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 4th July 2006

Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Lord Hutton
Lord Brown of Eaton-under-Heywood
Lord Mance

[Delivered by Lord Mance]

1. In December 1999 and September 2000 the second and the first appellants respectively applied for a radio broadcasting licence. The second appellants, the Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc. (“SDMS”), are a substantial religious and cultural organisation. Amongst other things, they run schools, focusing, the Board understands, on the large Hindu population in Trinidad and Tobago. Their licence application on 1st December 1999 was for a Hindu radio station aimed at an estimated 35% of the total listening market. Existing stations were said not to cater for the Hindu religion. In August 2000 SDMS incorporated the first appellants, Central Broadcasting Services Limited (“CBSL”), which submitted the second application on 1st September

2000. This application was directed at a market of the same estimated size as that in SDMS's application, but described as the East Indian Youth Market, for which again existing stations were said not to cater. It was said that the proposed new station would be "for the enhancement and better understanding of Youth Related Issues, and the programme format will reflect this through its religious, cultural, musical, educational and discussion contents".

2. The applications were made under the Wireless Telegraphy Ordinance (Chapter 36 No. 2) of 1936, which in terms required any person installing or using any such wireless apparatus to obtain (in the absence of any applicable regulations made under the Ordinance) a "special licence" issued by the Governor General, and provided that the Governor General might "appoint a Wireless Officer and such other officers and servants as may be necessary for the purposes of the Ordinance". With the coming of independence and republican status, this provision fell at the material times to be read as requiring a licence issued by the President of Trinidad and Tobago acting on the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. Applications were in the first instance evaluated by the Director of the Telecommunications Division of the relevant Ministry, the identity, or at least name, of which changed on several occasions (from the Ministry of Communications and Information Technology in early 2001, to the Ministry of Science, Technology and Tertiary Education between December 2001 and 2002 to, thereafter, the Ministry of Public Administration and Information). Applications which the Director of the Telecommunications Division approved would be forwarded with his corresponding recommendation for the Minister's attention.

3. The Director at the time of the Telecommunications Division, Mr Ragbir, was prompt to evaluate CBSL's application. After requesting and receiving certain information in September 2000, he wrote to the Permanent Secretary of the Ministry on 10th October 2000 to report that the application "has met all the necessary criteria for a broadcasting station" and that the "division has no objection to the grant of this licence". But no decision was made regarding any licence and the appellants wrote to the Ministry seeking information. By letter dated 5th March 2001 the Permanent Secretary said he would investigate and communicate again "shortly". Internally, this led to a further memorandum from the Director to the Permanent Secretary dated 15th March 2001, in which he referred to "your memorandum dated 10th October 2000" and advised that SDMS's application "was sent to you under the Company's name **Central Broadcasting Services Limited** with my recommendation". The Director may have meant to refer to his own memorandum dated 10th October 2000 or there may be another

missing memorandum. Either way it is clear that (despite an apparently contrary statement in his affidavit sworn 16th August 2002) he was treating CBSL's application as effectively embracing and subsuming SDMS's application and was recommending it accordingly. Before the courts below there was an issue whether there were thereafter two applications or only one by CBSL, as the Court of Appeal held. Realistically, Sir Fenton Ramsahoye SC representing the appellants was in oral submissions content to put this issue aside, and focused attention on CBSL's application which was unquestionably evaluated and recommended.

4. Again however nothing was heard by the applicants, until in August 2002 it came to their attention that a radio broadcasting licence had been granted to a company called Citadel Limited ("Citadel"), whose directors were a Mr Louis Lee Sing and Mr Anthony Lee Aping. A new administration had held office since the general election in December 2001, which had resulted in a tie with each party having 18 seats in the House of Representatives. The Minister of Science, Technology and Tertiary Education from December 2001 was Mr Hedwidge Bereaux. In a media conference on 1st August 2002 Mr Bereaux stated that Citadel had applied for its licence on 13th March 2001. A search of the Companies Registry showed the appellants that Citadel was only incorporated on 28th August 2001.

5. The appellants in these circumstances began proceedings on 16th August 2002 against the Attorney General, being the appropriate representative of the State for that purpose under section 76(2) of the Constitution of Trinidad and Tobago. They alleged that "The present administration arbitrarily and quickly awarded a radio licence to Citadel Limited in disregard of other applicants whose applications had been pending and were first in time". They claimed declarations that they had been denied equality of treatment contrary to section 4(b) and (d) of the Constitution and that their right to freedom of conscience, religious belief and observance and to freedom of thought and expression had been denied contrary to section 4(h) and (i) of the Constitution. They sought an order directing the grant of licences or such further orders and directions as might be necessary and appropriate.

