IN THE ELECTRONIC COMMUNICATIONS TRIBUNAL

ACCRA

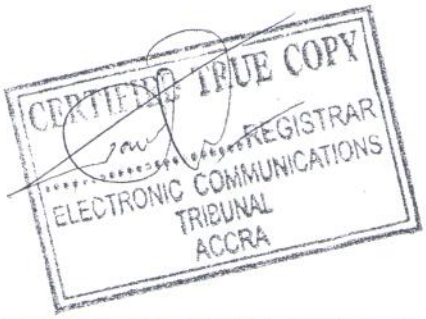
AD 2018

APPEAL NO: ECT/APP/002/2017

GHANA INDEPENDENT BROADCASTERS ASSOCIATION

(suing for and on behalf of Mascott Multimedia Ltd & 8 others)

Accra APPELLANTS/APPLICANTS



VERSUS

NATIONAL COMMUNICATIONS AUTHORITY

Accra RESPONDENT/RESPONDENT

18th June 2018

CORAM: JUSTICE DATE-BAH (PRESIDING), PROFESSOR QUAYNOR, MR AKPADZI

DECISION

PROF. DATE-BAH JSC (RETIRED): This is the final decision of the Electronic Communications Tribunal established by the Electronic Communications Act, 2008 (Act 775) in this case. It is the first such decision since the establishment of the Tribunal and it has been arrived at unanimously. Section 91 of the Act vests in this Tribunal jurisdiction to hear appeals from a

person affected by a decision of the National Communications Authority ("NCA") or the Dispute Resolution Committees. Accordingly, this Tribunal has statutory authority to apply the principles of administrative law to decisions of the NCA and its Dispute Resolution Committees.

INTRODUCTION

The principles of administrative law in Ghana are based on the common law and the 1992 Constitution. As regards the common law principles, the following passage from *De Smith, Woolf & Jowell's Principles of Judicial Review* (1999) provides an insight into the principles that this Tribunal will be applying: "In all developed legal systems there has been recognition of a fundamental requirement for principles to govern the exercise by public authorities of their powers. These principles provide a basic protection for individuals and prevent those exercising public functions from abusing their powers to the disadvantage of the public. During the last quarter of the twentieth century, the circumstances in which the courts have been prepared to intervene to provide relief for unlawful administrative action have expanded in spectacular fashion. Coherent principles have steadily evolved in a number of areas of administrative law and disfiguring archaisms have been removed."

Article 23 of the 1992 Constitution provides as follows:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal."

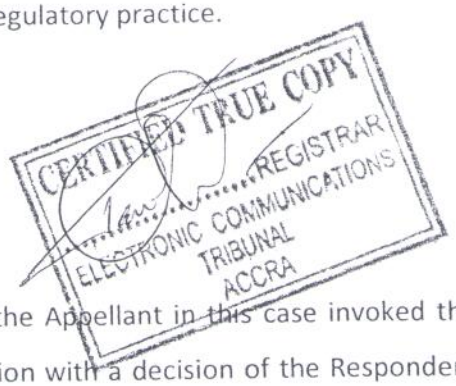
Construing this provision in *Awuni v WAEC* [2003-2004] SCGLR 471, I, when serving on the Supreme Court, said (at p. 559):

> "It appears to me that the purpose of article 23 is to provide a constitutional foundation for administrative law in Ghana and to entrench entitlement to administrative justice as a fundamental human right in Ghana. Under the English common law, from which the Ghanaian common law has borrowed most, an

important part of administrative law is the judicial control of administrative action. This is because administrative power is quintessentially derived power. It is the power of public officials derived from the Constitution or from statutes. The common law courts have, therefore, seen it as their role to ensure that these public officials, and the bodies to which they belong, keep within their authority or jurisdiction."

Accordingly, this Tribunal, when exercising its jurisdiction under the Electronic Communications Act, 2008, will apply the principles of administrative justice like a court, although it has more procedural flexibility than the High Court.

The Tribunal will also be guided by the matters set out in section 5 of the National Communications Authority Act, 2008 (Act 769), including the principles of transparency, accountability, proportionality, consistency and best regulatory practice.



THE APPEAL IN THIS CASE

By a Notice of Appeal filed on 3rd November 2017, the Appellant in this case invoked the jurisdiction of this Tribunal to remedy its dissatisfaction with a decision of the Respondent dated the 28th day of September 2017 and reviewed on the 20th day of October 2017.

According to the unsworn evidence presented in the Appellant's Statement of Case, the Appellant is a company limited by guarantee which has among its objects the protection of media rights and freedoms in Ghana. It is on the authority of nine of its members, whose names are contained in a list appended to its Notice of Appeal, that this appeal has been brought. The grounds of the appeal are stated as follows in the Notice of Appeal:

a. "The Respondent erred when it penalized the Appellants according to the Respondent's Schedule of Penalties when those penalties were not applicable to the offences/breaches the Appellants were alleged to have committed.
b. That the Respondent erred when it applied the Schedule of Penalties to punish the Appellants for their alleged offences/breaches when the applied

portions of the said Schedule of Penalties are ultra vires the Electronic Communication Act, Act 775, and therefore void and of no effect.

c. That the Respondent erred when it sought to apply the penalties against the Appellants in a retrospective manner.

d. That the Respondent erred when it imposed penalties on the Appellants without offering them the opportunity to remedy the alleged infractions as provided for under Act 755."

The Respondent is the NCA, originally established by the National Communications Authority Act, 1998 (Act 524), and currently established under the National Communications Authority Act, 2008 (Act 769) which repealed the earlier statute. According to section 2 of Act 769, the NCA is the regulator of the provision of communications services in Ghana.

In its Statement of Case, the Appellant elaborates on its first ground of appeal as follows: the real reason why the Respondent sanctioned the Appellant's members was that they had failed to renew their authorisations, upon their expiry. The Appellant accepts that its members fell into the category of those whose authorisations had expired but had failed to apply for their renewal. The Appellant contends that failure to apply for renewal of authorisation is not equivalent to failure to produce documents or returns to the Respondent, which is the offence for which its members are being sanctioned. Accordingly, the sanctions which should be applied to its members are those formulated to deal with failure to renew and not those targeting failure to produce documents or returns to the NCA. It is noteworthy that the pecuniary administrative penalties prescribed for failure to produce documents or returns to the NCA are more severe than the prescribed statutory penalty for failure to renew.

