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Judgment
6, 1966

IN THE PRIVY COUNCIL

No. 9 of 1965

ON APPEAL
FROM THE COURT OF APPEAL, MALTA

B E T W E E N :

A THE HONOURABLE DOCTOR PAUL BORG OLIVIER
and ~~GOUVERNS~~ (Defendants) Appellants
DR CARMELO COLEIRO
- and -
THE HONOURABLE DOCTOR ANTON BUTTIGIEG,
M.L.A. (Applicant) Respondent

B C A S E FOR THE RESPONDENT

Record

1. This is an appeal from the judgment of the Court of Appeal, Malta, (Sir A.J. Mamo, C.J., Gouder and Camilleri, JJ.), of the 10th day of January 1964, dismissing the Appellants' appeal against the judgment and order of the First Hall, Civil Court, Malta, (Professor Xuereb), of the 11th day of March, 1963. pp.64-72
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2. The following facts formed common ground in the Courts below :-
- (i) That the Respondent was a member of the Legislative Assembly of Malta, a member of the Opposition and President of the Malta Labour Party and that he was the editor of the "Voice of Malta", a newspaper of that party. p.9
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- (ii) That on the 26th day of May, 1961 the Ecclesiastical Authorities in Malta condemned the "Voice of Malta". p.10
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- (iii) That on the 25th day of April, 1962 the Appellants issued a Circular No. 42/62 by which they prohibited the entry into hospitals and branches of the Medical and Health Department of newspapers condemned by the Church, of which the "Voice of Malta" was one. p.4
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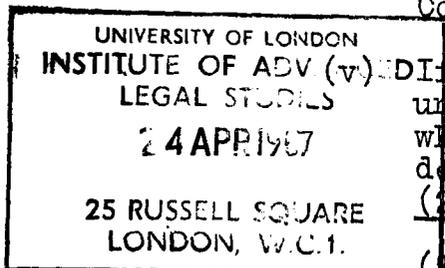
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3. The principal questions which arise upon this appeal are as follows :-

- (i) Whether the Courts below had jurisdiction to review the issue by the Appellants of the Circular or whether the same was a purely administrative act not cognizable by the Courts. A
- (ii) Whether the Circular was in breach of Section 13 of the Malta (Constitution) Order in Council, 1961, (hereinafter referred to as "the Constitution"), which provides for freedom of conscience and religious toleration. B
- (iii) Whether the Circular was in breach of Section 14 of the Constitution, which provides for freedom of expression.
- (iv) If the Circular was in breach of Section 14(1) of the Constitution, whether it was nevertheless a thing done under the authority of a law imposing restrictions upon public officers in the terms of Section 14(2)(b) of the Constitution. C



If the issue of the Circular was a thing done under the authority of a law as aforesaid, whether it was reasonably justifiable in a democratic society in the terms of Section 14(2) of the Constitution. D

(The relevant sections of the Constitution are set out in the Annexure hereto.) E

p.1

4. On the 4th day of May 1962 the Respondent made application to the First Hall, Civil Court, Malta, for relief under Section 16 of the Constitution. He alleged that the Circular issued by the Appellants was in breach of Sections 13 and 14 of the Constitution in that, for religious reasons, it impeded the Respondent from imparting his ideas and information without interference to the patients doctors and employees of the Appellants in hospitals and branches of the Medical and Health Department and debarred those patients, doctors and employees from receiving those ideas and information without interference. F