6. The Constitution of Trinidad and Tobago provides:

"Rights enshrined

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

(a)

- (b) the right of the individual to equality before the law and the protection of the law;
- (c)
- (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;
- (e)
- (f)
- (g)
- (h) freedom of conscience and religious belief and observance;
- (i) freedom of thought and expression;
- (j)
- (k)"

7. The proceedings were supported by two affidavits sworn on 16th August 2002, one from Mr Satnarayan Maharaj, the secretary general of SDMS, the other from Mr Ragbir, the former Director of the Telecommunications Department who had retired on 13th April 2002, having been on pre-retirement leave from 30th November 2001. Mr Maharaj's affidavit attested to the course of events set out above so far as it involved action by or communications with the appellants. By an application only made in January 2004 the Attorney General applied successfully to the trial judge, Best J, to strike out certain passages in it as containing hearsay. These were passages based on a newspaper report dated 9th August 2002 regarding, first, the granting by the Cabinet of the Citadel licence to Mr Sing, described as an open supporter of the new administration, and, second, statements in that connection by the Minister, Mr Bereaux, when announcing and giving his explanation of the grant at the media conference following the Cabinet meeting at which the grant was made. Sir Fenton challenges the basis for the striking out what were reports of ministerial statements intended to inform the public. He points out that Smith J had on 3rd July 2003 ordered that, unless the respondents filed affidavits by 29th August 2003, the matter should proceed on the basis of the appellant's affidavits; that, in response to this order, affidavits had been sworn on 28th August 2003 by the Minister, Mr Bereaux, and by Miss Mala Guinness (Deputy Director of the Telecommunications Division who had effectively stepped into Mr Ragbir's shoes after he went on pre-retirement leave on 30th November 2001); and that these two deponents had responded generally to the appellants' two affidavits (although not specifically to the passages to which the respondents later objected). The Board sees some force in these submissions by Sir Fenton but does not consider that the outcome of this appeal turns on whether the judge was correct to strike out the passages in question. It is unnecessary to take further time considering Sir Fenton's challenge to their striking out.

8. Mr Ragbir in his affidavit recounted the position within the Telecommunications Division, as set out above, and produced certain lists of outstanding and recommended applications, including a list submitted by him on 30th October 2001 to the Minister under the previous administration, Dr Moonilal. This included CBSL as one of seven outstanding applications which Mr Ragbir had as at that date submitted with recommendations for the Minister's attention.

9. Mr Bereaux said that he never saw any of the lists produced by Mr Ragbir. The only list he saw was a list of outstanding applications requested by him in February 2002 and received by him from Miss Mala Guinness with a covering letter dated 4th April 2002. However, the covering letter disclosed that there was "a considerable lack of organisation and an absence of proper systems and mechanisms in the Division", which remained unresolved notwithstanding her "bringing it to the attention of a number of Permanent Secretaries on several occasions", that the Division was unable to locate some files and that it was therefore not possible to say whether the enclosed list was complete. The list was headed "Interim Draft – Unedited" and contained only five applications. One of them was that by Citadel, against which there was a note that: "The Telecommunications Division received this application in the Ministry in late March 2002 and will be attending to it as soon as possible". Neither of the appellants' applications was included.

10. Miss Mala Guinness's affidavit was consistent with the appellants' evidence regarding their applications. She explained that even prior to Mr Ragbir's pre-retirement departure the Division was under-staffed. At some time after his pre-retirement, she recalled conversations with Mr Maharaj regarding his application for a licence, and commented that "It may be that his was one of the files that could not be located at that time". She said that after Mr Ragbir's pre-retirement she had advised that "recommendations for wireless licences should be made in the context of a Broadcast Policy" to make "efficient use of this limited and lucrative resource", and that the Division had ceased to make recommendations pending the establishment of such a policy. As Warner JA observed in the Court of Appeal, this does not explain the expedited processing and grant of Citadel's licence, regarding which Miss Guinness went on to produce certain formal documentation. This included a copy of Part 1 of an application form dated 13th March 2001 (the date to which Mr Bereaux later referred in the media conference on 1st August 2002). But the note to the Interim Draft - Unedited list enclosed with Miss Guinness's letter dated 4th April 2002 indicates that this application was only seen by the Telecommunications Division in March 2002.