The Respondent, in its Statement of Case, has accepted that the Appellant's members' authorisations to use the radio spectrum expired at various times between 2000 and 2017. (The parties seeking redress from this Tribunal will be referred to interchangeably as the Appellant's members and Appellants). Consequently, the Respondent had written to them at different times in 2017 to notify them of their breach of section 2(4) of the Electronic Communications Act, 2008 (Act 775). The letters had informed them that they were operating illegally and notified them that the Respondent would close their stations down and re-assign their frequency after 30 days.

When the members of the Appellant failed to comply with the direction to renew their authorisations, the Respondent by letters dated 25th, 26th and 28th September 2017 imposed various penalties on the Appellant's members for their failure to submit a complete set of documents required for the renewal of their expired authorisations. Ultimately, these penalties were reduced through an amnesty approved by the Board of Directors of the NCA on 13th December 2017. This amnesty was communicated in a Press Release dated the 19th December 2017.

One of the central issues in the Appellant's first ground of appeal is whether it was unlawful for the Appellant's members to be penalised for their failure to produce documents to the NCA, rather than for their failure to renew their authorisation. In other words, is there any restriction on the discretion of the Respondent to decide on what offence with which to charge the members of the Appellant? The answer, of course, is that the Respondent's discretion is constrained by the principles of constitutional and administrative law. However, if it does not infringe any of the limits set by those principles, then it is free to exercise its discretion as it chooses.

Lord Diplock, in what has come to be known as the *GCHQ Case,* whose formal title is *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C.374 at 410, clasically articulated three grounds on which courts will intervene to quash decisions of public officials and bodies. These are: illegality; irrationality; and procedural impropriety. These are his own words:

> *"By illegality*...I mean that the decision-maker must understand correctly the law that regulates his decision-making power and give effect to it...By 'irrationality' I mean what can now be succinctly referred to as '*Wednesbury* unreasonableness'...It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it....I have described the third head as 'procedural impropriety' rather than the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly

laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

These common law grounds articulated by Lord Diplock are buttressed in Ghana by the obligation imposed by Article 23 of the Constitution on public officials and bodies to "act fairly and reasonably and comply with the requirements imposed on them by law." These words in the Constitution probably do not expand the grounds on which decisions of officials can be impugned, but merely re-inforce the common law grounds. This is an inference that may legitimately be made from the following passage from the judgment of Date-Bah JSC in *Awuni v WAEC* [2003-2004] SCGLR 471 at 561 *et seq.*:

> "The first element of the Article 23 duty imposed on administrative bodies and officials is that of acting fairly and reasonably. What does this mean? In addition to whatever meaning may be derived from subjecting these words to the canons of constitutional interpretation, there is also the common law understanding of acting "fairly" in matters of administrative law. Since the 1992 Constitution was affixed unto an underlying common law system, which was saved by Article 11 of the Constitution, it is necessary to examine the common law on this issue.
>
> A duty on administrative bodies to act fairly exists at common law. It is a duty that the English courts have evolved from the doctrine, commonly referred to earlier as the principles of natural justice, epitomised in the twin latin maxims of : *nemo iudex causae suae* and *audi alteram partem.* On this evolution, *De Smith, Woolf and Jowell* (supra) comment (at pp. 272-273) that:
>
> > "The principal value of the introduction of the duty to act fairly into the court's vocabulary has been to assist them to extend the benefit of basic procedural protections to situations where it would be both confusing to characterise as judicial, or even quasi-judicial, the decision-makers' functions, and inappropriate to insist on a procedure analogous to a trial."
>
> In the modern English common law, the term "natural justice" is being increasingly replaced by the duty to act fairly. The current position of the English common law on this issue is summarised thus by *De Smith, Woolf and Jowell (*supra at pp. 275-276):

"The entitlement to fair procedures no longer depends upon the adjudicative analogy, nor whether the authority is required or empowered to decide matters analogous to *lites inter partes*. The law has moved on; not to the state where the entitlement to procedural protection can be extracted with certainty from a computer, but to where the courts are able to insist upon some degree of participation in reaching most official decisions by those whom the decisions will affect in widely different situations, subject to well-established exceptions."

This generalisation of the English common law position suggests that the English jurisdiction is likely to have a rich seam of case-law which this Court can mine, so to speak, to operationalise Article 23. Of course, the Article, being a Ghanaian constitutional provision, has to be given purposive meaning within the context of the Ghanaian Constitution and the Ghanaian legal order. Accordingly, any resort to foreign case-law has to be had with circumspection and any solutions adopted must be customised to fit the Ghanaian situation."

Date-Bah JSC further points out (at p. 566) as follows:

"The next element of the Article 23 duty which we need to examine is the duty to comply with the requirements imposed on administrative bodies and officials by law. I understand this element to be additional to what has been discussed above. In other words, administrative bodies and officials, in addition to complying with the rules on procedural fairness embodied in *audi alteram partem* and its derivatives and independent constitutional obligations (if any) distilled by Ghanaian courts from the duty to "act fairly and reasonably", must comply with all other applicable rules of law. Such other relevant applicable rules of law will often be in the constitutive enactment relating to the administrative body concerned. In the present case, the main source to examine for these applicable rules of law is the West African Examination Council Law (PNDCL 255) and instruments issued pursuant to it. The effect of this element of Article 23 is to convert breaches of such rules into breaches of a fundamental human right actionable under Article 33."

What has been sketched out above is the framework of law within which this Tribunal has to determine the lawfulness of the Respondent's exercise of its authority.

GROUND (a) OF THE APPELLANTS' GROUNDS OF APPEAL.

It will be recalled that Ground (a) of the Appeal is as follows:

a. "The Respondent erred when it penalized the Appellants according to the Respondent's Schedule of Penalties when those penalties were not applicable to the offences/breaches the Appellants were alleged to have committed."

