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Judgment 6, 1966

IN THE PRIVY COUNCIL No. 9 of 1965

ON APPEAL

FROM THE COURT OF APPEAL OF MALTA

BETWEEN:-

THE HONOURABLE DR. PAUL BORG OLIVIER and DR. CARMELO COLEIRO — Appellants

- and -

THE HONOURABLE DR. ANTON BUTTIGIEG, M.L.A. — Respondent

CASE FOR THE APPELLANTS

CIRCUMSTANCES OF APPEAL — Record

1. This is an appeal by leave of the Court of Appeal of Malta, dated the 20th November, 1964, from a judgment of the Court of Appeal of Malta (Mamo, C.J., Gouder and Camilleri, JJ.) dated the 10th January, 1964, which dismissed the Appellants' appeal against the judgment of the Civil Court, First Hall (Xuereb, J.) dated the 11th March, 1963, whereby the Respondent was granted a declaration that a circular issued on behalf of the Appellants had infringed his constitutional rights, and it was ordered that a further circular be published referring to such declaration, and the Respondent was awarded his costs — P.80, P.64, P.51

2. The relevant statutory provisions are :

THE MALTA (CONSTITUTION) ORDER IN COUNCIL 1961

PART II

PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

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5. Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

a) life, liberty, security of the person and the protection of the law;

b) freedom of conscience, of expression and of assembly and association; and

c) protection for the privacy of his home and other property, and from deprivation of property without compensation,

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

.....

13. (1) All persons in Malta shall have full liberty of conscience and enjoy the free exercise of their respective modes of religious worship.

(2) No person shall be subject to any disability or be excluded from holding any office by reason of his religious profession.

14. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to

hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

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

a) that is reasonably required -

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

ii) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosures of information received in confidence, maintaining the authority and independence of the Courts, or regulating telephone, telegraphy, posts, wireless, broadcasting, television, public exhibitions or public entertainments;

or

b) that imposes restrictions upon public officers

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

3. The Respondent made an Application to the Civil Court on the 4th May, 1962, in which he claimed that the Appellants had issued an Order, exhibited to his application, whereby they had prohibited the entry into hospitals and other branches of the Health Department of newspapers which had been condemned by the Ecclesiastical Authorities. The Application

P.1
P.1 l.18

P.1
l.22-28

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continued that that Order was intended to prohibit patients and doctors in the Hospitals as well as all employees of the Department of Health from carrying and reading within the Hospitals the newspapers of the Malta Labour Party, amongst which was the "Voice of Malta", edited by the Respondent who was also a member of the Opposition. The "Voice of Malta" had been condemned by the Archiepiscopal Curia by a circular dated the 26th May, 1961. The Respondent claimed that this Order in so far as it affected such newspaper was a breach of Sections 13 and 14 of the Malta (Constitution) Order in Council, 1961, and claimed the appropriate remedy in accordance with the provisions of that Order in Council.

P1 11.29-39

4. The circular referred to in the Respondent's claim had been dated the 25th April, 1962 and addressed to the Chairman, St. Luke's Hospital Management Committee, Medical Superintendents and Heads of Branches. It was headed "Political Discussions During Working Hours", and was in the following terms:

P.4

> "The attention of all employees is again drawn to the instructions contained in OPM Circular No.34 of 22nd August, 1955, which is again being subjoined herewith for ease of reference.
>
> The entry in the various Hospitals and Branches of the Department of newspapers, which are condemned by the Church Authorities, and the wearing of badges of political parties are strictly forbidden.
>
> You are requested to ensure that the directions contained in the above mentioned OPM Circular and in paragraph 2 above are strictly observed by all the employees of the Department."

The circular had been signed by the second Appellant as Chief Government Medical Officer.

P.4 l.34-
P.5 l.11

5. The defence of the Appellants was filed on the 10th May, 1962. It pleaded that the circular complained of in the first place had not the force of law, secondly was not

directed to the patients, and thirdly, was only a directive regarding certain relations arising between the employer and employee, limitedly to the hours and places of work, so that the Respondent was not being hindered in the enjoyment of his freedom of expression.

6. Evidence was given in the course of the proceedings by both Appellants, and certain other witnesses, the effect of which was summarized in an appendix to the Appellant's note of submissions filed in the Civil Court, as follows:

1) the Appellants issued the Circular complained of.

