NTN Pty. Ltd. and NBN Ltd. v. The State

Supreme Court
Kidu C.J., Kapi Dep. C.J., Amet, Woods and Barnett JJ.
7 April 1987

Constitutional law – *derogation of qualified rights – burden of proof – legislation – Act of Parliament – validity impugned – burden on parties – Papua New Guinea Constitution (Ch. No. 1) section 38(3)*

Constitutional law – derogation of qualified rights – right to freedom of expression – television broadcasting – Television (Prohibition and Control) Act 1986 – whether prohibition of right of the use of State properties, viz. air waves and frequencies – Papua New Guinea Constitution section 46.

Constitutional law – derogation of qualified rights – right to freedom of expression – television broadcasting – substantive requirements for valid derogation – whether Television (Prohibition and Control) Act 1986 valid – Papua New Guinea Constitution section 38(1).

Constitutional law – derogation of qualified rights – right to freedom of expression – television broadcasting – formal requirements for valid derogation – whether Television (Prohibition and Control) Act 1986 valid – Papua New Guinea Constitution section 38(2).

Constitutional law – interpretation of constitutional law – fundamental rights – qualified rights – liberal and purposive construction – Papua New Guinea Constitution Schedule 1.5.

The first applicant, NTN Pty. Ltd. was a company incorporated in Papua New Guinea and the second applicant NBN Ltd., was its corporate manager, a company incorporated in New South Wales, Australia. By a contract dated 25 May 1985, the previous government entered into an agreement between the applicants and the State for the establishment of a commercial television station in Papua New Guinea. In accordance with this agreement the applicants established a television station and other facilities required for television broadcasting. They were also issued with four different licences for television broadcasting by the Board of Post and Telecommunications Corporation under section 6 of the Radiocommunications Act (Ch. 152) and were ready to commence broadcasting on or about 14 July 1986 – in accordance with the agreement.

However, on 10 July 1986 – after a change of government – the Radiocommunications (Television) Regulations 1986, S.I. No. 7 of 1986 came into force, the effect of which was to prohibit television broadcasting until after 31 January 1988. The applicants then applied to the National Court successfully arguing that their right to television broadcasting by virtue of the licences previously granted to them by the State had been adversely affected by the Regulation, S.I. No. 7 of 1986 upon which the said Regulation was declared invalid on 21 August 1986.

However, on the same date, 21 August 1986, the Television (Prohibition and

Control) Act 1986 was passed by the National Parliament. The Act prohibited the operation of a television station even under licence before 31 January 1988.

The applicants then commenced proceedings in the Supreme Court under section 57(1) of the Constitution (set out below) and sought a declaration that section 3 of the Television (Prohibition and Control) Act 1986 and the whole of the Act were inconsistent with sections 46 and 38 of the Constitution and therefore should be declared invalid and of no effect.

The applicants first argued that as they had been licensed to broadcast television under the Radiocommunications Act (Ch. 152), their right of freedom to communicate ideas and information by television broadcasting under section 46 of the Constitution (set out below) had been invalidly infringed by section 3 of the Television (Prohibition and Control) Act 1986 which is in the following terms:

> 3. Prohibition on operation of a television station prior to 31 January 1988.
>
> (1) A person who operates a television station in Papua New Guinea before 31 January 1988 is guilty of an offence. Penalty: A fine not exceeding K1,000,000.00. Default penalty: A fine not exceeding K500,000.00.
>
> (2) It shall not be a defence to a prosecution under Subsection (1) that a person –
>
> (a) holds a licence under any other Act; or
>
> (b) has entered into an agreement with the State, authorising the operation of a television station.

Section 46 of the Constitution read as follows:

> 46. Freedom of expression.
>
> (1) Every person has the right to freedom of expression and publication, except to the extent that the exercise of that right is regulated or restricted by a law –
>
> (a) that imposes reasonable restrictions on public officeholders; or
>
> (b) that imposes restrictions on non-citizens; or
>
> (c) that complies with Section 38 (general qualifications on qualified rights).
>
> (2) In Subsection (1), "freedom of expression and publication" includes –
>
> (a) freedom to hold opinions, to receive ideas and information and to communicate ideas and information, whether to the public generally or to a person or class of persons; and
>
> (b) freedom of the press and other mass communications media.
>
> (3) Notwithstanding anything in this section, an Act of Parliament may make reasonable provision for securing reasonable access to mass communications media for interested persons and associations –
>
> (a) for the communication to ideas and information; and
>
> (b) to allow rebuttal of false or misleading statements concerning their acts, ideas, or beliefs, and generally for enabling and encouraging freedom of expression."

The respondent State's argument was that when the Television (Prohibition and Control) Act 1986 prohibited the broadcasting of television from a television station, the State was not interfering with the applicant's right to freedom of expression and

publication at all but rather it merely prohibited the use of its property, viz, air waves and frequencies owned by the State. The State further argued that the Act as a whole was to be read as part of the licensing scheme for television broadcasting.

The applicant's second argument was that the Television (Prohibition and Control) Act 1986 did not satisfy the substantive requirements of section 38(1) of the Constitution (set out below) because a prohibition for such a long time was neither "necessary" nor "reasonably" justifiable in a democratic society.

The applicant's third ground of argument was that as the Television (Prohibition and Control) Act 1986 was an Act which purported to regulate or restrict a qualified right such as section 46. For the Act to be valid it would have to comply with the mandatory formal requirement of section 38(2) of the Constitution (set out below), inter alia by expressly stating which of the seven heads of public interest was the purpose which the Act sought to "give effect to". As the Act failed to do so, it was unconstitutional and invalid.

Section 38 of the Constitution is as follows:

38. General qualifications on qualified rights.

(1) For the purpose of this Subdivision, a law that complies with the requirements of this section is a law that is made and certified in accordance with Subsection (2), and that –

(a) regulates or restricts the exercise of a right or freedom referred to in this Subdivision to the extent that the regulation or restriction is necessary –

(i) taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of giving effect to the public interest in –

(A) defence; or
(B) public safety; or
(C) public order; or
(D) public welfare; or
(E) public health (including animal and plant health); or
(F) the protection of children and persons under disability (whether legal or practical); or
(G) the development of under-privileged or less-advanced groups or areas; or

(ii) in order to protect the exercise of the rights and freedoms of others;

or

(b) makes reasonable provision for cases where the exercise of one such right may conflict with the exercise of another, to the extent that he law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

(2) For the purposes of Subsection (1), a law must –

(a) be expressed to be a law that is made for that purpose; and
(b) specify the right or freedom that it regulates or restricts; and
(c) be made, and certified by the Speaker in his certificate under Section 110 (certification as to making of laws) to have been made, by an absolute majority.

(3) The burden of showing that a law is a law that complies with the

requirements of Subsection (1) is on the party relying on its validity.

The respondent responded by arguing that the "ban" being only for a limited period of time was not a prohibition or, even if it was, that it was nevertheless a justifiable restriction in the interest of public welfare.

HELD: Application allowed: Television (Prohibition and Control) Act 1986 declared invalid and of no effect as being ultra vires the Constitution.

(1) That where a "qualified right" such as the right to freedom of expression under section 46 is infringed by legislation, the burden of showing that the legislation complies with section 38 of the Constitution is on the party relying on its validity. This is clear from the terms of section 38(3) of the Constitution (per Kapi D.C.J. *l.* 360) and that in this case the State had to satisfy that burden on a high standard of proof (per Barnett J.: *l.* 1080). It is however not sufficient for a party impugning the legislation to simply make an allegation that his right is affected by the legislation. He must demonstrate that there is a prima facie case that the right is affected (per Kapi D.C.J.: *l.* 360. *Supreme Court Reference No. 2 of 1982, Re Organic Law on National Elections (Amendment) Act 1981* [1981] P.N.G.L.R. 214 adopted.

Thus on the first ground of argument, the Court rejected the State's argument and found that section 3 of Television (Prohibition and Control) Act 1986 constituted an interference with the qualified right of freedom of expression and publication guaranteed by section 46 of the Constitution. The applicants had been granted and were in lawful possession of current licences giving them a legal right to operate television broadcasting. The Act forbade the use of government property for the particular period and in so doing it thereby affected the applicant's right to freedom of expression and publication by means of television broadcasting.