The offence that the Appellant's members were found by the Respondent to have committed is provided for in a Schedule of Penalties published by the Respondent on its website and in the Gazette. Part N of the Schedule is entitled "Offences For Which Pecuniary Penalties are Fixed by the Authority" and it begins as follows:

"Pursuant to **Section 72(1)(e) of Act 775** and **Regulation 137** of **L.I. 1991,** the Authority enacts the following pecuniary penalties.

1. Failure of a service provider to respond within the time required to any request for information or order of inspection issued by the Authority. **Penalty – A fine of GH C 10,000 for each day the infraction persists.**"...

And, continues as follows in paragraph 7:

"7. Failing to submit to the Authority in a manner and at the times as may be reasonably requested, documents, accounts, estimates, returns and other information that may be required under the Authorisation and in general give the Authority's inspectors the necessary facilities to carry out inspections of the communications system.

Penalty – A fine of GH c 10,000 for each day the infraction persists."...

The section 72(1)(e) of Act 775 referred to in the Schedule of Penalties states that:

"The Authority may in furtherance of its functions ...

(e) impose a pecuniary penalty on a licencee for breach of a condition of a licence, ..."

Regulation 103(1)(h) of the Electronic Communications Regulations, 2011 (LI 1991) reads as follows:

"(1) A Class 1 licensee shall

(h) submit to the Authority, in a manner and at the times as may be reasonably requested, documents, accounts, estimates, returns and other information that may be required under the licence and, in general, give the Authority's inspectors the necessary facilities to carry out inspections of the communications system;..."

Regulation 103(2) also provides as follows:

"A licensee who contravenes sub-regulation (1) is liable to

(a) pay to the Authority a fine; or

(b) any other sanction that the Authority may determine."

The argument of the Appellant, based on these provisions, in its Statement of Case, is that where an offence has a prescribed punishment, then the Respondent's power to determine the applicable penalty is ousted. Furthermore, the Statement of Case states that: "It is submitted that the Respondent erred in placing the Appellants under the Schedule of Penalties when in fact the offences the Appellants are said to have committed are amply provided for both under the Electronic Communications Act, (2008), Act 755 and the Electronic Communications regulations LI 1991."

The Appellant's attack on the penalties imposed on its members, on this ground, is thus two-pronged. First, it avers that the Respondent lacked the power to prescribe the penalty concerned and, secondly, that their members should not have been brought within the ambit of the offence alleged, since their offending conduct was already captured by offences available under Act 755 and LI 1991. The argument thus relies on the category of "illegality", in the range of categories formulated by Lord Diplock, in his classic dictum quoted above.

Elaborating further on this ground of illegality, the Appellant contends that failure to renew a licence is not interchangeable with failure to produce documents or returns to the Respondent. It refers to section 2(4) of Act 775 which provides that, except as provided by the Act, a person shall not operate a broadcasting system without a frequency authorisation by the Authority. It also refers to section 2(6)(b) of Act 775, under which the Minister, on the advice of the Authority, may by legislative instrument make Regulations to prescribe "the issue, conditions, duration, suspension or revocation of frequency authorisation". The Appellant contends that nowhere in Act 775 is there a provision that, upon the expiry of a frequency authorisation, a refusal to submit an application for renewal of the authorisation is equivalent to a refusal to submit documents, accounts etc. to the Respondent for which the Respondent may seek to punish the Appellant's members under the Act.

The Appellant urges further that in any case the refusal to apply for renewal was a contravention of the Act itself, for which punishment was already provided under the Act, and therefore the Appellant's members cannot be "charged" under a clause which obliges them to provide information and be subjected to the sanctions applicable to that different offence.

The Appellant points out that section 73(1)(a), (b). and (c) of Act 775 is in the following terms:

> "(1) A person who
>
> a) knowingly fails to comply with or acts in contravention of this Act,
> b) knowingly fails to comply with prescribed standards and requirements for the use of radio spectrum,
> c) provides electronic communication service without a licence where a licence is required for that service....
>
> Commits an offence and is liable on summary conviction to a fine of not more than three thousand penalty units or to a term of imprisonment of not more than five years or to both."

The Appellant relies on this provision to show that operating a radio frequency after the Respondent's authorisation has expired is an infringement of the Act itself and not of the Schedule of Penalties.

The Appellant also invites this Tribunal to consider Regulations 55, 56, 105, 106 and 107 of LI 1991, in connection with its argument that refusal to renew is not the same as refusal to submit documents to the Respondent. Regulations 55 and 56 state that:

> "55. The duration of a broadcasting frequency authorisation shall be as specified in the authorisation document.
>
> 56. (1) A person who wants to renew a broadcasting frequency authorisation shall submit an application to the Authority at least three months before the expiry of the authorisation.
>
> (2)The provisions on renewal of a Class 1 licence under Regulations 105 to 107 shall apply with modifications that the Authority considers necessary for the renewal of a broadcasting frequency authorisation."

Under Regulation 105, an applicant for renewal of a licence (or authorisation) must put in its application at least 3 months before its expiry and the NCA is obliged to notify the applicant in writing of the receipt of the application within 5 working days of the receipt of the application. Regulation 106 provides that the NCA is then to prepare an evaluation report on the application and conduct a public hearing on it.

The Appellant asserts that: "There is no where in these processes that one can infer that there is a standing request for documents, accounts etc. from the Respondent to the Appellants and for which the Appellants are required to submit so as to make the failure to apply for renewal of authorization the same as failure to submit documents."

The Appellant also makes the point that for a person to be guilty of the offence of failing to produce documents, accounts etc to the Respondent, there must have been a request made by the Respondent under section 19 of Act 775, which the Appellant denies was ever made. The Appellant also submits that for a person to be in breach of Regulation 103(h) of LI 1991 which places an obligation on a Class 1 licensee to submit to the NCA "in a manner and at the times as may be reasonably requested documents, accounts, estimates, returns and

other information that may be required under the licence and, in general, give the Authority's inspectors the necessary facilities to carry out inspections of the communications system," there must be a valid authorisation or licence under which the request for information is made.