11. The next dated document produced by Miss Guinness is a letter dated 16th January 2002 attaching a copy of the Citadel application (or rather it appears, of Part 1 of the seven Parts required by the standard application form). This is date-stamped as seen in the Division on 28th April 2002, although in the light of the note on the Interim Draft - Unedited list it must presumably have been received by March 2002. This copy of the application was itself apparently mislaid and so re-submitted on 12th June 2002 under cover of a letter on Citadel's letter-head, showing an existing frequency 92.5FM. The reference to an existing frequency elicited a vigorous request from the Permanent Secretary dated 18th July 2002 seeking an explanation. He pointed out that the frequency 92.5FM had been allocated to Tobago Broadcasting Systems Limited, of which Mr Sing was the manager under contract and he made clear that "Processing your application would be most inappropriate in the absence of a satisfactory and written explanation". In anticipation that Citadel could provide a satisfactory explanation, he invited Citadel to submit Parts 2 to 7 required by the application form.

12. There is no indication of any written explanation of Citadel's use of the frequency 92.5FM. The only further letter produced by Miss Guinness is a letter dated 24th July 2002 from Citadel, submitting Parts 2 to 7 as required. This letter is noted as seen by the Permanent Secretary on 30th July and sent on to Miss Guinness on 7th August 2002. Within a very short time, Citadel was given a licence to operate on, Miss Guinness records, a frequency of 95.5FM. In a second affidavit sworn 16th January 2004, which was excluded by the trial judge but admitted by the Court of Appeal, Mr Bereaux gave as the explanation that "developments involving the use by certain principals of Citadel [i.e. query, Mr Sing] of the frequency FM 92.5 by agreement with Tobago Broadcasting Systems Limited led to a situation which I considered and concluded needed to be resolved quickly. I therefore requested expedition of Citadel's application". Citadel was thus given a new licence on an additional and up to that point unused frequency. Mendonca JA commented, appositely, on this explanation in the Court of Appeal that "With all due respect, that really says nothing. I am not satisfied that what is said in that paragraph provides any justification for the different treatment granted to Citadel Ltd" (cf paragraph 44 of Mendonca JA's judgment, with which Hamel-Smith JA agreed in paragraph 37).

13. On Monday 19th January 2004, the first day of the hearing before Best J, the respondents filed and sought to adduce a further affidavit sworn on 16th January 2004 by Gillian Macintyre, Acting Permanent Secretary in the Ministry. The Judge refused to admit this affidavit (because of its lateness and the unfairness to the appellants), and the Court of Appeal upheld his refusal. But at the respondents' insistence, the

affidavit appeared in the bundle of documents put before the Board, and (for good reason, as will appear, and without objection) Sir Fenton referred the Board to documents produced to it. These show that in November 2003 (over three years after Mr Ragbir as the Division's Director had approved the CBSL application and forwarded it for the Minister's attention) the Telecommunications Division was now suggesting that insufficient information had been provided.

14. On 5th November 2003 an official sought further information by noon on Friday 7th November 2003 on four points (the first three on their face minor technical points, the fourth relating to manpower and financial data under Sections 5 and 7 of the original application). On 11th November 2003 the Minister himself wrote effectively limiting the outstanding information to two aspects of the fourth point. He said that "While the information provided so far has enabled us to positively evaluate certain aspects of your submission, there remains some information which is outstanding and which is necessary for the successful consideration of your application". He required this as a matter of urgency. On 17th November 2003 CBSL replied with brief information "without prejudice to the pending constitutional motion". At a Cause List hearing on 19th November 2003 the parties indicated their readiness to proceed to a hearing which was fixed for 19th to 21st January 2004. At some point the Telecommunications Division made a telephone call requesting information under Sections 1 (General), 5 (Manpower), 6 (Incorporation) and 7 (Financial). CBSL responded by letter dated 18th December 2003 with several pages of information but simply drawing attention as regards financing arrangements to the previous letter dated 17th November 2003. The Division did not complain that this was insufficient or in what respect until Miss MacIntyre's affidavit, filed a month later on the first day of the hearing before Best J. There she said that "no further financial details were provided as was requested nor have these essential details been provided to date". She went on to say that an (unspecified) broadcast policy had been approved in Cabinet on 2nd January 2004, and that there were some 32 outstanding applications and that "a process is underway to evaluate these applications in the context of the Broadcast Policy and the frequencies available".

15. The Judge's refusal to admit Miss Macintyre's affidavit meant that it was not open to the Attorney General or the State which he represents to make any suggestion thereafter that the appellants' application for a licence was (contrary to its recommendation by the Director in 2000 and 2001) either incomplete or defective. The hearing proceeded and judgment was given on the basis that the State had, for over three years, had before it but had failed to give due consideration to an application which was in order and had been recommended by the Director of the

Telecommunications Division as long ago as October 2000. The matter also proceeded in the Court of Appeal on this basis. Hamel Smith JA was thus able to say “There is nothing to suggest that there is a risk that the application will not be successful” (paragraph 36).