5. The Appellants, in argument and in written submissions, contended :- G

p.4
p.18

- (i) That the Circular was not intended for the patients. H

- A (ii) That the issue of the Circular was a purely administrative act within the discretion of the Appellants, that it constituted only a directive as between employer and employees, and that it did not fall within the jurisdiction of the Court. p.4
p.22
- (iii) That there was no breach of Section 14(1) of the Constitution as the Respondent was still free to publish and circular his newspaper. pp.30-31
- B (iv) That if there was a breach of Section 14(1), it was permissible under the provisions of Section 14(2)(b) of the Constitution and was reasonably justifiable in a democratic society. p.33
- C 6. On the 17th day of July 1962 the First Hall, Civil Court, gave judgment for the Respondent.
- D 7. The Appellants appealed against this judgment and on the 22nd day of February 1963 the Court of Appeal, Malta, declared the same to be null and void and remitted the record of proceedings to the First Hall, Civil Court, for the case to be decided afresh.
8. Upon remittance of the case the Appellants raised a further plea in the First Hall, Civil Court, that the proceedings ought to have been initiated by writ of Summons and were in consequence a nullity.
- E 9. The First Hall, Civil Court, rejected the Appellants' further plea of nullity and on the 11th day of March 1963 gave judgment for the Respondent. In so doing the First Hall held that the Circular was not directed to the patients and that finding was not thereafter challenged by the Respondent. pp.51-57
- F 10. The First Hall, Civil Court, declared :- p.57
- G (a) that the Circular contravened the rights of freedom of expression and of freedom of conscience of the Respondent and was illegal in that part which prohibited the entry of newspapers condemned by the Ecclesiastical Authorities in the places therein specified;
- (b) that the prohibition was without any effect and to be set aside;
- H and ordered that this declaration should be brought to the cognizance of the people to whom the preceding Circular was directed by means of a fresh Circular.

pp.56-57

11. In dealing with the Appellants' contention that the issue of the Circular was reasonably justifiable in a democratic society, the learned judge of the First Hall, Civil Court, said :-

" That in this connection the Court has been invited to consider that the use made of these powers is justified by the local way of life in view of the respect up to now due to the Ecclesiastical Authority, in such a way that the restriction complained of is consonant with the local democratic way of life. In this respect the presiding judge has also been invited to contribute his views regarding the concept of democracy. Certainly this submission carries weight especially when one remembers the laws that have as their object this respect and recollects also that Act I of 1922 acknowledged the Catholic Religion as the National Religion of these Islands. On the other hand, however, one would not be realistic if one did not admit the fact declared by the Applicant and which resulted during the hearing of the case in the sense that notwithstanding the time (now almost two years) that has passed since the newspaper edited by him was condemned by the aforementioned Authority this is still being printed and circulated. As a proposition of law (and this is the crux of the whole question) the Court cannot fail to recognize this right of the Applicant, which evidently relates more to the freedom of conscience than the freedom of expression and this shows more clearly how well-founded is the preceding conclusion in the sense that the Circular in question contravenes this right of freedom of conscience of the Applicant. And in the light of the fact which has resulted, of the continued publication of the condemned newspaper, in spite of such condemnation, that measure cannot be considered as democratic which denies such right on the ground that formerly such a thing did not occur, in as much as by following such line of reasoning one would not be giving the due weight to the change which has occurred in the circumstances."

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At a later stage in his judgment the learned judge continued with these words :-

" Indeed the limitation of the application of the Circular to the employees only, declared by the defendants, confirms also the view above expressed in regard to that which the concept of democracy requires in its application, particularly if such

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A limitation so declared is looked at in the light
of the other declaration that the restriction of
entry of the condemned newspapers was made in order
not to irritate the employees who do not agree
with the views of the condemned newspapers. In
fact, the means used, once it is not of general
application, cannot have a general and complete
result, as was desired and expected, and it is
logical therefore to conclude that the reason for
B the limitation of the restriction was that which has
just been mentioned and it is precisely for this
reason and on its account that the Circular cannot
be upheld, that is because it does not respect the
rights of other people, whose rights are equal to
C those respect for whom motivated it."

12. The Appellants appealed against the decision
of the First Hall, Civil Court, both on the
further plea of nullity and on the merits.

pp.59-63

D 13. On the 28th day of June 1963 the Court of
Appeal, Malta, dismissed the appeal on the further
plea of nullity and ordered that the appeal upon
the merits should proceed.