In other words, the Appellant argues that this provision presupposes that the person who has an obligation to furnish the information requested is the holder of an authorisation or a licence. Therefore the holder of an expired authorisation or licence is not subject to the obligation to provide information. Rather the correct sanction to apply to a person whose authorisation has expired is the sanction for failure to renew and not the sanction for refusal to submit documents requested under the authorisation, since there is no longer an authorisation.

The Respondent, in its Statement of Case, dismisses these arguments of the Appellant on this ground as unmeritorious. It submits that once the Appellant's members had submitted applications for renewal and yet failed to submit the complete set of documents required to conclude the renewal process, they became liable for the offence of failure to provide the required documents. The Appellant's members did not have the right to choose which penalty should be applied to them. The Respondent asserts that:

> "It is amply clear that having failed to submit all the documents required and having been notified of the need to submit the documents that they failed to submit, their infraction is a failure to provide documents and they can be penalised under the Schedule of Penalties."

The Respondent concludes its submission on this ground as follows:

> "Respectfully, the Appellants, having failed to comply with the request to produce documents as indicated above, had breached a requirement of the licences granted them. The Respondent was thus right in imposing penalties in accordance with the Schedule of Penalties and we submit that the Appellants' appeal must be dismissed on this ground."

This conclusion is flawed in that, by the Respondent's own showing, the licences or authorisations of the Appellant's members had expired. Accordingly, obligations under

licences or authorisations could not be used as a basis for requesting the information demanded by the Respondent.

The Respondent is right in pointing out that the Appellant's members do not have the right to determine what offences they are "charged with" and what penalties should be invoked against them. That is the prerogative of the Respondent, subject to it not infringing the rationality test embodied in the *Wednesbury* principles (See *Associated Provincial Picture Houses v Wednesbury Corpn* [1948] 1KB 223 and *Tema Development Corporation & Musah v Atta Baffuor* [2005-2006] SCGLR 121).

However, once a particular offence has been has been laid at the door of the Appellant's members, this Tribunal has the jurisdiction to examine the legality of the accusation and whether the penalty applied to the Appellant's members is supported by the facts of their respective cases and thus lawful. This Tribunal thus needs to examine the facts of the case of each member of the Appellant on whose behalf it has brought this appeal in order to determine whether there is evidence to support the application of the sanction applied to each of them.

1. Digital Broadcasting Systems Co. Ltd.

The Respondent avers that this company was notified on 30th March 2016 and on 22nd June 2017 to submit outstanding documents. Exhibit 11 appended to the Respondent's Statement of Case is a letter written by the Director General of the Respondent to Digital Broadcasting Systems Col Ltd. ("DBS"). It acknowledges receipt of DBS' letter of March 1, 2016 for renewal of its licence. It states that the NCA is by the letter informing DBS that its application to renew its Commercial FM Radio Station Authorisation is incomplete. The letter accordingly requires DBS to submit a list of documents set out in the letter in accordance with the attached guidelines on renewal of broadcasting authorisations at DBS' earliest convenience to enable NCA to process the application. The documents listed are: a letter of commitment; certificate of incorporation; certificate to commence business; technical characteristics of the station; company's regulations; tax clearance certificate; SSNIT contribution of workers; audited financial reports for the last 4 years of operation; and operational overview.

In the NCA's letter of 22nd June 2017, also appended to its Statement of Case, but unnumbered, it refers to the FM broadcasting authorisation dated 28th January 2003 granted to DBS to establish and operate a commercial radio station at Koforidua on an assigned frequency. It states that the NCA's records indicate that DBS has refused, in its application for renewal of its authorisation, to submit certain statutory documents listed in the letter. These are: business plan; copies of the registration documents of the company; Ghana Revenue Authority Tax Clearane Certificate; a signed letter of commitment; SSNIT clearance certificate; audited financial report for the past five years; a non-refundable renewal application fee; certificate of incorporation; certificate to commence business; and company regulations.

The letter goes on to point out that this refusal to submit the requisite documents means that the station is operating illegally, in breach of section 2(4) of the Electronic Communications Act, 2008 (Act775). It notifies DBS that the NCA, exercising its power under section 13(1) of the Electronic Communications Act, 2008, would close down DBS and re-assign its frequency after 30 days.

On 26th September 2017, the NCA again wrote to DBS by a letter appended by the Respondent to its Statement of Case, but again unnumbered. The letter states that:

> "Regrettably, Digital Broadcasting Systems Company Limited has operated without a valid authorisation since 27th January 2008 in contravention of section 2(4) of the Electronic Communications Act, 2008, Act 775. Per Number N(7) of the Schedule of Penalties of the National Communications Authority (Ghana Gazette 20th April 2015):
>
> > **Failing to submit to the Authority in a manner and at times as may be reasonably requested documents, accounts, estimates, returns and other information that may be required under the Authorisation, attracts a fine of Ten Thousand Ghana Cedis (GHS 10,000.00) for each day the infraction persists.**
>
> Consequently, the Authority hereby fines Digital Broadcasting Systems Company Limited total amount of:

Thirty-four Million, Three Hundred and Forty Thousand Ghana Cedis (GHC34,340,000.00) being the penalty for not submitting the complete set of required documents for the renewal of your expired Authorisation for a total of three thousand, four hundred and thirty four (3,434) days from 27th January, 2008 to 22nd June 2017 when you were served with a Notice of Suspension."

The letter then concludes by stating that the fine should be paid within 30 days from the date of receipt of the letter and that DBS is at liberty to submit all outstanding documents for the renewal of its authorisation, if it so minded. It finally gives notice that the NCA will close down the station after 30 days from the date of the letter if the penalty is not paid and the outstanding documents submitted.

The crucial issue emerging from the facts set out above is the interpretation to be put on N(7) of the Schedule of Penalties. Was it intended to cover persons who were not licensees or holders of frequency authorisations? Is it reasonable to interpret its severe financial sanctions to bring within their ambit applicants for licences and frequency authorisations? What would be the purpose of an interpretation that brings in such persons without frequency authorisations?