16. Following the hearing before him, Best J gave judgment on 4th February 2004, holding that there had been unequal treatment contrary to section 4(b) and (d) of the Constitution. Having so concluded, he found it unnecessary to consider the claim of breaches of section 4(h) and (i). But he considered it perverse, in the circumstances as they appeared at that date, to seek an order obliging the Cabinet to grant a licence or usurping the Cabinet’s decision-making power. He adjourned the issue of redress to a Master. On 11th February 2004 SDMS wrote to the Prime Minister enclosing a copy of the judgment and asking that a licence be granted by 20th February 2004, failing which it would “be forced to continue its journey for justice, equality and fair play in the courts of this land”. The Minister of Public Administration and Information, Dr Saith, replied on 25th February 2004 saying that “The matter is receiving attention and further correspondence will be addressed to you”. None was, and the appellants lodged grounds of appeal dated 26 February 2004.

17. The appeal was heard in October 2004. During its course the Court of Appeal sought information about licences granted and was provided with a list by the new Telecommunications Authority (established under the Telecommunications Act 2001 which came into force on 30th June 2004). The list showed only two licences for applications pre-dating 2001. In respect of all thirteen applications the date of recommendation was 19th December 2003 and the date of grant of a licence 24th June 2004. No information appeared in the letter or list about any application by the appellants.

18. The Court of Appeal in its judgment delivered on 27th January 2005 held, disagreeing with the Judge, that only CBSL could be entitled to any relief. The confining of relief to CBSL is, as the Board has mentioned, no longer in issue before the Board. Before the Court of Appeal a central issue was whether proof of mala fides was a prerequisite to establishing a case of infringement of the right to equal treatment. Hamel-Smith JA and Warner JA held that it was not. While disagreeing with the Judge’s conclusion that the Ministry’s inaction in the case of the appellants (compared to its action in the case of Citadel) amounted to a constructive refusal of a licence, they upheld his conclusion that the Ministry’s conduct amounted to a breach of CBSL’s constitutional right to equal treatment.

19. Mendonca JA in contrast considered that mala fides was necessary, but held on the facts that there was sufficient evidence of intentional and irresponsible conduct which was, in the absence of any justification, sufficient to rebut the presumption of regularity and give rise to an inference of mala fides. Warner JA did not consider that mala fides had been shown. But Hamel-Smith JA, while considering in common with Warner JA that proof of mala fides was not required, also said that for the reasons which Mendonca JA gave, he did not depart from Mendonca JA's decision and findings. So there was a majority in favour of the appellants on the issue of inequality of treatment, both on the basis that mala fides was not a pre-requisite and, it seems (though this is not perhaps entirely clear), on the basis that it was. No cross-appeal was filed by the Attorney General against these conclusions.

20. The Board was invited by Mr Ramlogan, who followed Sir Fenton, to consider further whether mala fides is a pre-requisite to a finding of unequal treatment under the Constitution, having regard to the authorities in Trinidad and Tobago and the Board's own reservations expressed obiter in *Bhagwandeem v. Attorney General of Trinidad and Tobago* (Privy Council Appeal No. 45 of 2003) [2004] UKPC 21. But, in the absence of any cross-appeal before the Board and in circumstances in which Mr Peter Knox for the respondents had had no previous notice of any intention to address such an issue, it would have been inappropriate to accede to Mr Ramlogan's invitation, and the Board declined to do so. The Board has however one observation to make on the treatment in the courts below of the issue of inequality. In both courts it was assumed that the unequal treatment which was established justified a declaration of breach both of section 4(b) and of section 4(d) of the Constitution. The Board does not consider this to be correct. Section 4(d) is the provision covering circumstances such as the present. Section 4(b) is in the Board's view directed to equal protection as a matter of law and in the courts: see *Bhagwandeem v. Attorney General of Trinidad and Tobago* at paragraph 14. There is here no suggestion that either the law itself or its administration by the courts was discriminatory. But the established breach of section 4(d), against which the Attorney General has lodged no appeal, is by itself a sufficient finding of discrimination for the appellants' purposes.