2) This Circular, amongst other things which are irrevelant to the present case, prohibited the employees in hospitals and in the branches of the Medical and Health Department from carrying with them to their place of work the newspapers condemned by the Church; amongst these there is the newspaper edited by the Respondent.

3) The employees affected by the Circular are all civil servants.

4) Those employees who have their quarters annexed to the hospitals are not debarred by the Circular from carrying the newspapers condemned by the Church into their residence.

5) The decision of the Church under penalty of mortal sin was pronounced by the competent Church Committee on May 26th, 1961.

6) The Respondent is still free to exercise his functions as editor of the newspaper affected by the Circular.

7) The Circular exhausts its effects in the official hierachy and this limitedly to the places and hours of work of the dependants of the Minister. During any other time and in any other place these are free to read the newspaper of Respondent.

8) The paper is issued weekly, every Saturday evening and is put on sale by

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newsagents and newsboys willing to take part in its distribution, apart from its being put on sale in Labour Party clubs, and being a weekly publication it can be bought throughout the week and particularly on Sundays which is a public holiday.

7. The parties filed lengthy written submissions, and the judgment of the Civil Court, First Hall (Xuereb, J.) was delivered on the 11th March, 1963. After summarising the issues arising on the pleadings, the learned Judge pointed out that two sections of the Constitution were in issue in this case, and although each should be considered separately, nevertheless in any particular case one and the same might be a contravention of both freedoms given by the two sections. The first question that arose was whether the Circular complained of was directed not only to the Government employees working in hospitals but also to the patients in those hospitals as well. In the view of the Court the Circular had to be interpreted as being applicable only to Government employees for the purposes of the present case. It thus appeared to be an administrative act executed by the Appellants in the exercise of the powers inherent in their respective offices regarding the management of the Health Department. On that basis, the Appellants had claimed that the Circular was not cognizable by the Court. This submission, however, went too far - although in particular cases the Court would be most reluctant to interfere with mere acts of policy of a Department as if it were itself exercising a mere administrative function. The Court, the learned Judge said, had a general power of review over the acts of the executive; for the new principle introduced in the 1961 Constitution gave the Court power to interfere even in the legislative field, of which the administrative branch was only the implementation. Looking at the Circular complained of, the learned Judge held it was not a normal administrative act, but on the contrary related to something extraneous to the normal activities of Government

employees. For that reason the Appellants should not enjoy the same measure of freedom from judicial control as would apply to their normal administrative activities. The Court considered that the Circular was therefore reviewable in the circumstances of the case.

8. In considering whether there had been any breach of the constitutional rights of the Respondent, the learned Judge said he had to show that it was his own constitutional rights that had been infringed, and it would not be sufficient to show that the rights of other people had been restricted. Since the Respondent had clearly intended to use his newspaper to express his ideas and impart information, and acquire the largest possible circulation, it followed that he was being interfered with by the Appellants in the enjoyment of his right to propagate his ideas. There was an impairment or violation of his right of freedom of expression, since any restriction on the right of persons to receive a newspaper also affected the editor and restricted his rights. The prohibition of the newspaper had been made on religious grounds, and thus the Respondent's right of freedom of conscience also had been in some way restricted. If the restriction had been justified as falling within the provisions of section 14(2) (a) of the Constitution, that would have required the restriction of the freedom of every one, not simply that of the employees of the Health Department.
The Court therefore declared that the Circular contravened the rights of freedom of expression and of freedom of conscience of the Respondent, the latter more gravely, and that it was also illegal in that part which prohibited the entry of the newspapers condemned by the Ecclesiastical Authorities in the places therein specified; the Court also ordered that the declaration of the Court should be brought to the notice of the same people who had received the Circular, within two days. The costs were to be paid by the Appellants.

9. The Appellants appealed to the Court of Appeal against the judgment of the Civil Court, and the Court of Appeal (Mamo, C.J. Gouder and Camilleri, JJ.) on the 10th January, 1964 delivered judgment, dismissing the appeal.