By the express language of the provision imposing the penalty, it applies to "documents, accounts, estimates, returns and other information that may be required under the Authorisation". This language presupposes that the person liable to the penalty is the holder of an authorisation. It does not make sense for the provision to be interpreted to enable a fine to be levied on a fresh applicant for an authorisation, before the grant of the authorisation. There is no need for the hefty sums that can be levied under the Schedule of Penalties to be exacted from a fresh applicant, when there is the simple remedy of dismissing its application for not complying with the preconditions for success in the application. An alternative remedy is to invoke the sanction applicable to persons whose authorisation has expired and have failed to renew it. The Appellant correctly points out that such a sanction is contained in Regulation 65 of LI 1991.

Regulation 65(1) and (11) provide as follows:

1. A person shall not use a radio frequency without authorisation from the Authority.

.....

(11) A person who acts in breach of any provision of regulation 65 to 77 commits an offence and is liable on summary conviction to a fine not exceeding five hundred penalty units."

The same considerations apply to an applicant for renewal of an authorisation. When the authorisation expires, the former holder of it reverts to the same position as a fresh applicant for it. Applying a purposive approach to the interpretation of the provision under consideration, the Tribunal is of the view that, given its context, it does not apply to persons who do not have a current frequency authorisation.

Accordingly, on the basis of the facts set out in the letters reviewed above, the Tribunal holds that there was no legal basis for the imposition on DBS of the penalty prescribed in N(7) of the Schedule of Penalties. There were other sanctions that the NCA could have lawfully deployed against DBS, but which it chose not to. That was its prerogative.

2. Gray Express Service Ltd

By a letter of 8th November 2016 (appended to the Respondent's Statement of Case), the NCA wrote to the Chief Executive Officer of Gray Express Service Ltd. ("GES"), acknowledging receipt of GES' letter dated June 23 2016 applying for a renewal of its licence. The letter informed GES that NCA had taken note of the change in ownership of GES and had amended its records accordingly. However, in reviewing the application, the NCA had noticed that GES had omitted the following documents:

1. Tax Clearance Certificate
2. Audited Financial Reports for the last four years of operation
3. Certificate to Commence Business
4. Certificate of Incorporation.

GES was therefore required to submit the listed documents and to pay annual and regulatory and spectrum fees from 2014 to 2016 and a non-refundable application fee.

In a subsequent letter, dated 21st June 2017, (attached as Exhibit 3 to the Respondent's Statement of Case) the NCA refers to the FM Broadcasting Authorisation dated 4th June 2009 granted to GES to establish and operate a Commercial Radio Station. It states that the NCA's records indicate that GES had refused to submit statutory documents listed in the letter. The list is identical in substance to that contained in the earlier letter of the NCA. The letter goes on to assert that GES' refusal to submit the listed documents meant that it was operating illegally. It therefore notifies GES that the NCA, exercising its power under section 13(1)(b) of the Electronic Communications Act, 2008, would close down GES and re-assign its frequency after 30 days.

On 26th September 2017, NCA wrote a further letter to GES which contained the following passage:

> "Regrettably, Gray Express Services Limited has operated without a valid authorisation since 3rd June 2013 in contravention of section 2(4) of the Electronic Communications Act, 2008, Act 775. Per Number N(7) of the Schedule of Penalties of the National Communications Authority (Ghana Gazette 20th April 2015):
>
> > **Failing to submit to the Authority in a manner and at times as may be reasonably requested documents, accounts, estimates, returns and other information that may be required under the Authorisation, attracts a fine of Ten Thousand Ghana Cedis (GHS 10,000.00) for each day the infraction persists.**
>
> Consequently, the Authority hereby fines Gray Express Services Limited a total amount of:
>
> **Fourteen Million, Seven Hundred and Ninety Thousand Ghana Cedis (GHC14,790,000.00) being the penalty for not submitting the complete set of required documents for the renewal of your expired Authorisation for a total of one thousand, four hundred and seventy-nine (1479) days from 3rd June, 2013 to 21st June 2017 when you were served with a Notice of Suspension."**

It is obvious that the material facts of GES' case are on all fours with those of Digital Broadcasting Systems Co. Ltd. Accordingly, the case against GES is decided the same way.

The Tribunal holds that there was no legal basis for the imposition on GES of the penalty prescribed in N(7) of the Schedule of Penalties. There were other sanctions that the NCA could have lawfully deployed against GES, but which it chose not to.

3. Mascott Multi-Services Ltd

The NCA wrote to Mascott Multi-Services Ltd ("MMS") by a letter dated April 15th 2008 (appended as Exhibit 13 to the Respondent's Statement of Case) and indicated in it that MMS had failed or refused to submit the Renewal Form and necessary documentation for the renewal of its expired frequency authorisation. The letter further drew MMS' attention to the fact that it was operating illegally contrary to sections 9,26 and 43(1)(a) and (b) of the National Communication Act 1996 (Act 524). The letter advised MMS to submit within 30 days of the date of the letter the necessary documentation listed in the "Guidelines" sent to MMS. The letter threatened to close down MMS' illegal radio station without further recourse to it, if it failed to submit the necessary documentation.

In a letter dated 22nd June 2017, the NCA, referring to the FM broadcasting authorisation dated 13th December 1995 granted to MMS to establish and operate a commercial radio station on an assigned frequency, indicated that MMS had refused to submit the following statutory documebts in its application for the renewal of its authorisation: certificate of incorporation; certificate to commence business; Ghana Revenue Authority Tax Clearance Certificate; audited financial reports for the last four years of operation; SSNIT Clearance; and a particular completed NCA Form.

The letter went on to explain that this refusal to submit the requisite documents meant that the station was operating illegally, in breach of section 2(4) of the Electronic Communications Act, 2008 (Act775). It notified MMS that the NCA, exercising its power under section 13(1) of the Electronic Communications Act, 2008, would close down MMS and re-assign its frequency after 30 days.