21. The Court of Appeal agreed with Best J that the established discrimination made it unnecessary to consider the further claims of breach of section 4(h) and (i) of the Constitution. Mendonca JA accepted (in paragraph 48) that it might have been necessary to consider those further claims if it appeared that they might offer grounds for further relief not appropriate under section 4(b) and (d). Warner JA considered (in paragraph 20) that the right to freedom of religion must attach to a

natural person, and that there was no evidence of any refusal of a licence, or that CBSL's application had ever been placed before the Cabinet. She concluded therefore that there had been no denial of freedom of expression. The Court of Appeal concluded that the Cabinet could and should now, in Hamel-Smith JA's words (in paragraph 36), be trusted to act responsibly and fairly in determining whether or not a licence should be granted to the appellants. Distinguishing the circumstances which existed before the Board in *Observer Publications Ltd. v. Matthew* [2001] UKPC 11: 58 WIR 188, the Court of Appeal dismissed the appellants' appeal seeking an order for the grant of a licence. However, it concluded that the Judge's intentions should be clarified and that an order should be made directing that the matter be placed before the Cabinet for its consideration within 28 days, while the Judge's order that the issue of "redress" be adjourned to a Master should be amended to require the matter to be referred to the master for the assessment of damages (cf per Mendonca JA at paragraphs 49-51, with which Hamel-Smith JA agreed at paragraphs 34 and 38 and Warner JA agreed at paragraph 36).

22. On 10th February 2005 the respondents filed a 12 page skeleton. All but the last 12 lines were devoted to an application that the Court of Appeal should review its order that the respondents should bear 50% of the appellants' costs of the appeal and cross-appeal. The last 12 lines referred to the order that CBSL's application be placed before Cabinet for consideration within 28 days, they pointed out that the Wireless Telegraphy Ordinance (Ch 36, No 2) of 1936 had been replaced by the Telecommunications Act 2001 (which, as the Board has mentioned, came into force on 30th June 2004) and they concluded baldly that "In the circumstances it appears that the regime for the grant of licences under the Wireless Telegraphy Ordinance no longer obtains". The implicit effect of this submission was, as Mr Knox acknowledged before the Board, that CBSL should, despite four and half years of relatively successful litigation against the State, now start all over again with a new application to the new Telecommunications Authority.

23. The issue whether this was so, or whether the transitional provisions of the Telecommunications Act 2001 preserved the existing machinery for dealing with applications outstanding at the date when it came into force, was litigated before the Court of Appeal at a further hearing. The Court of Appeal on 21st April 2005 delivered a second judgment, dealing with the point. Mendonca JA giving the judgment of the Court recorded in paragraph 7:

"We have been told by Counsel for the Respondent that in compliance with the order of the Court that Cabinet has

considered the application, but it is in a quandary as to what to do next and now seeks clarification in view of the order made.”

24. The Court of Appeal held that the transitional provisions of the 2001 Act preserved the power of the President acting on the advice of the Cabinet to grant licences in respect of pending applications, so that the Cabinet might continue to deal with CBSL’s application. In order to avoid doubt, it added (at paragraph 15) that, since it understood from counsel that the Cabinet had already considered the application (“in compliance with the order of the court” as Mendonca JA said in paragraph 7), it would direct that, if the application had been approved, the Cabinet should so advise the President within the next 28 days, and, if it had been refused, the Cabinet should so advise CBSL giving written reasons for the refusal, again within the next 28 days.

25. On 21st April 2005 the appellants were granted conditional leave to appeal to the Board, which was converted into full leave on 12th May 2005. On 17th May 2005 the Permanent Secretary to the Ministry of Public Administration and Information then wrote to CBSL a letter, disclosing a position so remarkable that it is appropriate to set the letter out in full:

“Re: Application dated December 1, 1999 [sic] of Central Broadcasting Services Limited

We refer to the above captioned matter.

Please be advised that Cabinet has considered your application of December 1, 1999 for a broadcasting licence. Your application was made pursuant to section 3(2) of the Wireless and Telegraph Ordinance. Your application was required to be made in accordance with the conditions stated in the Instructions for filing the Application Form for Broadcast Licences.

Cabinet first considered your application on February 19, 2004 whereupon Cabinet referred the application to the Finance and General Purposes Committee for its detailed consideration and recommendation to Cabinet.

On March 1, 2004 the Finance and General Purposes Committee considered your application and the application was sent back to the Cabinet on March 4 2004. Cabinet again referred your

application to the Finance and General Purposes Committee on March 11, 2004 for further consideration and recommendation.

The Finance and General Purposes Committee considered your application again on June 21, 2004 for recommendation to Cabinet. In formulating its recommendation the Committee referred to the Report on the Review of Applications for FM Radio Broadcasting Licences (hereinafter “the Report”), dated December 19, 2003 which stated that you did not submit detailed financial information as required by law and the Application Form despite separate requests for additional information from you.

Correspondence was issued to all parties with incomplete applications during the period October 6 to October 8, 2003 with a deadline for all outstanding information by October 17, 2003. Letters were again dispatched to those applicants whose applications were incomplete in the week of November 10, 2003 with November 19, 2003 as the deadline for submission. A final request for information was sent to all applicants with outstanding information with a deadline of December 17, 2003. At that stage, a review of all applicants with complete applications was undertaken. Your application was incomplete as at the date of the preparation of the Report that is dated December 19, 2003. Based on the contents of the Report, the Finance and General Purposes Committee recommended on June 21, 2004 to Cabinet that your application should be refused.