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10. In its judgment, the Court of Appeal reviewed the course of the proceedings so far, and set out the relevant parts of the Circular. The Court said that throughout the hearing of the appeal it had been assumed on all sides that the Circular was only intended to govern the activities of the employees of the Government, and not the patients in the hospitals. The Court was delivering judgment on this basis also, but it had to be noticed that even on this basis the number of persons affected, as well as the number of institutions and places all over the two Islands, was considerable. The first question was whether the Circular was cognizable by the Court at all. In considering this question, it was important to point out that the Respondent had to show that there had been an interference with a fundamental right guaranteed by the Constitution, which affected him personally. The Court agreed with the Civil Court in holding that, in princple, the Court did have power in a constitutional case to review administrative acts of the government. The executive and Administrative authorities were limited by the provisions of the Constitution just as much as was the Legislature. It was not necessarily conclusive to consider what had been done before the granting of the Constitution, as was shown by section 120 of the Constitution itself. The fundamental rights and freedoms protected by the Constitution were not a matter of administrative or executive "discretion". Although the Court was not concerned with the policy behind any particular act, it had the duty of deciding upon the constitutionality even of administrative acts which were impugned. Such a power was not unlimited, as was shown by the provisions of section 16 of the Constitution. If the case warranted, the Court would take regard of rules, such as those laid downin the United States of America, as to the proper degree of self-restraint a Court should exercise in a constitutional case of this nature: one of those, which might well be relevant in the present case, was that the Court would not

consider questions of constitutional law going outside the facts of the case with which it was directly concerned.

11. Turning to the merits of the Respondent's own claim, the learned Judges said the Civil Court had held that the Respondent's freedom of expression and of conscience had both been contravened, and further that such contraventions were not justifiable under section 14(2)(a) of the Constitution. The Court of Appeal after consideration could not but agree with the conclusions reached by the Civil Court, though it did not entirely accept the reasons of that Court. As to section 14 of the Constitution, the Courts of Malta, hearing a subject new to them, were entitled to look at decisions of other countries, and in particular India and the United States, for guidance from similar cases decided there. Such cases had decided that freedom of expression, stated in section 14, necessarily involved freedom to express or communicate ideas to another party. If then a number of people, already described as not inconsiderable, were prevented from carrying the Respondent's newspaper in the hospitals and other branches of the Health Department, that was an interference with the freedom of the Respondent to impart his ideas and information, and so an interference with his freedom of expression. As to the interference with the rights granted by section 13 of the Constitution, criticism had been strongly made of the conclusion of the Civil Court in regard thereto. However, the Minister himself had explained that the reason for the limitation imposed by the Circular was solely of a religious character. In this manner there was a contravention of the Respondent's freedom of conscience, which freedom was comprehended under section 13. Although section 13 contemplated principally the freedom of belief and the external manifestation thereof in the form of worship, freedom of conscience also manifested itself in the freedom of expression of the beliefs or religious views of the person concerned. The Court of Appeal accordingly felt that the Civil Court was justified in holding that the act complained of was a restriction of both the fundamental rights described by sections 13 and 14 of the Constitution.

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12. The judgment of the Court of Appeal then went on to consider the further plea of the Appellants that, assuming that the Circular in question involved a restriction of the Respondent's constitutional rights, nevertheless, that restriction was in the circumstances legitimate. The form of section 5 of the Constitution showed, the learned Judges said, that any limitation of a right guaranteed under the Constitution must come within one of the limitations expressly laid down in section 5. The Appellants had invoked paragraph (b) of section 14 (2). It was submitted that the Circular in question should be considered as an administrative act done under statutory power, and so a "thing done under the authority of a law". The law relied upon was section 42 of the Constitution and the Medical and Health Department (Constitution) Ordinance. The Court however considered that the law so invoked was not the law contemplated by section 14 (2) of the Constitution. What was required was a law the object of which was to impose, or at least authorise the imposition of, restrictions upon public officers related to freedom of expression. No such law had been relied upon by the Appellants, and in those circumstances it was not necessary to consider whether the Circular could be considered as reasonably justifiable in a democratic society, within the meaning of the constitutional phrase. Nevertheless, the Court felt that it was its duty to say that, if such a course had been necessary, there did not appear to be any grounds on which it could have held that the Civil Court had wrongly decided this point. For those reasons the appeal would be dismissed with costs.