Finally, on 28th September 2017, NCA wrote to MMS along the lines already noted in relation to the other members of the Appellant whose cases have earlier been discussed. The relevant part of the letter stated that:

"Regrettably, Mascott Multi-Services Limited has operated without a valid authorisation since 27th January 2008 in contravention of section 2(4) of the Electronic Communications Act, 2008, Act 775. Per Number N(7) of the Schedule of Penalties of the National Communications Authority (Ghana Gazette 20th April 2015):

> **Failing to submit to the Authority in a manner and at times as may be reasonably requested documents, accounts, estimates, returns and other information that may be required under the Authorisation, attracts a fine of Ten Thousand Ghana Cedis (GHS 10,000.00) for each day the infraction persists.**

Consequently, the Authority hereby fines Mascott Multi-Service Limited (Atlantis FM, Accra) a total amount of:

Thirty Three Million, Two Hundred and Fifty Ghana Cedis *(sic)*[Thousand missing] (GHC33,250,000.00) being the penalty for not submitting the complete set of required documents for the renewal of your expired Authorisation for a total of three thousand, three hundred and twenty-five (3,325) days from 15th May, 2008 to 22nd June 2017 when you were served with a Notice of Suspension."

The facts of this case differ from the previous ones in that at the beginning of the correspondence between the NCA and MMS the latter had not even yet submitted an application for renewal. The second letter discussed conveys the impression that MMS in the meantime had submitted an application for renewal. The case, however, shares a common feature with the previous ones in that the person on whom the penalty was sought to be applied was not the holder of a frequency authorisation, that authorisation having expired. Following the principle used to determine the earlier cases therefore, this Tribunal holds that on the basis of the facts set out in the letters reviewed above, there was no legal basis for the imposition on MMS of the penalty prescribed in N(7) of the Schedule of Penalties. There were other sanctions that the NCA could have lawfully deployed against MMS, but which it chose not to.

4. Network Broadcasting Company Ltd

The NCA wrote to Network Broadcasting Company ("NBC") (by a letter appended to the Respondent's Statement of Case as Exhibit 12) on 23rd November 2009 acknowledging receipt of a letter from NBC which sought a renewal of its expired radio frequency authorisation. The letter stated that, following an assessment of the application, it had been detected that NBC had failed to submit the following required documents: tax clearance certificate; audited financial reports for the past five years; and SSNIT contributions of workers. NBC was therefore requested to submit these documents.

On 23rd June 2017, NCA wrote again to NBC, referring to the latter's FM broadcasting authorisation dated 7th September, 1995. NCA informed NBC that its records indicated that NBC had refused to submit documents listed in the letter, which were required in connection with NBC's application for renewal of its authorisation. The listed documents were: business plan; copies of company registration documents; copy of tax clearance certificate; signed letter of commitment; copy of SSNIT clearance certificate; audited financial report for the past 5 years; and a non-refundable renewal application fee. The letter also contained paragraphs, similar to what was contained in the similar letters earlier discussed in connection with other members of the Appellant, that the refusal to submit the requisite documents meant that the station was operating illegally, in breach of section 2(4) of the Electronic Communications Act, 2008 (Act775). It notified NBC that the NCA, exercising its power under section 13(1) of the Electronic Communications Act, 2008, would close down NBC and re-assign its frequency after 30 days.

Finally, on 23rd October 2017, the NCA wrote to the NBC. The NCA referred to its letter dated 26th September 2017 on the subject of a penalty for failure to apply for renewal of authorisation before expiry. This letter of 26th September 2017 is not exhibited by the Respondent. The letter of 23rd October 2017 states that:

> "Following the reprieve granted to sanctioned FM stations by the Minister for Communications in consultation with the National Communication Authority and announced in a Press Release dated 20th October 2017 you are hereby informed that the penalty for your failure to apply for renewal of your Authorisation within the stipulated period has been reduced by fifty per cent (50%)

Consequently, your fine now stands at Fifteen Million, Seven Hundred and Ninety-Five Thousand Ghana Cedis (GHC 15,795,000.00) which is to be settled on or before 19th November, 2017."

The facts relating to NBC are different in that, it would appear that the offence with which it was charged was not failure to produce documents, but rather failure to apply for a renewal of authorisation before its expiry. However, a copy of the letter accusing the NBC of this offence is not on record. Moreover, the evidence contained in a Press Release dated 28th September, 2017 and entitled "Press Release on Nationwide FM Broadcasting Audit" seems to be contradictory since it lists Network Broadcasting Limited (at p. 18) as among the companies which the NCA states it has requested to submit renewal documents and pay a fine for:

> "Failing to submit to the Authority in a manner and at times as may be reasonably requested, documents, accounts, estimates, returns and other information that may be required under the Authorisation..."

This Press Release is appended to the Notice of Appeal. The evidence in this case is thus conflicting. Nevertheless, the ground for declaring the penalty imposed on Appellant's members in the earlier cases considered in this Decision to be unlawful does not seem to apply here. The penalty applied to NBC therefore survives the Appellant's challenge under ground (a), subject to this Tribunal's finding later on the issue of procedural fairness, which will be discussed later.

5. Progress Multimedia Ltd

The NCA wrote to Progress Multimedia Limited ("PML") on June 22nd 2017 stating that NCA's records indicated that PML had refused to submit its tax clearance certificate from the Ghana Revenue Authority – a statutory document required for the renewal of its authorisation. The letter referred to the FM broadcasting authorisation dated April 18, 2012 granted to PML to establish and operate a commercial radio station on an assigned frequency. The letter asserts that PML's refusal to submit the requisite document means that the station is operating illegally, in contravention of section 2(4) of the Electronic Communications Act, 2008 (Act 775) which states that:

"Except as provided by this Act or any other law not inconsistent with this Act, a person shall not operate a broadcasting system or provide a broadcasting service without a frequency authorisation by the Authority."

The letter gave notice to PML that the NCA, exercising its power under section 13(1)(b) of the Electronic Communications Act, 2008 (Act 775) would close down the station and re-assign its frequency after 30 days from the date of the letter.

On 28th September 2017, NCA wrote again to PML. The letter stated that under clause 5 of the authorisation granted to PML on 18th April 2012 it was expected to apply for renewal of its authorisation 3 months prior to its expiry. However, PML did not apply for renewal by the date of the expiry of the authorisation on 17th April, 2017. It was not until 9th June 2017 that PML submitted an incomplete application. As at 22nd June 2017, PML had not submitted a complete renewal application. The letter then continues as follows:

"Regrettably, Progress Multimedia Limited has operated without a valid Authorisation since 17th April, 2017 in contravention of Section 2(4) of the Electronic Communications Act, 2008, Act 775. Per Number N(7) of the Schedule of Penalties of the National Communications Authority (Ghana Gazette, 20th April, 2015):

Failing to submit to the Authority in a manner and at the times as may be reasonably requested, documents, account, estimates, returns and other information that may be required under the Authorisation, attracts a fine of Ten Thousand Ghana Cedis (GHS10,000.00) for each day the infraction persists.