On June 24, 2004 Cabinet, on the recommendation of the Finance and General Purposes Committee, refused to grant your application for a broadcasting licence on the grounds stated in the Report, which formed the basis of the recommendations of the Finance and General Purposes Committee.

Cabinet therefore decided not to grant your application because, despite separate requests for additional information from you, you failed to submit detailed financial information in support of your application. The said information was required to be stated in the Application Form on which all applications were evaluated. The failure to submit this information rendered the application ineligible for approval.

Please be guided accordingly.”

26. A number of points follow:

(1) Firstly, a Report on the Review of Applications for FM Radio Broadcasting Licences was prepared on 19th December 2003. It seems quite likely that this was prepared within the Telecommunications Division but no such Report has been disclosed, even to the Board. Evidently however it stated that CBSL “did not submit detailed financial information as required by law and the Application Form despite separate requests for additional information”. In this respect, the Board notes that (a) the letter dated 17th May 2005 refers to a letter as having been sent in the week of 10th November 2003 to any applicant whose application was incomplete – a reference which corresponds with the sending of the Minister’s letter dated 11th November 2003 to CBSL; but (b) it goes on to suggest that a final request had been sent to all applicants with outstanding information with a deadline of 17th December 2003 – that is not consistent with Miss MacIntyre’s affidavit sworn 16th January 2004, in which no such request is mentioned or exhibited and no such deadline is suggested, and (c) it makes no mention of the appellants’ letters dated 17th November and 18th December 2003, or of the telephone conversation referred to in the latter letter, all attested to by Miss MacIntyre in her affidavit sworn 16th January 2004. On the contrary it plainly implies that, when Cabinet considered the matter in the first half of 2004, no regard was paid to the latter letter, despite its production by Miss MacIntyre (and although she makes no suggestion that a deadline of 17th December 2003 was given to CBSL).

(2) The letter dated 17th May 2005 discloses that Cabinet considered CBSL’s application in the light of recommendations of its Finance and General Purposes Committee on three occasions shortly after judgment was given by Best J. These were on 19th February 2004, on 11th March 2004 and finally on 24th June 2004 when the Cabinet is said to have refused to grant a licence because of CBSL’s failure to submit detailed financial information. Thus the very allegation which the respondent was refused leave to advance by Best J (a refusal later upheld in the Court of Appeal) became and remains the only basis ever suggested for refusing CBSL a licence.

(3) Until the letter dated 17th May 2005 no step was taken to notify the Cabinet’s refusal of 24th June 2004 to CBSL, to SDMS or to anyone else who might be concerned or interested. The letter tenders no explanation why or how it came about that none was. Mr Knox representing the Attorney General, a member of the Cabinet, was equally in no position before the Board to tender any

explanation. The letter was in the bundle put before the Board. It is self-evident that any court dealing with the appeal would expect an explanation on this, and other points, arising upon the letter. The Cabinet's consideration of CBSL's application is presented in the letter as the ordinary, objective consideration that any application should receive, quite independently of any legal proceedings. If that were so, there could be no basis for not communicating it accordingly. The cross-appeal to the Court of Appeal could not justify failure to notify CBSL of the failure of its application. One can only speculate whether any notification would have taken place had the cross-appeal succeeded.

(4) The letter discloses a situation in which the Court of Appeal was allowed to proceed under a serious misapprehension in and throughout the course of two substantial hearings. The Court of Appeal was twice allowed to give judgment on false premises, viz that the Cabinet had never considered the licence application, still less reached any decision on it prior to the Court of Appeal's first judgment. Again no explanation had been tendered as to why or how this could have come about, although it is obvious that one would be expected.

(5) Contrary to the impression that the respondent through his counsel gave or allowed the Court of Appeal to have during the second hearing, the letter dated 17th May 2005 does not disclose any substantive re-consideration of the matter by the Cabinet after and "in compliance with" the Court of Appeal's first judgment. On the contrary, it is inconsistent with there having been any such re-consideration or compliance.