(2) On the second ground (Kidu C.J. and Kapi D.C.J. dissenting): That the Television (Prohibition and Control) Act 1986 satisfied the substantive requirements of section 38(1) of the Constitution for it was a law that "regulates" and "restricts" a qualified right viz, the right to freedom of expression and publication and that the ban for the particular period was a prohibition that was necessary in order to achieve the purpose of public welfare and was also reasonably justifiable in a democratic society taking into account the National Goals and Directive Principles and the fact that there was a lack of government policy on this subject matter and that a Commission of Inquiry for policy formulation was already in progress commissioned by a recently appointed government – and that time would be required to draft the appropriate regulation (per Barnett J.: *l.* 1200).

(3) On the third ground: Section 38 of the Constitution sets out the extent to which a law may validly derogate the qualified right of a person where it sets out the substantive requirements under subsection (1) and the prescribed formal requirements under subsection (2). The Television (Prohibition and Control) Act 1986 failed to satisfy the prescribed formal requirements in that it did not "express" the "purpose" for which it was necessary to restrict the right affected therefore the whole of the Act was declared invalid as

being ultra vires the Constitution and of no effect.

(4) Per Kapi D.C.J. at *l.* 480:

> "... [t]he provisions of the Constitution relating to fundamental rights must be interpreted with a liberal approach to ensure protection of fundamental rights": *Attorney-General of the Gambia* v. *Momodou Jobe* [1984] 1 A.C. 689 (P.C) and *Minister for Home Affairs* v. *Fisher* [1980] A.C. 319 (P.C) followed.

Per Barnett J. at 1.920: In interpreting any substantive provisions of the Papua New Guinea Constitution, it is first necessary to look at the Constitution as a whole and be guided by its spirit as set out in the preamble and the various sections which provide guides to interpretation as pointed out by Prentice D.C.J. as follows:

> The Constitution itself provides many clear finger posts to assist its interpreters. Among these are its requirements that:
> (a) all its provisions are to be given their fair and liberal meaning (schedule 1.5(1), (2));
> (b) all laws are to be interpreted so as to give effect, or not derogate from, the National Goals and Directive Principles where possible (section 25);
> (c) all persons are entitled to certain defined basic rights and freedoms and the full protection of the law (National Goals and Directive Principles, 'Basic Rights (a)'); (section 37);
> (d) the debates on the Constitution and the reports of the Constitutions Planning Committee may be used in and where relevant;
> (e) in interpreting the law the courts shall give paramount consideration to the dispensation of justice, section 158(2) – a provision to be considered to relating to the development of an underlying law (section 20: Schedule 2.3, 2.4, 2.5) and to the principles of natural justice (section 59(1)); *Supreme Court Reference No. 1 of 1977* [1977] P.N.G.L.R. 362 at pp. 373 and 374 adopted.

Other cases mentioned in judgment:

Attorney-General of the Gambia v. *Momodou Jobe* [1984] A.C. 689; [1984] 3 W.L.R. 174 (P.C.)

Attorney-General v. *Antigua Times Ltd.* [1976] A.C. 16; [1975] 3 W.L.R. 232; [1975] 3 All E.R. 81 (P.C.)

Minister for Home Affairs v. *Fisher* [1980] A.C. 319; [1979] 2 W.L.R. 889; [1979] 3 All E.R. 21 (P.C.)

New Brunswick Broadcasting Co. Ltd. and Canadian Radio Television and Telecommunications Commission, Re (1984) 13 D.L.R. (4th) 77 (C.A.)

NTN Pty. Ltd. and NBN Ltd. v. *The State* (unreported judgment of the National Court, No. N555, 21 August 1986)

Société United Docks v. *Government of Mauritius* (1985) A.C. 585; [1985] 2 W.L.R. 114; [1985] 1 All E.R. 864; [1985] L.R.C. (Const.) 801

Supreme Court Reference No. 1 of 1977 [1977] P.N.G.L.R. 362

Legislation referred to in judgments:
Constitution of Papua New Guinea Ch. 1, sections 38, 46, 57, Sch. 1.5
Radiocommunications Act, Ch. 152, sections 5 and 6
Radiocommunications (Television) Regulations 1986, S.I. No. 7 of 1986
Television (Prohibition and Control) Act 1986, sections 3, 4, 6
Vagrancy Act, Ch. 268

Other sources referred to in judgment:
Final Report of the Constitutional Planning Committee, 1974.

Application for review:
NTN Pty. Ltd. and its corporate manager NBN Ltd., who held current licences for television broadcasting, applied to the Supreme Court at first instance under section 57(1) of the Constitution, to enforce a qualified right, namely the right to freedom of communication and publication under section 46 of the Constitution seeking a declaration that section 3 of the Television (Prohibition and Control) Act 1986 and indeed the whole Act was inconsistent with sections 46 and 38 of the Constitution, and was accordingly null and void.

R. O'Regan Q.C. and *Molloy* for the applicants
G. Beaumont Q.C. and *O. Emos* for the respondent

KIDU C.J.

Judgment:

The decision of the court was announced on 10 January 1987 and was that the Television (Prohibition Control) Act 1986 was unconstitutional, in that it contravened section 38(2) of the Constitution.

We now publish our reasons.

The Deputy Chief Justice and Barnett J. have set out, in their judgments, the background to this application as well as the submissions advanced by the parties. It is not my intention to traverse the same grounds.

Preliminary point

As a preliminary point the State argued that the electromagnetic spectrum (or the airwaves) within the borders of Papua New Guinea belong to it (the State) and no person or corporate body has the right to use them without its permission.

Consequently, although the applicants had been granted licences to use the electromagnetic spectrum under the Radiocommunications Act (Ch. No. 152), the Television (Prohibition and Control) Act 1986 prohibited the use of the medium until after 31 January 1988 and the State had every right to do this in respect of its property. This, the argument continued, had nothing to do with the right guaranteed by section 46 of the Constitution.

The State's case on this point was based on the Radiocommunications Act (Ch. No. 152). But nowhere in this Act is there to be found a statement that the electromagnetic spectrum belongs to the State. Its preamble includes the following statement:

> Being an Act relating to radio communications in Papua New Guinea . . .
> (a) *to authorize the Government* to establish, maintain and operate radio

communications; . . .
(my emphasis)

Now if the State owned the resource in question there would be little or no need at all to have an Act of Parliament to authorize the State to establish, maintain and operate radiocommunications. Such an Act would merely set up the controlling or regulating machinery.

Section 5 of the Act was the provision relied on heavily by the State to press this property question. It provides as follows:

> Subject to section 4, the Minister had the exclusive privilege by establishing, erecting, maintaining and operating stations and apparatus for the purpose of –
> (a) transmitting radio communications to, and receiving radio-communications from any place, vehicle, vessel or aircraft in the country; and
> (b) transmitting radio communications to, and receiving radio communications from, any space station or place, vessel or aircraft outside the country.

Careful reading shows that section 5 is not a provision which vests the ownership of the electromagnetic spectrum in the State.

Counsel for the State mentioned no other law which vests the ownership of the electromagnetic spectrum in the State. If there is such other law in existence it was their responsibility to bring it to the notice of the Court. I am, therefore, not satisfied that the State has established its ownership of the resource in question.

Although there is no legislation or law in this country which vests the ownership of the resource in the State I consider that there can be no objection to the State controlling and regulating its use. If there were no controls or regulations, chaos would reign as television stations, without regulation, could use any frequency and at whatever power level they wished. It is therefore in the public interest to have proper regulation and control of the spectrum.

I would dismiss the property argument put up by the State as it has no proper legislative or legal basis.

As to the merits of the application I am in complete agreement with the Deputy Chief Justice.

KAPI D.C.J.

Judgment:

This is an application before the Supreme Court at first instance. It is an application by way of an enforcement of a fundamental right under section 57 of the Constitution. The right which is sought to be enforced is the right to freedom of expression under section 46 of the Constitution, more specifically, the right to freedom of mass communication media, that is the right to communicate ideas and information through television.