Consequently, the Authority hereby fines Progress Multimedia Limited a total amount of:.."

The letter then specifies the quantum of the fine.

The facts set out above bring this case within the category of cases where the Tribunal has found that the penalty imposed is not well founded in law, since the person on whom the penalty was imposed was not the holder of an authorisation. Accordingly, the penalty imposed on Progress Multimedia Limited is hereby quashed.

6. SuperMax Media Company Ltd

The NCA wrote to SuperMax Media Company Limited ("SMCL") on 22nd June 2011, acknowledging SMCL's letter dated 19th May 2011 seeking a renewal of its FM radio authorisation, which had expired. The NCA indicated that, in reviewing SMCL's application, it had found that the following requirements had been omitted: company regulations; certificate of incorporation; certificate to commence business; evidence of tax payment for the past 5 years; SSNIT contributions of its employees; audited financial statements for the past 5 years; feasibility report; and signed commitment letter. The letter therefore requested SMCL to submit these documents within two weeks from the date of the letter. It ended rather self-contradictorily that failure to submit the documents would leave the NCA with no option than to revoke SMCL's authorisation. Since the letter had earlier stated that the authorisation had expired, it was rather curious for a threat to be issued that it would be revoked. What had expired did not require revocation!

On 22nd June 2017, the NCA again wrote to SMCL, referring to the FM broadcasting authorisation dated 4th December 2002 granted it to operate on an assigned frequency. The letter indicated that SMCL had refused to submit specified statutory documents in connection with its application for the renewal of its authorisation. The specified documents were the same as those listed in the letter of 22nd June 2011. The letter went on to state that refusal to submit the documents would mean that SMCL was operating illegally. Section 2(4) of the Electronic Communication Act, 2008 (Act 775) would be contravened. NCA therefore notified SMCL that the NCA, exercising its power under section 13(1)(b) of the Electronic Communications Act, 2008, would close down SMCL's radio station and re-assign its frequency after 30 days.

NCA wrote a further letter dated 26th September 2017 to SMCL, which contained the following paragraphs:

> "Regrettably, SuperMax Media Company Limited has operated without a valid Authorisation since 3rd December, 2007 in contravention of Section 2(4) of the Electronic Communications Act, 2008, Act 775. Per Number N(7) of the Schedule of Penalties of the National Communications Authority (Ghana Gazette, 20th April, 2015):

Failing to submit to the Authority in a manner and at the times as may be reasonably requested, documents, account, estimates, returns and other information that may be required under the Authorisation, attracts a fine of Ten Thousand Ghana Cedis (GHS10,000.00) for each day the infraction persists.

Consequently, the Authority hereby fines SuperMax Media Company Limited a total amount of:.."

The letter then specifies the quantum of the fine.

From the facts contained in the letters discussed above, it is obvious that this case also falls within the category of cases in which the NCA has unlawfully imposed a penalty on a company which does not hold a radio frequency authorisation. As already explained earlier in relation to the cases already discussed, there was no legal basis for the imposition on SuperMax Media Company Ltd of the penalty prescribed in N(7) of the Schedule of Penalties.

7. Trickie FM Ltd.

The NCA wrote a letter dated 4th March 2014 (attached as Exhibit 15 to the Respondent's Statement of Case), entitled: **"REMINDER NOTICE: RENEWAL OF EXPIRED RADIO FREQUENCY AUTHORISATION** to Trikie Fm ("TF"). in this letter, the NCA reminded TF of two previous letters to TF in which it had been directed to submit five years audited financial reports to enable the Authority process its renewal application. The NCA gave TF 30 days from the date of the letter to submit its five years audited financial statements and pay its outstanding regulatory and spectrum fees, if it wanted to re-use its frequency. It indicated that It would take steps to have TF's frequency withdrawn if the directive contained in the letter was not heeded to.

On 22nd June 2017, the NCA wrote again to TF, stating that according to its records TF had not submitted its audited financial statements for the past five years. It asserted that this refusal meant that TF was operating illegally, in contravention of section 2(4) of the Electronic Communications Act, 2008 (Act 775) which states that:

"Except as provided by this Act or any other law not inconsistent with this Act, a person shall not operate a broadcasting system or provide a broadcasting service without a frequency authorisation by the Authority."

The letter gave notice to TF that the NCA, exercising its power under section 13(1)(b) of the Electronic Communications Act, 2008 (Act 775), would close down the station and re-assign its frequency after 30 days from the date of the letter.

In yet another letter to TF from NCA, dated 28th September, 2017 and marked Exhibit 8 and attached to the Respondent's Statement of Case, the NCA pointed out that under clause g(i) of TF's expired authorisation, the holder of it was expected to apply for its renewal three months before its expiry. However, although its authorisation expired on 4th December 2007, TF had not applied until 18th June, 2009, when it submitted an incomplete application. The letter continued that, as of 22nd June 2017, TF had not submitted "complete renewal application documents."

Accordingly, the letter continued:

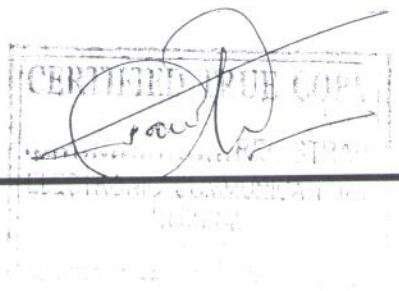
"Regrettably, Trickie FM Limited has operated without a valid Authorisation since 4th December, 2007 in contravention of Section 2(4) of the Electronic Communications Act, 2008, Act 775. Per Number N(7) of the Schedule of Penalties of the National Communications Authority (Ghana Gazette, 20th April, 2015):

Failing to submit to the Authority in a manner and at the times as may be reasonably requested, documents, account, estimates, returns and other information that may be required under the Authorisation, attracts a fine of Ten Thousand Ghana Cedis (GHS10,000.00) for each day the infraction persists.