27. Mr Knox conceded that the position was "unusual and unsatisfactory". That is an understatement. Mr Knox went on to argue valiantly that, in the light of the facts disclosed in the letter dated 17th May 2005, the appropriate course would now be for CBSL to take fresh proceedings for judicial review of the Cabinet's refusal, or (secondly) for the Board simply to make yet a further order for the Cabinet to re-consider the application, or (as a third possibility) for CSBL to avoid any Cabinet involvement by making a new application to the Telecommunications Authority. In the Board's view, neither the first nor the third of those possible courses could be an appropriate response to the course of events which has become apparent since the Court of Appeal was allowed to deal with the matter under a misapprehension as it did. They do not take appropriate account of the long history of this matter, the inequality of treatment established independently of the new matters now known, or the Cabinet's uncommunicated consideration and decision

to refuse a licence in June 2004 on a ground that the Attorney General had been refused permission to raise by the Judge. All these matters relate closely to the course of and issues in the present proceedings. Any suggestion that CBSL should have to commence yet further proceedings or begin with a fresh application to the Telecommunications Authority is in the Board's view unrealistic. The same matters also bear strongly, in the Board's view, on the question whether the second course would, as matters now appear, afford appropriate relief in these proceedings.

28. Before considering that question further, the Board observes that the course of events revealed by the letter dated 17th May 2005 is also relevant in relation to Sir Fenton's submission that the Board should consider the constitutional challenge based on section 4(h) and (i), and that a finding of a breach under one of these sections could have a bearing on the appropriate remedy. The Board sees force in Warner JA's view that section 4(h) is irrelevant to an application by a corporate entity. With regard to section 4(i), the Board starts by noting section 5(1) of the Constitution which provides:

“Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.”

29. A law may clearly “abridge” or “infringe” the right to freedom of expression without entirely “abrogating” it. Likewise, the right which section 4(i) guarantees will exist without discrimination in respect of freedom of expression can be infringed even though (i) no absolute right exists to a licence and (ii) the conduct impugned does not abrogate all freedom of expression, but leaves it in many respects unaffected. In *Benjamin v. Minister of Information and Broadcasting* [2001] UKPC 8; [2001] 1 WLR 1040, the Board was concerned with the Constitution of Anguilla, section 11 of which provided that “Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression....”. The government had decided to suspend a radio programme, without notice to the producer, because of criticisms and statements of intention to sue made by the vice president of the local lottery company after the producer said that a lottery was inappropriate and in his view illegal. The Board in its opinion considered that “freedom of speech may be hindered where there is no contractual and no absolute generalised right to speak in the way in which the individual wishes to express his views” (paragraph 31). It regarded “the motive of the government in closing the programme [as] a relevant factor in

deciding whether there was a contravention of section 11” (paragraph 49). It observed that *Benjamin* was “not a case where the government, as owners of the radio station, felt that the programme had ceased to have sufficient audience participation or appeal”, nor a case where there had been intended from the beginning a limited series or period (paragraph 49). Rather, it appeared that “As long as people were not criticising the government on sensitive issues, the government was content for the programme to continue” (paragraph 49) and so there was, as the judge had there held, “an arbitrary or capricious withdrawal of a platform which had been made available by the government” (paragraph 51).

30. In relation to a government controlled radio station, the government as owners with direct responsibility for policy and finance would normally, and rightly, be recognised as having wide control over operations and programming. The present case is in contrast concerned with a government controlled licensing process, in relation to which the government’s legislative and constitutional role is to ensure the efficient, objective and non-discriminatory handling of licence applications, securing the speedy granting of licences where appropriate and thereby also securing the constitutional right of freedom of expression. Where there has been a failure in this respect, an applicant’s freedom of expression can in the Board’s opinion be said to have been infringed.

31. This is confirmed by the Board’s decision in *Observer Publications Ltd. v. Matthew* 58 WIR 188, where a constitutional challenge based on that ground was mounted after more than five years of prevarication in dealing with an application for a licence to operate a commercial FM radio station. The relevant constitutional provision (section 12 of the Constitution of Antigua and Barbuda) was in effectively identical terms to that in issue in *Benjamin v Minister of Information and Broadcasting* [2001] 1 WLR 1040. The relevant application fell under the local telecommunications legislation to be made to and considered by a Telecommunications Officer, Mr Matthew, who had been duly appointed by the Public Service Commission, but due to a misapprehension believed that it was his role to forward applications for consideration by the Minister of Public Works, who in turn secured the decision of the Cabinet.

32. The Board emphasised that, although no-one has an absolute right to establish a broadcasting station, the effect of the constitutional provisions before it was that a licence could be refused only on constitutionally justifiable grounds (paragraph 4). The case was not argued on the basis of discrimination (although the homogeneous nature of existing long-term licences, almost exclusively granted to the government or members or relatives of its ministers, might in the Board’s

view have been given rise to “a serious issue of discrimination”, had it been discovered earlier: paragraph 11). The Board was also unable to conclude on the evidence that there had been “a policy motivated by a desire to suppress or limit criticism of the Government of the day”, although it saw some cause for concern on this score: paragraph 47. But the Board unhesitatingly concluded that the right of freedom of communication had been denied without justification: paragraph 53. It made a corresponding declaration and went on to make “an order that forthwith a radio broadcasting licence will be issued to [the appellant] as applied for or on such other frequency as the High Court, on prompt application by the Attorney-General, may approve” (paragraph 54).