The first applicant, NTN Pty. Limited, is a company incorporated in Papua New Guinea. The second applicant is a company incorporated in Newcastle, New South Wales, Australia and is the corporate manager of NTN.

By a contract dated 25 May 1985, an agreement was reached between the applicants and the State for the establishment of a commercial television station in

Papua New Guinea. This contract was reached with the previous Government. In accordance with this contract, the applicants established a television station and other necessary requirements for broadcasting of television, including licences for broadcast. In accordance with clause 4.2 of this agreement, the applicants would have commenced broadcast on about 14 July 1986. However, on 10 July 1986, Radiocommunications (Television) Regulations 1986 (Statutory Instrument No. 7 of 1986) came into force. This had the effect of prohibiting broadcast of television until after 31 January 1988. This resulted in litigation between the parties before the
340 National Court. In the National Court, two major issues emerged. The first related to whether or not the applicants would be in breach of the agreement, if it commenced broadcasting of television in absence of regulatory legislation. The second issue related to whether or not the Radiocommunications (Television) Regulations 1986 were void. The National Court ruled in favour of the applicants on 21 August 1986. See *NRN Pty. Limited & NBN Limited* v. *The State* – judgment of the Chief Justice numbered N555 dated 21 August 1986. The ruling gave no comfort to the applicants because on the same date a new Act which was passed by the National Parliament, the Television (Prohibition & Control) Act 1986, came into force. Under section 3 of the Act, the applicants could not exercise the right to
350 broadcast television until 31 January 1988. By this application, the applicants seek a declaration that section 3 of the Act and indeed the whole of the Act is inconsistent with the terms of sections 46 and 38 of the Constitution and, therefore, should be declared invalid and of no effect. That is the substance of the cause of action before this Court.

It has not been disputed by counsel for the State that the applicants, which are corporations, come within the definition of "every person" under section 46(1) of the Constitution. This view must be correct. See sections 22 and 34 of the Constitution. See also *Attorney-General* v. *Antigua Times Limited* [1976] A.C. 16 and *Société United Docks* v. *Government of Mauritius* [1985] 1 A.C. 585; [1985] 2 W.L.R. 114;
360 [1985] 1 All E.R. 865; [1985] L.R.C. (Const.) 801.

Onus of Proof

It is clear that the right to freedom of expression may be "regulated" or "restricted" by a law but that law must comply with section 38 of the Constitution. The central issue raised in this case relates to the question of whether or not the Television (Prohibition & Control) Act 1986 complies with section 38. Where this issue arises, the burden of showing that the legislation complies with section 38 of the Constitution is on the party relying on its validity. This is clear from the terms of section 38(3) of the Constitution. However, it is not sufficient for a party impugning the legislation to simply make an allegation that his right is affected by legislation.
370 He must demonstrate that there is a prima facie case that the right is affected. In this regard, I adopt what I stated in *Supreme Court Reference No. 2 of 1982, Re Organic Law On National Elections (Amendment) Act 1981* [1981] P.N.G.L.R. 214. The nature of evidence required to establish a prima facie case depends on the manner in which the fundamental right is said to be affected by the legislation.

In the present case, the applicants argue that they have all the necessary requirements in law to freely exercise the fundamental right to communicate ideas and information through broadcasting of television. They argue that section 3 of the Television (Prohibition & Control) Act 1986 affects the right by prohibiting the

operation of a television station. The State, on the other hand, argues that section 3 does not deal with the right guaranteed by section 46. They argue that it deals with a scheme of licence to use airspace for broadcasting. Counsel for the State relies heavily on the property argument from a passage in a Canadian Supreme Court decision *Re New Brunswick Broadcasting Company Limited and Canadian Radio Television and Telecommunications Commission* (1984) 13 D.L.R. (4th) 77, 88-89.

> In my opinion, the argument confuses the freedom guaranteed by the Charter with a right to the use of property and is not sustainable. The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property and subject to the licensing and other provisions of the Broadcasting Act. The appellant's freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence to operate a broadcasting undertaking. It would have the same freedom as anyone else to air its information by purchasing time on a licensed station. Nor does the Charter confer on the rest of the public a right to a broadcasting service to be provided by the appellant. Moreover, since the freedom guaranteed by para. 2(b) does not include a right for anyone to use the property of another or public property, the use of which was subject to and governed by the provisions of a statute, there is, in my opinion, no occasion or need to resort to section 1 of the Charter to justify the licensing system established by the Broadcasting Act.

It is argued by the State that section 3 deals with the question of licence to use property, airspace and frequencies, the right of freedom of expression is not affected at all. If this argument was accepted, I would have to conclude that the applicants failed to establish a prima facie case. That of course would be the end of the matter.

Without expressing any view on the correctness or otherwise of the decision of the Supreme Court of Canada on the property argument, the first question to be determined on this issue is the subject matter with which section 3 of the Act is concerned. In the *New Brunswick* case, there is no doubt that the appropriate authority limited the renewal of a broadcasting licence to a shorter period. In the present case, counsel for the State submitted that section 3 of the Act is to be read together with section 4 in the sense that it is part of the licensing scheme.

Under the Radiocommunications Act, the applicants have been granted four different types of licences to operate the television station. There was some suggestion by counsel for the State that this Act does not apply to television broadcasts because the words "television station" have not been defined under the Act. I cannot accept this argument. The Act is widely worded to include television broadcasts. For example, the term "broadcasting service" is defined to include television transmission. This Act sets out a scheme of licensing to control all forms of broadcasting services. Under this scheme, the applicants have been granted four different licences for broadcast. All these licences were granted by the Board of Post

& Telecommunications Corporation under section 6 of the Radio communications Act, Ch. 152. If the property argument was correct, the applicants have been given permission to use such property. Licence to use this property does not expire until 29 May 1987.

Having been licensed to use this property, the applicants are entitled to exercise the right guaranteed by section 46 of the Constitution.

It is interesting to note that the right to use the property given under the licence under section 6 of the Act may be restricted or prohibited by the Minister under section 7 of the Act. This has not been done in this case.

What then is the effect of section 3 of the Television (Prohibition & Control) Act 1986? It is in the following terms:

> Prohibition on Operation of a Television Station prior to 31st January 1988.
>
> (1) A person who operates a television station in Papua New Guinea before 31st January 1988 is guilty of an offence.
> Penalty: A fine not exceeding K1,000,000.
> Default penalty: A fine not exceeding K500,000.
>
> (2) It shall not be a defence to a prosecution under subsection 1 that a person –
>
> (a) holds a licence under any other Act; or
> (b) has entered into an agreement with the State, authorising the operation of a television station.

Counsel for the State has maintained his submission that section 3 of the Act deals with the use of property and therefore deals with the question of a licensing system to be read together with section 4 of the Act. Herein lies the weakness of the State argument. I reject this argument. The analysis of section 3 reveals:

(a) It prescribes a criminal offence and a penalty. It does not deal with a licensing scheme. However, in effect, it affects the right of the applicants to the use of the property granted by the licence.
(b) It acknowledges a licensing scheme under other legislation, and
(c) it acknowledges an agreement reached with the State.

Section 3 does not deal with the question of revocation or even variation of the use of a licence. There can be no question that the licence granted under the Radiocommunications Act gives the applicant the right to use the property. That is the significant distinguishing feature of this case from the *New Brunswick* case. Section 3 under our Act has done something different – it has prohibited the right of the applicants to communicate ideas and information through the operation of the television station. If this is not a direct affront to the exercise of the freedom of expression, then I don't know what is.

I uphold the submissions by counsel for the applicants, they are entitled by virtue of licences to use the property under the law and that section 3 of the Act prevents them from exercising the fundamental right guaranteed under section 46 of the Constitution. I am satisfied that the applicants have shown a prima facie case that their fundamental right has been affected by this Act.

I must now consider whether or not the Act complies with section 38 of the Constitution. As I have pointed out before, the onus is on the State to prove that the Act comes within the permissible limits.