13. The Appellants respectfully submit that the judgments both of the Civil Court and of the Court of Appeal are wrong and should be reversed. It is respectfully submitted that the Circular in issue in these proceedings was a proper administrative act carried out in the exercise of their statutory functions by the Appellants. Such an exercise of proper discretion on the part of the Appellants in reasonable regulation

of their employees is not cognizable by the Court. It is a right of the Appellants within the meaning of Section 5 of the Constitution to impose restrictions upon the activities of their employees at their place of work or during the hours of work. Section 5 of the Constitution does not provide that no employer of labour can impose restrictions upon his employees, if any of those restrictions are going to be an infringement of the constitutional rights of any third party. If any such interpretation were given to section 5 of the Constitution, it would lead to an impossible situation, which was never contemplated in the making of the Constitution. Since the rights given by sections 13 and 14 of the Constitution claimed by the Respondent are expressly subject to the provisions of section 5 of the Constitution, the rights of the Respondent under sections 13 and 14 cannot prevail against the right of the Appellants to regulate the behaviour of their employees at their place of work.

14. The Appellants further respectively submit that in any event there was no violation of the rights given to the Respondent by section 13 of the Constitution. The Circular did not in any way affect the Respondent's liberty of conscience or his free exercise of religious worship. Section 13 should be read in its normal meaning, and in that sense does not make any reference to any right to express religious views to other people. The fact that the Circular had an origin of a religious nature, assuming that to be the case for the purpose of this part of the argument, does not of itself lead to the conclusion that the Respondent's rights under section 13 had been affected. It is submitted that the Court of Appeal, and the Civil Court, both extended the meaning of section 13 considerably beyond what is a proper interpretation of that section. On such a proper interpretation, the facts of this case do not disclose any breach of that section in relation to the Respondent.

15. The Appellants further submit that the Respondent has not been deprived of any rights given to him under section 14 of the Constitution. The Respondent was not in any way restrained from publishing or distributing his newspaper, nor were the employees of the Government prevented in any

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way from buying that newspaper, or possessing or reading it in any place other than their place of work. Alternatively, even if, in certain circumstances, prohibition of a large part of the population from reading a particular newspaper might be a breach of the editor's constitutional rights under section 14, on the facts of the present case the extent of the restriction was, as Xuereb, J. said, "so small that one may consider it negligible".

16. The Appellants further submit with respect that, even if there was any interference with the Respondent's rights under section 14 of the Constitution, such interference was justified by sub-section (2)(b). The Circular was issued as a proper exercise of the Appellants' statutory powers, and imposed restrictions only upon public officers. The Appellants submit that the Circular was not shewn not to be reasonably justifiable in a democratic society. The Appellants were merely continuing a policy which had in fact been first stated by a previous government, of a different political party. The question of how far government employees can or cannot carry on political activities during the course of their employment is, it is respectfully submitted, always a delicate question, and the facts of the present case do not disclose any action by the Appellants which can be said to be democratically unjustifiable.

17. The Appellants accordingly respectfully submit that the judgment of the Court of Appeal of Malta is wrong and should be reversed and this appeal should be allowed, with costs, for the following, amongst other,

R E A S O N S

1. BECAUSE the Circular was not cognizable by the Courts of Malta;

2. BECAUSE the Circular was a proper administrative act on the part of the Appellants:

3. BECAUSE the Respondent's rights under section 13 of the Constitution have not been infringed:

4. BECAUSE the Respondent's rights under section 14 of the Constitution have not been infringed:

5. BECAUSE if any rights of the Respondent under section 14 (1) have been infringed, the Circular comes within the terms of section 14 (2) of the Constitution:

6. BECAUSE any infringement of constitutional rights of the Respondent disclosed by the facts falls within the maxim, de minimis non curat lex.

J.G. Le Quesne

Mervyn Heald

No. 9 of 1965

IN THE PRIVY COUNCIL

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O N  A P P E A L

FROM THE COURT OF APPEAL OF MALTA

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B E T W E E N:-

THE HONOURABLE DR. PAUL BORG OLIVIER and DR. CARMELO COLEIRO — Appellants

- and -

THE HONOURABLE DR. ANTON BUTTIGIEG M.L.A. — Respondent

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# C A S E  FOR THE APPELLANTS

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