E 14. On the 10th day of January 1964 the Court of
Appeal, Malta, by a unanimous judgment dismissed
the Appellants' appeal on the merits and affirmed
the judgment and order of the First Hall, Civil
Court.

pp.64-72

F 15. In dealing with the Appellants' contentions,
the Court of Appeal, Malta, unanimously held that
it had jurisdiction to review the act of the
Appellants in issuing the Circular and that even
though such act was executive or administrative in
character, it could be challenged in the Courts as
violating fundamental rights or freedoms. The Court
G dealt with this matter in the following words:-

pp.66-67

" These rights and freedoms are called
'fundamental' precisely because they are guaranteed
by the fundamental law and cannot certainly be
suspended or abridged except in the cases and in
H the manner laid down in the Constitution. Precisely
because these rights are so guaranteed no organ of
the State can act in breach thereof and any act of
the State which is repugnant to those rights, is
within the limits of that repugnancy, necessarily
I null and void.

" Once the Constitution is considered as the

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Supreme Law of the land and the powers of all the other Organs of the Government are considered as limited by its provisions, it follows that not only the Legislature but also the Executive and the Administrative Authorities are limited by its provisions, in a manner that every administrative or executive act contravening those provisions and, to the extent of such contravention, are similarly null and void. The very purpose of a 'Bill of Rights' is that certain matters should be removed from the vicissitudes of political controversy and placed beyond the control of the majority or the executive 'pro tempore' and established as legal principles to be applied by the Courts."

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Later in their judgment the Court of Appeal went on to say :-

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" Now the provisions of Part II "(of the Constitution)" relating to the fundamental rights and freedom of the individual are manifestly addressed also to the Executive; indeed, in some cases, it appears that they cannot be directed except to the Executive, and the acts of these organs, if challenged as contravening those rights and freedoms cannot be removed from the cognizance of the Court and the sanction of unconstitutionality."

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p.67

The Court of Appeal went on to say :-

" The fundamental rights and freedoms as protected in the Constitution are not a matter of administrative or executive 'discretion'."

16. The Court of Appeal went on to deal with the Appellants' contention that the issue by them of the Circular did not constitute a breach of Sections 13 or 14 of the Constitution and did not restrict any fundamental right or freedom of the Respondent. Dealing with breach of the latter section, the Court said :-

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pp.69-70

" In the opinion of the Court there seems to be no doubt that the prohibition to a number of people, which, as already stated is not inconsiderable, to carry the newspaper of the respondent in the several hospitals, offices, Government dispensaries and other branches of the Department - which implies, for instance, that they cannot buy that newspaper on their way to work to read it in those places during their leisure periods - constitutes an interference

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with his freedom to impart ideas and information about his ideas and those of his political party by means of that newspaper to those persons in the places where they may wish and can receive those ideas and information, and therefore constitutes an interference with his freedom of expression as defined."

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17. The Court of Appeal then considered Section 13 of the Constitution :-

p.70

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" This interference was committed in the shape of 'previous restraint' in the sense that the entry and reading of the newspapers in the places above-mentioned was prohibited 'wholesale', whatever the contents of the particular issues of the newspapers in question, for all the time during which they remain condemned by the Ecclesiastical Authorities and for this reason only."

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After citing the section referred to, the Court continued, later in the same judgment :-

p.70

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" Though the provision made in the Circular directly affects the freedom of expression, the reason for it, as explained by the Minister, was solely of a religious character. For that reason it was discriminated against the respondent, in as much as only the circulation, entry and reading of the newspaper edited by him was prohibited and some other papers of the political party to which he belongs. In this manner there was a contravention also of his freedom of conscience, intended such freedom in the general and comprehensive sense as protected by Section 13."