Before I discuss the contested matter of interpretation of the provisions of the Constitution, it is appropriate at this point to emphasize the significance of the onus on the State. Our Constitution in this regard is unique. In other jurisdictions, the question of onus has been left to the courts to decide. The Constitution has taken it upon itself to express which of the parties has the onus of proving that an Act is valid. This in itself is an indication by the Constitution of the significance given to the provisions relating to fundamental rights. To the legislature, which may pass laws which may regulate or restrict a right, it must explain clearly the reasons for such regulation and restriction. This is made absolutely clear by the terms of section 38(2) of the Constitution. It is in this context that the provisions of the Constitution relating to fundamental rights must be interpreted with a liberal approach to ensure protection of fundamental rights. See also schedule 1.5 of the Constitution. The courts in other jurisdictions have also adopted the same approach. See *Attorney-General of the Gambia* v. *Momodou Jobe* [1984] 1 A.C. 689; [1975] 3 W.L.R. 174 and *Minister for Home Affairs* v. *Fisher* [1980] A.C. 319; [1979] 2 W.L.R. 889; [1979] 3 All E.R. 21.

Formal requirements under section 38(2) of the Constitution

The relevant parts of section 38 are as follows:

> Section 38(1). For the purposes of this subdivision, a law that complies with the requirements of this section is a law that is made and certified in accordance with subsection (2) . . .
>
> (2) For the purposes of subsection (1), a law must –
>
> (a) be expressed to be a law that is made for that purpose; and
>
> (b) specify the right or freedom that it regulates or restricts; and
>
> (c) be made and certified by the Speaker in his certificate under section 110 (*Certification as to making of laws*) to have been made by an absolute majority.

It was submitted by counsel for the applicants that a failure to comply with any of the requirements under section 38(2) would render an Act invalid. Counsel for the State conceded this and in my view quite correctly.

The requirement under section 38(2)(a) is in dispute between the parties. The question is whether the Television (Prohibition & Control) Act 1986 has been "expressed to be a law that is made for that purpose". What is the purpose that must be expressed? The meaning of the words "that purpose" is to be interpreted in the light of the whole section. Section 38(1) of the Constitution sets out the purposes for which a law may be made when regulating or restricting a right. A law may be made for any one of three different purposes:

(1) To give effect to public interest in defence, public safety, public order, etc. (Section 38(1)(a)(i).)

(2) To protect the exercise of the rights and freedoms of others. (Section 38(1)(a)(ii).)

(3) To make reasonable provisions for cases where the exercise of one such right may conflict with the exercise of another. (Section 38(1)(b).)

For the purpose of this provision, the Act must set out clearly the particular purpose for which the law is made. It is not sufficient for purposes of this provision to simply say that the Act is to regulate or restrict a fundamental right. That would

not be compliance with section 38(2) of the Constitution.

A good illustration of compliance with section 38(2)(a) appears in the Vagrancy Act, Ch. 268. The preamble to the Act reads:

> Being an Act to regulate or restrict the right or freedom referred to in subdivision 3.3(c) of the Constitution namely the right to freedom of movement conferred by section 52 of the Constitution *for the purpose of giving effect to the public interest in public order and public welfare* taking into account the National Goals and Directive Principles and the Basic Social obligations and in particular the following directive principles and social obligations:
>
> (a) Integral human development; and
>
> (b) Traditional villages and communities to remain as viable units in Papua New Guinea society; and
>
> (c) Each person to work according to his talents in socially useful employment; and
>
> (d) Each person to respect the rights and freedoms of others ... (my emphasis)

The Act in question provide as follows in section 1(1):

> This Act to the extent that it regulates or restricts a right of freedom referred to in division 3.3(c) (Qualified Rights) of the Constitution, namely the right to freedom of expression conferred by section 46 of the Constitution, is a law that is made for that purpose.

While the section specifies the right which it restricts, it does not go on to explain or to express the purpose why such a right should be restricted. The words "is a law that is made for the purpose" within the context of section 1, simply means the purpose or the reason for which the law is to restrict the right of freedom of expression. The section falls short of setting out the purpose for restricting the right as set out in the case of the Vagrancy Act. The omission of this is fatal to the State's case. For this formal defect, the whole Act is invalid and therefore of no effect.

On this ruling, it is not necessary to deal with all the other issues. However, there are important issues that have been fully argued; I intend to make obiter dicta remarks concerning them.

Section 46 – "Regulated" and "Restricted"

It is clear from the terms of section 46 of the Constitution that the freedom of expression may be "regulated" or "restricted" by law.

"Regulated"

This has been interpreted in the *Supreme Court Reference No. 2 of 1982, Re Organic Law on National Elections (Amendment) Act 1981* [1982] P.N.G.L.R. 214. I adopt what I said in that case. It is clear that prohibition does not come within the meaning of "regulation".

"Restricted"

It was submitted by counsel for the applicants in effect that what I said in relation to the term "regulated" in *Supreme Court Reference No. 2 of 1982* should also govern the meaning of the word "restricted". On the other hand, counsel for the State

submitted that the words "regulated" and "restricted" should be given distinct meanings. He submitted that the Court should adopt the obiter dicta remarks by Kearney D.C.J., in *Supreme Court Reference No. 2 of 1982* at p. 225. With respect, I would adopt the interpretation given by Kearney D.C.J. in that the word "restricted" may extend to prohibition. In coming to this conclusion, I have borne in mind that a restriction which amounts to prohibition may be necessary to give effect to the public interest in defence, public safety, etc. Such a restriction takes into account the rights and freedoms of others (section 32(2)(a) of the Constitution). The fact that section 3 is prohibitive is permissible by the word "restriction" in section 38(1)(a) and "restricted" under section 46(1) of the Constitution.

Is the restriction imposed by the Act

> necessary –
> (i) taking account of the National Goals and Directive Principles and the Basic Social Obligations for the purpose for giving effect to the public interest in –
> (D) public welfare . . . to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind?

Several issues arise for consideration. The State must satisfy the Court that:

(1) The restriction by the Act is necessary for the purpose of giving effect to the public interest in public welfare. For the purposes of discussing this issue, I have assumed that the purpose of the Act was to give effect to the public interest in public welfare.
(2) That the Act is reasonably justifiable in democratic society having a proper respect for the rights and dignity of mankind.

"Necessary"

The word "necessary" relates to section 38(1)(a)(i) – for the purpose of giving effect to the public interest in public welfare of section 38(1)(a)(ii) – in order to protect the exercise of the rights and freedoms of others. Section 38(1)(b) used the terminology "reasonable provision".

Is the Act "necessary" for the purpose of giving effect to the public interest in public welfare? The "public interest" relates to rights or interests of the community at large. "Public welfare" relates to the benefit or the good of the public. These terms speak for themselves, it is not necessary to give any further interpretation than given above. In the present case, the State argued that there are factors which give rise to a matter of public interest in the areas of public welfare. The main argument is that television is a sophisticated medium which has a dramatic and powerful impact on the people both individually and collectively. It is argued that the impact that it is likely to have on the people includes:

(a) impact of television on the cultures and languages of the people of Papua New Guinea;
(b) impact on the traditional ways of life;
(c) invasion of alien cultural values on the people of Papua New Guinea;
(d) a promotion of materialism in the minds of people through commercial television;

(e) the potential of television on education;
(f) the question of control of foreign ownership and control of television;
(g) use of foreign programmes, standards and censorship considerations.

Counsel for the applicants did not seriously contest, either in cross-examination of the State witnesses or submissions, that there was a question of public interests in public welfare. Having regard to the National Goals and Directive Principles and the Basic Social Obligations, I am of the view that matters raised by the State do raise a matter of "public interest" in "public welfare".

The question is, is the restriction by the Act necessary?

It would be proper in the light of the whole of section 38 to imply that what the section has in mind is "reasonably necessary". See the concept of "reasonableness" and "reasonably justifiable" in section 38.

I have already indicated that under section 46 of the Constitution, freedom of expression may be restricted. But that restriction is qualified by section 38 of the Constitution. Is the restriction necessary? The word "necessary" implies that fundamental rights should not be regulated or restricted if there is another way of effectively protecting the public interest. This is consistent with the spirit of the Constitution that the freedom should be enjoyed with the least amount of restriction. See section 32(1) of the Constitution. This is also apparent from the spirit of section 38 of the Constitution, in that, rigid requirements are demanded for law which either "regulates" or "restricts" a fundamental right. It is therefore, proper to inquire whether there is an alternative way of protecting the public interest without unnecessarily restricting the enjoyment of a fundamental right.