33. Returning to the present case, there was here in the Board’s opinion a similar infringement of CBSL’s right to freedom of expression under section 4(i) of the Constitution of Trinidad and Tobago. CBSL’s application for a licence was recommended to the Minister by the Director of the Telecommunications Division as long ago as October 2000. There was conspicuous failure to deal with the application for over three years. There was unexplained and unjustified discrimination in favour of another applicant, Citadel. No questions were raised about CBSL’s application or financial position during those three years, until after the time for filing evidence in, and shortly before the hearing of, proceedings brought to challenge the government’s inaction. Even then, the Board notes, it was not explained why the Director’s previous recommendation was now regarded as inappropriate; or why financial information should have assumed so significant a role in the context of the operation of a radio station, let alone its operation by a company incorporated by a substantial organisation able, as the papers indicate and as the Board was also told without contradiction, to draw on significant voluntary as well as financial resources. In any event, the trial judge refused the Attorney General permission to rely on any objection based on CBSL’s suggested failure to provide adequate financial information. The matter fell to be considered thereafter on the basis that the application was in that respect in order. Yet the information now available shows that the only ground put forward for refusal of the application is the ground which the Attorney General representing the State was refused permission to raise. In addition, as the Board has already noted, there was a complete failure to communicate that refusal, or the fact that Cabinet had even considered the matter, to the applicant, and the Court of Appeal was allowed to hear and determine the matter under a serious misapprehension on two occasions.

34. These factors in the Board’s opinion justify the application to the State’s handling of CBSL’s licence application since the end of 2000 of the same description “arbitrary or capricious” as was applicable to the

conduct in issue in *Benjamin v Minister of Information and Broadcasting* [2001] 1 WLR 1040, at paragraph 51. Further, assuming (which the Board should not be taken to accept, though it expresses no concluded view) that it is necessary, in order for there to have been an infringement of the right to freedom of expression, to show that, given proper handling, a licence would by now have been granted, the Board considers such a conclusion to be amply justified on the present facts. The Director in October 2000 had actually specified a frequency of 107.1 MhZ (a frequency in the event allocated on 24th June 2004 to Inner City Broadcasting whose application only dated from 22nd July 2002). There is no doubt some limit to available frequencies, as Miss Mala Guinness says, but there has never been any suggestion, past or present, of scarcity of channels as a reason for resisting CBSL's application (which should, if fairly treated, also have had prior consideration to that of Inner City Broadcasting). As to the suggestion that there might be other applications, especially applications even older than CBSL's, which might justify prior treatment or might be prejudiced by the grant of a licence to CBSL, that is neither established nor on its face at all likely, bearing in mind that all but two of the applications recommended on 19th December 2003 and granted by Cabinet on 24th June 2004 dated from the years 2001 to 2003. It is true that a further 19 applications are said to have been reviewed on 19th December 2003 (including, as is now known, CBSL's). The likelihood is that all or most of them were refused and there is no indication that any of them is complaining or could complain if the Director's recommendation of CBSL's application, given as long ago as October 2000, were now implemented.

35. The Constitution of Trinidad and Tobago provides in section 14 that:

“14.(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

(2) The High Court shall have original jurisdiction

(a) to hear and determine any application made by any person in pursuance of subsection (i); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4),

and may, subject to subsection (3), make such 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 this Chapter to the protection of which the person concerned is entitled.”

Section 14 is for present purposes in identical form to section 18 of the Constitution of Antigua and Barbuda under which relief was afforded in *Observer Publications Ltd. v. Matthew* 58 WIR 188.

36. The Board would pay tribute to the care and skill with which this case has been handled in the courts below. It is through no fault of the Court of Appeal and highly regrettable that the Court of Appeal was allowed to proceed on false premises. It is in the light of exceptional circumstances not revealed to the Court of Appeal that the Board concludes that the appeal should be allowed. As in *Observer Publications Ltd. v. Matthew*, so here the Board considers that the only appropriate order is a mandatory order, in this case ordering the Attorney General to do all that is necessary to procure and ensure the issue forthwith to the appellant, Central Broadcasting Systems Limited (CBSL), of a FM radio broadcasting licence, as applied for on 1st September 2000, on an appropriate frequency to be agreed with CBSL or, in default of agreement, to be determined by the High Court on application by either party. The Attorney General must pay the appellants’ costs in the courts below and before the Board.