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18. Finally, the Court of Appeal, Malta, considered and rejected the Appellants' contention that even if there had been a breach of Section 14 and the Circular involved a restriction of the Respondents' fundamental rights, such restriction was legitimate in the circumstances. For this purpose the Court found it necessary to consider Section 5 of the Constitution (set out in the Annexure hereto) and decided :-

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" This language in the opinion of the Court cannot but mean that for a limitation of a guaranteed right to be held permissible it must come at least within one of the limitations expressly laid down. Except for those limitations,

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the right or freedom is protected and the Court must provide the redress..."

p.72

After consideration of the terms of Section 14(2) the Court held that the issue of the Circular was not a thing "done under the authority of any law" and that the provisions of the sub-section did not therefore avail the Appellants.

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p.72

19. In the circumstances the Court of Appeal found it unnecessary to consider whether the issue of the Circular was reasonably justifiable in a democratic society. Nevertheless, the Court felt it to be its duty to state that if this had been necessary, they would have agreed with the judgment of the First Hall, Civil Court, on this point.

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pp.73-75

pp.80-81

19. On the 31st day of January 1964 the Appellants filed a Petition for leave to appeal to Her Majesty in Council and on the 20th day of November 1964 the Court of Appeal, Malta, granted the Appellants Final Leave to Appeal against the judgment of the 10th day of January, 1964.

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20. The Respondent respectfully submits that the Judgment of the Court of Appeal, Malta, was right and ought to be affirmed and this appeal ought to be dismissed for the following amongst other.

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REASONS

1. BECAUSE the Courts below had jurisdiction under the Constitution to review the act of the Appellants in issuing the Circular.

2. BECAUSE the issue of the Circular constituted a restriction upon and interference with the Respondent's fundamental right of freedom of conscience as provided by Section 13 of the Constitution and was in breach of that section.

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3. BECAUSE the issue of the Circular constituted a restriction upon and interference with the Respondent's fundamental right of freedom of expression as provided by Section 14 of the Constitution and was in breach of that section.

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4. BECAUSE the issue of the Circular was not an act done under the authority of any law and was not permissible under Section 14(2)(b) of the Constitution.

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5. BECAUSE the issue of the Circular was not an act which was reasonably justifiable in a democratic society and was not permissible under Section 14(2) of the Constitution.
- A 6. BECAUSE of the other reasons given by the First Hall, Civil Court and the Court of Appeal, Malta.

JULIAN PRIEST.

ANNEXURE

THE MALTA (CONSTITUTION) ORDER IN COUNCIL,
1961

PART II

A PROTECTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS OF THE INDIVIDUAL

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 :-

Fundamental
rights and
freedoms
of the
individual.

C (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

D (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, being limitations designed to
ensure that the enjoyment of the said rights and
freedoms by any individual does not prejudice the
rights and freedoms of others or the public
interest.

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

Freedom of
conscience
and
religious
toleration.

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

Freedom of expression.

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.

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

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(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 disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts wireless, broadcasting, television, public exhibitions or public entertainments; or

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(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.

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Enforcement of protective provisions.

16. - (1) Any person who alleged that any of the provisions of this Part of this Order has been, is being, or is likely to be, contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleged, may, without prejudice to any action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.

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(2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made in pursuance of the preceding subsection, and may make such orders, issue such writs

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and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any rights to which any person concerned may be entitled under this Part of this Order :

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Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this subsection in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

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(3) Where any question as to the interpretation of any of the provisions of this Part of this Order arises in any proceedings in any court other than the Civil Court, First Hall, or the Court of Appeal in Malta, the person presiding in that court shall refer the question to the Civil Court, First Hall, unless, in his opinion, the raising of the question is merely frivolous or vexatious; and that Court shall give its decision on any question referred to it under this subsection and, subject to the next following subsection, the court in which the question arose shall dispose of the question in accordance with that decision.

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(4) Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this section shall have the same rights of appeal as are accorded generally to parties to civil proceedings in that Court.

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