Is it reasonably necessary to prohibit television for the purpose of protecting the public interest in public welfare? Whether or not it is reasonably necessary to prohibit the exercise of fundamental rights depends on the public welfare for which the prohibition seeks to put into effect.

The evidence called by the State may be characterized into three basic reasons:

(1) Television would have adverse effects on the people through the types of programmes that may be broadcast. For example, through commercial television, the people of Papua New Guinea may become materialistic.
(2) Television would destroy the cultures and languages of our people.
(3) The Government has not carried out any proper assessment of the introduction of television in Papua New Guinea.

A Commission of Inquiry has been set up to inquire into all these matters. It is argued that for the reasons stated above, television has been prohibited until 31 January 1988 to protect the public interest and to allow the Government to inquire into the matter. As I understand the submissions by counsel for the applicants, they do not dispute that there are such dangers and that no proper inquiry has been made by the State on television. He submits that the evidence before the Court also shows that there are advantages and benefits to be gained from television, that television is not so evil as to require such restriction as is imposed by the Act. All the witnesses that were called by the State in cross-examination admitted that there are advantages and benefits in television. For example, Mr Jacob Simet of the Institute of Papua New Guinea Studies in his affidavit states that television can be used as a tool to achieve national integration and to develop national consciousness. Also, in

para. 8 of his affidavit, he states that there are benefits relating to education, current and formal entertainment and even the development of unity as a nation. As I understand counsel for the State, he does not contest that there are advantages and the benefits of television.

The question is not whether this is the right time to introduce television in Papua New Guinea. That cannot be an issue as far as section 46 of the Constitution is concerned. It guarantees the right to communicate ideas and information through mass media such as television. The question is whether it is necessary to completely prohibit television until 31 January 1988.

Let me examine the reasons advanced by the State.

The adverse effects of T.V. on the people

This would depend on the type and the contents of programmes that are presented. This is recognized in all countries all over the world. Measures are taken to protect the public. To a large extent, this is already protected by censorship laws in Papua New Guinea.

Counsel for the State attempted to argue that T.V. may have a different effect of a different nature, such as, affecting traditional working habits or making people materialistic by watching commercial advertising. No evidence has been called to prove this. In this country, we have had other forms of mass media such as newspapers, radio, films, videos, cable television as well as satellite television for some time. No evidence was led by the State to show the effect of these various forms of mass media on the people. These are matters which can be regulated. I am not convinced that this is a valid reason for prohibiting television.

T.V. would destroy the cultures and languages of our people

I fail to see how T.V. would destroy cultures and languages. I can appreciate the general effect on our people of introducing modern media, in the same way that everything else has done. That is inevitable in modern Papua New Guinea. Our culture is dynamic and it will develop from time to time. We cannot make it stand still. That is not to say that we should not preserve some of our culture. The T.V. industry may help to preserve some of our old traditions in documentaries for generations later. Radio has not destroyed our culture or languages. At least no evidence was called to prove this. If any aspect of T.V. can be found to be destructive to culture and language, it can be regulated. No evidence has been called to persuade me that this is a valid reason for prohibiting T.V.

No proper assessment in introduction of T.V.

It seems to me that this is the basic reason for prohibiting T.V. Mr Kwarara, the Acting Minister for Telecommunications, made this quite clear: that no proper review of government policy was carried out by the previous Government before entering into a contract with the present applicants to introduce T.V. The present Government's view is to prohibit T.V. and then work out how it may regulate it. They want until 31 January 1988 to do this. I would reject this argument for the following reasons.

First, it is now eleven years since Independence, when the Constitution guaranteed this fundamental right. The authorities have had sufficient time in which to consider policy matters. Failure to do this rests not only with the present

Government but with all governments since Independence. Their failure to do this is no valid reason to postpone the exercise of a fundamental right. I consider that interim measures can be drawn up to regulate the broadcasting of television. Indeed, the Minister for Telecommunications met with the officials of NTN to draw up regulations. I am not convinced that the Government with technical advice could not draw up interim standards. The project agreement would lay the basics for drawing
720 up interim standards. I am not suggesting that they should adopt it. That could be improved to include other matters which are necessary in the public interest in public welfare. I gained the impression from the whole of the evidence that this has not been attempted by the Government.

I consider that the concern by the State is a proper one and on the balance of interests the State would adequately protect the public by regulating the disadvantages of television. This would enable others to exercise the right to broadcast and the public to enjoy the advantage without doing any harm to anyone. I consider this to be a fair interpretation and application of the fundamental rights provisions.

730 For these reasons, I consider section 3 of the Act to be inconsistent and therefore void and of no effect.

I need not consider the question of severability of the section from the rest of the Act because as I have held the whole Act is void for non-compliance with section 38(2) of the Constitution.

"Reasonably justifiable in a democratic society"

That a law is necessary does not necessarily mean that it is also reasonably justifiable in a democratic society. In fact, a law which is necessary for any purpose stated in section 38(1) is yet limited by the words "that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity
740 of mankind."

What is reasonably justifiable in a democratic society is not a concrete or precise concept. It entails different policy and executive considerations. Traditionally, courts are kept out of this field. This is a new field of intrusion by the Constitution. The Court is to be careful in saying what it is. I do not think it is a concept which can be precisely defined by the courts. There is no legal yardstick. What has been decided by courts can only be a a guide as to the nature of this illusive principle. However, the fundamental thread which runs through all this is that it must have regard for a "proper respect for the rights and dignity of mankind." It is in this context that I adopt what I said in *Supreme Court Reference No. 2 of 1982, Re Organic Law On*
750 *National Elections* (Amendment) Act 1981 [1982] P.N.G.L.R. 214. I have one correction to make. After I discussed the proper principles, I stated that proper test was a subjective one. The test really is an objective one. What I should have said was the application of the proper test must be considered within the context of the subject matter or circumstances of each case.

In the present case, the applicants have established a television station with the necessary licences to broadcast. This include employment of personnel. The means of earning a livelihood depends on the operation of the television station. Although the agreement was entered into with the previous Government, the present Minister for Post & Telecommunications held meetings with the officials of the applicant
760 companies and indicated that regulations should be passed during 1986. At that

time, indications were that they would eventually broadcast in 1986. The applicants were all set to broadcast when the Government introduced the Act which came into force on the very day of the broadcast. There is an element of unfairness and injustice in this. The matter in which television has been prohibited in the circumstances of this case, has no proper respect for the rights of the applicants in establishing all the necessary facilities and the employment of personnel whose level depends on the operation of the television station. In a democratic society such as ours, the interest of everyone must be taken into account. If television is prohibited in the manner it has been done in this case, little regard is given to the applicants
770 and the expense of establishing the station as well as the interest of those who are employed to operate the station. There is also a correspondent right to the public who are entitled to receive the broadcast.

The appropriate solution to this would be to regulate broadcast of television in the manner I have described previously. This would take into account the interests of everyone in the society.

For these reasons, I find that this law is not reasonably justifiable in a democratic society and is therefore void.

AMET J.

I agree with the decisions of Kapi D.C.J. and Barnett J., that the Television
780 (Prohibition & Control) Act 1986 does not satisfy the formal requirements of the Constitution, section 38(2)(a). It does not, in its preamble , "express" the "purpose" for which it was "necessary" to "regulate or restrict" the right. Such a purpose may be any one or a number of "public interests" enumerated under section 38(1)(a)(i)(A-C) or (ii), which it was necessary to regulate or restrict the "right" to give effect to.

The formal defect of non-compliance with this requirement is, I agree, fatal to the respondent's case. The whole Act is therefore invalid as being ultra vires the Constitution and of no effect.

In relation to the requirements of section 38(1), I am in complete agreement with the judgment of Barnett J., and have nothing further to add.

790 **WOODS J.**

I agree with the reasoning of my brother Barnett J., and, whilst I find that the Television (Prohibition & Control) Act 1986 is a law which regulates and restricts the right to freedom of expression and publication and that the Act satisfies the substantive requirements of section 38(1) of the Constitution, I find that the Act does not satisfy the formal requirements of section 38(2) of the Constitution and is therefore ultra vires the Constitution and is invalid and of no effect.

BARNETT J.

The first applicant in this application, NTN Pty. Limited, is registered in Papua New Guinea, owns a television station and is the holder of a current licence to
800 broadcast television transmission, which was issued under the Radiocommunications Act, Ch. No. 152.

The second applicant is a company incorporated in Australia and is the manager of NTN. They are both represented by the same counsel and, with regard to the constitutional issues raised, the interests of the two applicants are identical.

The respondent is the State of Papua New Guinea.

The circumstances of the previous dealings between the applicants and the respondent, which led the applicants to successfully challenge the validity of the Radiocommunications (Television) Regulations 1986 in the National Court, have been clearly set out in the judgment of the Deputy Chief Justice and need not be
B10 repeated here. Having succeeded in the National Court the applicants intended to commence broadcasting television.

This application, which comes before the Supreme Court at first instance, arises from the fact that just as they were about to commence broadcasting television in Papua New Guinea, pursuant to their licence and in accordance with a Project Agreement with the previous Government, the present Government introduced a bill into the National Parliament which was promptly enacted as the Television (Prohibition & Control) Act 1986 and which prevented them from making television broadcasts. Section 3 and 6 of the Act read as follows:

B20 (3) Prohibition in Operation of a Television Station prior to 31 January 1988.

(1) A person who operates a television station in Papua New Guinea before 31st January 1988 is guilty of an offence.
Penalty: A fine not exceeding K1,000,000.
Default Penalty: A fine not exceeding K500,000.

(2) It shall not be a defence to a prosecution under subsection (1), that a person –
(a) holds a licence under any other Act, or
(b) has entered into an Agreement with the State, authorizing the
B30 operation of a television station.

(6) Offence.

(1) A person who, after 31st January 1988, operates a television station –
(a) without a valid licence under this Act; or
(b) except in accordance with the conditions of a licence under this Act, is guilty of an offence.
Penalty: A fine not exceeding K1,000,000.
Default Penalty: A fine not exceeding K500,000.

(2) It shall not be a defence to a prosecution for an offence under subsection (1), that a person –
B40 (a) holds a licence under any other Act; or
(b) entered into an Agreement with the State, authorizing the operation of a television station.

As a consequence of the enactment of this Act the applicants are forbidden to broadcast television before 31 January 1988. They seek a declaration that the Act violates their right to freedom of expression and publication guaranteed by section 46 of the Constitution, which reads as follows:

46. Freedom of Expression.

B50 (1) Every person has the right to freedom of expression and publication, except to the extent that the exercise of that right is regulated or restricted by a law –

(a) that imposes reasonable restrictions on public office-holders; or
(b) that imposes restrictions on non-citizens; or
(c) that complies with section 38 *(general qualifications on qualified rights).*

(2) In subsection (1), "freedom of expression and publication" includes –
(a) freedom to hold opinions, to receive ideas and information and to communicate ideas and information, whether to the public generally or to a person or class of persons; and
(b) freedom of the press and other mass communications media.
(3) Notwithstanding anything in this section, an Act of the Parliament may make reasonable provision for securing reasonable access to mass communications media for interested persons and associations –
(a) for the communication of ideas and information; and
(b) to allow rebuttal of false or misleading statements concerning their acts, ideas or beliefs,
and generally for enabling and encouraging freedom of expression.

Section 46 creates a qualified right which can be regulated or restricted by a law of the type referred to in section 46(1)(a)(b) and (c). As far as the Television (Prohibition & Control) Act 1986 is concerned, to be valid in the circumstances in which it was enacted it must comply with section 38 of the Constitution, which provides as follows:

38. General Qualifications on Qualified Rights.
(1) For the purposes of this Subdivision, a law that complies with the requirements of this section is a law that is made and certified in accordance with subsection (2), and that –
(a) regulates or restricts the exercise of a right or freedom referred to in this Subdivision to the extent that the regulation or restriction is necessary –
(i) taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of giving effect to the public interest in –
(A) defence; or
(B) public safety; or
(C) public order; or
(D) public welfare; or
(E) public health (including animal and plant health); or
(F) the protection of children and persons under disability (whether legal or practical); or
(G) the development of under-privileged or less advanced groups or areas; or
(ii) in order to protect the exercise of the rights and freedoms of others; or
(b) makes reasonable provisions for cases where the exercise of one such right may conflict with the exercise of another, to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

In commencing the task of interpreting any of the substantive provisions of the Papua New Guinea Constitution it is necessary to first look at the Constitution as a whole. Although they are said to be non-justiciable, the National Goals and Directive Principles must be given effect wherever it is fairly possible to do so without violating the meaning of the words used.

Looking at the Constitution, its concepts are not dissimilar from many other constitutions which have been influenced by Western political experiences. The legal language too is familiar. Perhaps this is not surprising as the Deputy Chairman of the Constitutional Planning Committee was a Roman Catholic Priest and its advisers were Western-trained lawyers and social scientists. It sets the rules for a democratic system of government of the "Westminster" type with the three basic governmental powers adequately separated and the basic rights cherished by Western liberal thinkers carefully protected, including the right of freedom of expression and publication.

This familiar type of constitution has, however, been enacted for a national consisting of many, many different groups. There was a substantial input into it by the ordinary people during the extensive public consultations and, though they were laymen being advised by western experts using western legal languages, the members of the Constitutional Planning Committee made a determined effort to try to express in laymen's language the principles and the spirit which were intended to enlighten the legal prose. They gave specific directions that courts and other governmental bodies interpreting the Constitution should ascertain and be guided by its spirit. These directions are found in the preamble and in various sections which provide guides to interpretation.

As was pointed out by Prentice D.C.J.:

> The Constitution itself provides many clear fingerposts to assist its interpreters. Among these are its requirements that:
>
> (a) all its provisions are to be given their fair and liberal meaning (schedule 1.5(1),(2);
>
> (b) all laws are to be interpreted so as to give effect to, or not derogate from, the National Goals and Directive Principles – where possible (section 25);
>
> (c) all persons are entitled to certain defined basic rights and freedoms and the full protection of the Law (National Goals and Directive Principles, "Basic Rights (a)"); (section 37);
>
> (d) the debates on the Constitution and the reports of the Constitutional Planning Committee may be used in aid where relevant;
>
> (e) in interpreting the law the courts shall give paramount consideration to the dispensation of justice, section 158(2) – a provision to be considered in association with those relating to development of an underlying law (section 20: schedule 2.3, 2.4, 2.5) and to the principles of natural justice (section 59 (1)). *(Supreme Court Reference No. 1 of 1977* [1977] P.N.G.L.R. 362, 373 and 374).

It is no spelling error that the last word of the first paragraph of the Preamble is "peoples". The first words of the Constitution sound the call of a nation of united people: "WE THE PEOPLE OF PAPUA NEW GUINEA", but the root from which this Constitution has grown is:

> By authority of our inherent right as ancient free and independent peoples.

The most unique and striking feature of this Constitution, then, is its Preamble. It sets out an imperative direction of all governmental bodies and all people to accept the diversified nature of the peoples of this country as its greatest strength. I

interpret it as a direction to appreciate the underlying Melanesian principles common to those diverse peoples and, with the aid of the more recently introduced concepts of Christianity, to build upon those underlying Melanesian principles a unified nation respecting both the "dignity of the individual and community interdependence".

960 It is commonplace to say that courts should endeavour to apply not only the letter of the law but also the spirit. This Constitution endeavours to raise this tired legal cliché to the position of guiding principle. It firstly, in its Preamble, focuses attention on the spirit of the Constitution in phrases which almost glow with light. Then it directs all governmental bodies, especially this Supreme Court, to endeavour to interpret the letter of the written sections in a way which gives effect to, or at least is not inconsistent with, the spirit illuminated in the Preamble – notably in the National Goals and Directive Principles.

The application before the Court has been argued as a conflict between the right to freedom of expression and publication set out in section 16, which the applicants 970 seek to enforce, and one of the basic principles of the nation – "national identity, integrity and self respect", which the respondent State seeks to protect. It is a case then which raises issues of profound significance.

Freedom of expression and publication is declared by the Constitution to be one of the qualified rights of all persons. Section 46(2) defines it to include freedom to "... receive ideas and information and to communicate ideas and information". It also includes "freedom of the press and other mass communications media", such as television. Freedom of expression and publication may be "regulated or restricted" by a law which complies with section 38 and is "for the purpose of giving effect to the public interest in ... [inter alia] ... public welfare."

980 The basis of the applicants' case is, firstly, that the Television (Prohibition & Control) Act 1986 does more than "regulate or restrict" the freedom of expression and publication: that it *prohibits* it, so far as the broadcasting of television is concerned, for a period of seventeen (now fourteen) months. Secondly, the applicants claim the Act does not satisfy the substantive requirements of section 38(1) because a ban for such a long time is neither "necessary" nor "reasonably justifiable in a democratic society."

Thirdly, the applicants challenge the Act as failing to satisfy the mandatory formal requirements of section 38(2) that it must express which of the seven heads of public interest it is the purpose of the Act to "give effect to."

990 The respondent State asserts that the ban, being only for a limited period of fourteen months, is not a prohibition or, even if it is, that it is nevertheless a justifiable restriction in the interest of public welfare. It asserts that the period of fourteen months is necessary for it to put controlling regulations into place. The public interest it seeks to protect is: "(D) public welfare" including, amongst other things, "national identity, integrity and self respect", about which the Preamble to the Constitution provides:

> that we guard with our lives our national identity, integrity and self respect.

The evidence produced by the State is aimed at proving that television, being such 1000 a powerful media, can, if not properly regulated and restricted by law, amount to such an invasion by foreign ideas and life-styles as to pose a very real threat to national identity.

It sought to gain the needed time by introducing the Act into Parliament in a manner which seems unfair to the applicants. The State insists, however, that, in the circumstances, the restrictions were both necessary to protect public welfare and reasonably justifiable in a democratic society. It denies any non-compliance with section 38(2).

As a preliminary point, however, the State first argued that the Act merely regulated the right to broadcast on the State-owned electromagnetic waves and
1010 therefore did not really affect the right of freedom of expression and publication at all.

I shall consider the application in three stages.

(1) Does the Television (Prohibition & Control) Act 1986 affect the right of freedom of expression and publication guaranteed by section 46?
(2) If so, does the Television (Prohibition & Control) Act 1986 regulate and restrict the right of freedom of expression and publication in a way which satisfies the substantive requirements of section 38(1)?
(3) If so, does the Television (Prohibition & Control) Act 1986 satisfy the
1020 formal requirements of section 38(1)?

(1) Does the Act affect the right of freedom of expression and publication?

The State argues that to operate a television station involves broadcasting radio communications by means of electromagnetic waves. These electromagnetic waves are State-owned property and nobody has a *right* to use State property. The right to use the electromagnetic waves has previously been regulated by the Radiocommunications Act, Ch. No. 152, under which the applicant had already been issued a licence. When the Television (Prohibition & Control) Act 1986 banned the broadcasting of television from a television station the State was merely prohibiting
1030 the use of its property for a limited period – not interfering with the right to freedom of expression and publication at all.

I have two reactions to this argument.

Firstly, it unwisely grafts the legal concepts of property and ownership into an area of activity where it seems quite out of place. The transmission of television signals involves the creation of vibrations which then travel through the ether at particular frequencies. It is quite within the State's power to regulate this activity and such regulation is necessary, if for no other reason than to avoid chaos in the field of broadcasting.

The power to regulate broadcasting comes from the National Parliament's basic
1040 power to make laws for the good government of the country. It is not necessary or appropriate to base the power upon some spurious notion of ownership. By way of comparison, it is similarly within Parliament's power to enact legislation restricting the use of the colour blue upon roofing iron.

Should it do so it would be unnecessary and inappropriate to base that power on an assertion that the State owns either blueness or roofing iron. It is not an acceptable answer to a constitutional challenge to the validity of legislation for the State to raise a spurious claim of ownership of electromagnetic vibrations, the airwaves, the electromagnetic spectrum or anything else.

Secondly, even if the State ownership of the airwaves theory was to be accepted, it
1050 would not answer this constitutional challenge. There is no way of broadcasting television except by using the State's electromagnetic waves. The fourteen months'

ban therefore does two things – it forbids the use of government property for the period *and*, in so doing, it thereby affects the exercise of the right to freedom of expression and publication by means of television broadcasting.

This ban particularly affected the applicants as, prior to the enactment of the Act, the applicants had been granted, and were in lawful possession of, current licences which gave them a legal right to operate a television broadcasting service.

In particular, they were licensed to use the electromagnetic waves to broadcast both sound transmissions and visual images on specified frequencies. In order to
1060 operate this television broadcasting service the applicants had constructed and were managing a station consisting of one or more transmitters and were ready and waiting to communicate ideas and information to the public generally (or at least to those persons with access to a television receiver).

By subsequently defining their particular type of "station" as a "television station" and making it an offence to operate such a station before 31 January 1988, the 1986 Act, in one sudden movement, grabbed back the applicants' pre-existing right to broadcast television over the State's electromagnetic airwaves.

I am firmly of the opinion that section 3 of the Act, which makes it an offence with very severe penalties to broadcast television before 31 January 1988, constitutes
1070 an interference with the qualified right of freedom of expression and publication guaranteed by section 46 of the Constitution. The State's argument to the contrary is scientifically untenable, tortious, legalistic and quite unacceptable as a justification for curtailing one of the rights guaranteed by the Constitution.

(2) Having decided that the right to freedom of expression and publication has been affected by this law the next question is whether the Act is a law which complies with the substantive provisions of section 38(1) of the Constitution.

Firstly as to the burden of proof on this point. Whatever presumptions of validity may apply elsewhere when considering fundamental rights legislation, it is quite
1080 clear in Papua New Guinea that section 38(3) places the burden squarely on the State in this case to establish that the television (Prohibition & Control) Act 1986 satisfies the requirements of section 38. And it must satisfy this burden to a high standard of proof.

To comply with section 38(1) it must be a law which:

> regulates or restricts the exercise of a right or freedom . . . [of expression and publication] . . . to the extent . . . necessary . . . for the purpose of giving effect to the public interest in . . .(D) public welfare . . . to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

1090

Both parties are agreed that the public interest in "public welfare" is the only one of the heads of public interest set out in subsection (1)(a) which is relevant. Applying this awkwardly worded section to this Act it becomes apparent that it must meet three criteria. The challenged law must:

(a) "regulate or restrict" the freedom of expression and do no more than that;
(b) be "necessary" for the purpose of giving effect to the public interest in public welfare;
(c) not regulate or restrict the freedom beyond the extent that the law is
1100 "reasonable justifiable in a democratic society having a proper respect for

the rights and dignity of mankind."

For the purposes of initial analysis, these three criteria warrant separate study but in arriving at the proper meaning of the section they must be seen as interacting with each other.

(a) "Regulate or restrict"

Mr O'Regan argues for the applicants that those words do not grant the State authority to prohibit. He then argues that a ban on television broadcasting for eighteen months (now reduced to fourteen months) constituted a prohibition. When
1110 pressed he conceded that the power to restrict could include a temporary but total ban for a very brief period, as long as the circumstances justified it or, to word it in another way, if the particular ban or restriction was proportionately necessary, given the existing circumstances and the size of the threat to, or the extent of the desired gain for, the public welfare.

Though not conceding that the term "restriction" could never encompass a "prohibition", the State appears to agree that whether or not this fourteen months' ban is an allowable restriction is a question which must be determined in the light of the circumstances now existing. Those are the same circumstances which must be considered in deciding whether the ban is "necessary" and "reasonably justifiable".

1120 *(b) "Necessary"*

This word has caused some difficulty. It has been argued that the court should give the liberal interpretation most protective of the right to freedom of expression and hold that any restrictive law should be disallowed unless it is "absolutely necessary". It must be remembered, however, that we are balancing this qualified right of individual persons alongside a consideration which is at least equally important – that of the welfare of the wider public. The court's task is to balance the scales; not to tilt them in favour of the right of the individual person. The Constitution requires the court to consider the extent to which the regulation or restriction is necessary for the purpose of protecting public welfare and to take into
1130 account the National Goals and Directive Principles and the Basic Social Obligations when performing this task. To be fair and liberal in working out a balance between these two important but sometimes competing principles, the court must weight the two considerations proportionately. To insist that a regulation or restriction must be "absolutely necessary" to satisfy the requirements of section 38(1) would be to make the State's task of protecting public welfare impossibly difficult. Whether a restriction is necessary should be considered with a due sense of proportion, balancing the nature and duration of the regulation or restriction against the urgency and desirability of the public welfare sought to be promoted or protected.

1140 I am satisfied that the State's evidence discloses that inadequately controlled television broadcasts are capable of constituting a substantive threat to public welfare.

The National Executive Council, the National Parliament and this Court are all enjoined, in the strongest possible words in the Preamble to the Constitution, particularly in the National Goals and Directive Principles, to protect ("guard with our lives") our national identity, integrity and self respect. Under the banner of "Integral Human Development" the call is for such activities as:

(1) *... every person to be dynamically involved in the process of freeing himself or herself from every form of domination ...*

(1), (2), (3), (4) ...

(5) ... for every step to be taken to promote the moral, cultural, economic and social standing of the Melanesian family;

(6) development to take place primarily through the use of Papua New Guinean forms of social and political organization.

National Goals and Directive Principle 5 calls for:

5. Papua New Guinean Ways.

We declare our fifth goal to be to achieve development primarily through the use of Papua New Guinea forms of social, political and economic organization.

(1) We accordingly call for a fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation, and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the people; and

(2) particular emphasis in our economic development to be placed on small-scale artisan, service and business activity; and

(3) recognition that the cultural, commercial and ethnic diversity of our people is a positive strength, and for the fostering of a respect for, and appreciation of, traditional ways of life and culture, including language, in all their richness and variety, as well as for a willingness to apply these ways dynamically and creatively for the tasks of development; and

(4) traditional villages and communities to remain as viable units of Papua New Guinean society, and for active steps to be taken to improve their cultural, social, economic and ethical quality.

These goals and principles are held out by the Constitution to be of prime importance and of immense concern for the public welfare.

On the evidence before this Court it appears that, for practical and economic reasons, any commercial television company will be tempted to transmit a significant proportion of cheap, readily available, foreign material and that fact poses a significant threat to the attainment of these goals. As Professor Waiko said in evidence, that threat may be intensified if the broadcaster is a foreign company managed by foreigners with little sensitivity to Papua New Guinea cultures.

The applicants, on the other hand, have produced evidence and argued persuasively that locally broadcast television is also capable of being a very powerful tool for preserving and enhancing these very same values which are stated to be under threat. I accept this argument also.

On the evidence before the Court it is a fact, however, that existing government policy is inadequately developed and suitable legislative controls are not yet in place.

Balancing the extent of the restriction imposed by the Act against the threats to be countered and the public welfare gains to be sought, I consider that a ban on television broadcasting for (now) fourteen months falls within the phrase "regulate or restrict". A ban for that length of time is also "necessary" within the meaning of

section 38(1)(a) in order to achieve the desired purpose of public welfare. In reaching that decision I have taken into account the National Goals and Directive Principles, the fact that an inquiry needed for policy formulation is in progress, the length of time for regulation and the necessary time constraints involved in drafting and enacting it.

(3) "Reasonably justifiable"

It still remains to be considered whether this fourteen months' restriction on operating a television station is reasonably justifiable in a democratic society. (The additional words "having a proper respect for the rights and dignity of mankind" do not seem to be raised for interpretation in this application.)

By section 39 the Court is directed to determine whether or not it is reasonably justifiable "in the light of the circumstances obtaining at the time when the decision on the question is made", which I take to be the date when judgment is delivered or perhaps, if anything should turn upon it, the date when the hearing of evidence and submissions is completed. It does not mean the date when the challenged law was enacted.

The circumstances now are that two companies have licences which, but for this Act, would enable them to commence broadcasting television. A recently appointed Government has not properly considered its policy on the control of television broadcasting and considers that the existing regulations are inadequate. The National Parliament has enacted by a very substantial majority the Television (Prohibition & Control) Act 1986 which effectively prohibits any person from broadcasting television for a period of some fourteen (14) months. A Commission of Inquiry, with significant terms of reference relevant to the question of public welfare, has been established and is at work. There is ample evidence before it for this Court to conclude that a major reason for the rushed enactment of this Act was because the applicants were on the verge of commencing broadcasts and another company also had the legal right to do so. One of the policy options, as set out in the terms of reference for the inquiry, is whether the State should be seeking to establish a State monopoly of television broadcasting service. There is no evidence as to the extent that this policy option influenced the Government but it certainly did act decisively to introduce legislation in order to gain time to consider its policy options before local commercial television broadcasting commenced.

From the viewpoint of the applicants the Government's actions must have seemed a complete and sudden about-face, a breach of faith and an unlawful breach of contract. The change of policy resulted in financial damage to the applicants and disappointment and loss of job and business opportunities for the many people associated with them.

It has been urged by Mr O'Regan that the test of reasonable justifiability is a subjective one and that, on that test, the way the Government has behaved is unreasonable and unjustifiable in a democratic society.

That may possibly be an apt description of the national Executive Council's behaviour in this instance but the question for this Court is whether the Act itself, as enacted by the National Parliament, is reasonably justifiable in a democratic society in today's circumstances.

When posed in this way, and for the reasons previously stated, I have come to the conclusion that a fourteen-month ban on television broadcasting, for the purposes

stated, is reasonably justified. Television broadcasting has not yet commenced, even though satellite, cable and video reception of foreign and locally made television material is available to the select few in urban areas and in some major hotels and clubs. Such a short delay in the commencement of a new venture in mass media communications is not unreasonable for the apparently genuine reason of formulating a policy and setting legislative controls in place, so as to reduce a potentially dangerous threat to public welfare and to maximize the very significant benefits for the public welfare which are latent in this powerful mass communications media.

Accordingly I find that the Television (Prohibition & Control) Act 1986 is a law which regulates and restricts the right to freedom of expression and publication and that the Act satisfies the substantive requirements of section 38(1).

That being so, does the Television (Prohibition & Control) Act 1986 satisfy the formal requirements of section 38(2)?

This third claim by the applicant is successful and it is fatal to the respondent's case.

For very good reasons section 38 of the Constitution provides that a law which is intended to regulate or restrict a constitutional right must very carefully follow certain prescribed formalities. These are designed to bring to the attention of members of the National Parliament that the Bill before them is intended to regulate or restrict one of the freedoms guaranteed by the Constitution and the reason why it is desirable to do so. The formalities are also designed to alert the public and specialist interest groups about what is being attempted and why. Not only is it expressly provided that the Bill must specify what freedom is being restricted but, on a fair and liberal meaning of the section, it must also clearly be specified which of the allowable listed purposes it is sought to achieve by this restrictive law.

Unless the purpose of the regulation or restriction is also clearly stated (in this case "the public interest in public welfare") citizens whose rights have been affected will not be in a position to assess whether the law complies with the Constitution or not; they could be uncertain whether to outlay the expense to challenge the law if the State could be quietly sitting on the knowledge that the true, but unstated, purpose was (for instance) defence or public order.

From the importance with which the Constitution treats the whole question of the guaranteed freedoms, and adopting a fair and liberal interpretation of section 38(2), it is required that a law which regulates or restricts the exercise of a right or freedom referred to in subdivision (c) (qualified rights) must clearly state which of the purposes specified in section 38(1)(a) it seeks to achieve.

The Television (Prohibition & Control) Act 1986 failed to do this and for that single but sufficient reason it is ultra vires the Constitution. The whole Act is therefore invalid and of no effect.

Reported by: L.K.