Consequently, the Authority hereby fines Trikie FM Limited a total amount of:.."

The letter then specifies the quantum of the fine.

From the facts that the unsworn evidence contained in the letters above show, the penalty imposed on Trikie FM suffers from the same legal flaw as has already been discussed above. The penalty is thus quashed.



8. Simgwado Broadcasting Compnay Limited

The NCA, on 25th September 2017, wrote a letter (marked Exhibit 6 and attached to its Statement of Case) to the Simgwado Broadcasting Company Limited (" SBCL)." The letter made reference to the FM broadcasting authorisation dated 27th March 2012 granted to SBCL to establish and operate a commercial radio station on an assigned frequency. It pointed out that, under clause 5 of the authorisation, SBCL was expected to apply for a renewal of its authorisation three months prior to its expiry on 26th March 2011. However, it was not until 7th July 2017 that it submitted an incomplete application, after being served with a Notice of Suspension on 22nd June 2017.

The letter then continues as follows:

> "Regrettably, Simgwado Broadcasting Company Limited has operated without a valid Authorisation since 4th December, 2007 in contravention of Section 2(4) of the Electronic Communications Act, 2008, Act 775. Per Number N(7) of the Schedule of Penalties of the National Communications Authority (Ghana Gazette, 20th April, 2015):
>
> > **Failing to submit to the Authority in a manner and at the times as may be reasonably requested, documents, account, estimates, returns and other information that may be required under the Authorisation, attracts a fine of Ten Thousand Ghana Cedis (GHS10,000.00) for each day the infraction persists.**
>
> Consequently, the Authority hereby fines Simgwado Broadcasting Compan Limited a total amount of:.."

The letter then specifies the quantum of the fine.

The facts as revealed in the letters above indicate that SBCL was no longer the holder of an authorisation and therefore could not be liable for the offence quoted above, as has already been discussed. The penalty imposed on the Simgwado Broadcasting Company is therefore hereby quashed.

9. Kalvico Company Limited

On the 22nd day of June 2017, the NCA wrore to Kalvico Company Limited ("KCL"), making reference to the FM broadcasting authorisation it had granted KCL on 16 April 2012 to establish and operate a commercial radio station on an assigned frequency. The NCA indicated that its records showed that KCL had failed to renew its authorisation which had expired on 15th April 2017 and that KCL was in breach of its authorisation. The letter also informed KCL that it was in breach of section 2(4) of the Electronic Communications Act, 2008 (Act 775) which states that:

> "Except as provided by this Act or any other law not inconsistent with this Act, a person shall not operate a broadcasting system or provide a broadcasting service without a frequency authorisation by the Authority."

The letter further gave notice to KCL that the NCA, exercising its power under section 13(1)(b) of the Electronic Communications Act, 2008 (Act 775), would close down the station and re-assign its frequency after 30 days from the date of the letter.

On the 28th day of September 2017, the NCA again wrote to KCL reminding it of its breach of its authorisation and the fact that it applied for renewal of its authorisation after its expiry. The letter then sets out the by now familiar passage that:

> "Regrettably, Kalvico Company Limited has operated without a valid Authorisation since 15th April, 2017 in contravention of Section 2(4) of the Electronic Communications Act, 2008, Act 775. Per Number N(7) of the Schedule of Penalties of the National Communications Authority (Ghana Gazette, 20th April, 2015):
>
> > **Failing to submit to the Authority in a manner and at the times as may be reasonably requested, documents, account, estimates, returns and other information that may be required under the Authorisation, attracts a fine of Ten Thousand Ghana Cedis (GHS10,000.00) for each day the infraction persists.**
>
> Consequently, the Authority hereby fines Kalvico Limited a total amount of:.."

The letter then specifies the quantum of the fine.

For the reasons already set out above several times, this penalty is quashed. The facts contained in the letters do not support the lawful imposition of the penalty on Kalvico Company Limited.

GROUND (b) OF THE APPELLANTS' APPEAL

In ground (b) of the Appeal, the Appellants complain that the Respondent erred when it applied the Schedule of Penalties to punish the Appellants for their alleged offences/breaches when the applied portions of the said Schedule of Penalties are *ultra vires* the Electronic Communications Act, 2008 (Act 775) and therefore void and of no effect. The issue under ground (b), therefore, is whether, quite apart from the issue already dealt with under ground (a), regarding whether the offence with which the Appellants were charged was right, given the facts of the case, N(7) of the Schedule of Penalties is ultra vires Act 775 and therefore void and of no effect.

The Appellants' argument is as follows: it questions whether the offence of failure to submit documents can lawfully carry the sanction applied to it by the Schedule of Penalties. It draws attention to section 97(1) of Act 775, under which the Minister may on the advice of the Authority by legislative instrument make Regulations generally to give effect to the provisions of the Act. One of the particular matters on which the Minister is given enabling power to issue Regulations is specified in section 97(1)(g) as follows:

> "procedures for the determination of breaches of Regulations and the imposition of sanctions, warnings and other penalties in respect of the breach, ..."

The Appellants point out that LI 1991 states in its Preamble that It is made pursuant to section 97 of Act 775, whose content has already been explained above. Under section 97(3) of Act 775, it is provided that despite the Statutory Instruments Act, 1959, the penalty for contravention of Regulations made under it shall be a fine of not more than two thousand penalty units. The Appellants contend that this means that LI 1991 cannot impose a fine in excess of two thousand penalty units for a breach of any provision in LI 1991. Regulation 103(1)(h) of LI 1991 states that a Class 1 licensee shall "submit to the Authority,

in a manner and at the times as may be reasonably requested, documents, accounts, estimates, returns and other information that may be required under the licence and, in general, give the Authority's inspectors the necessary facilities to carry out inspections of the communication system;"

The Appellants therefore contend that the penalty applied to them in this case could not lawfully be more than two thousand penalty units. This argument, however, ignores the distinction between holders of frequency authorisations and class 1 licensees. N(7) of the Schedule of Penalties appears to be a mirror image of Regulation 103(1)(h) of LI 1991 but drafted to apply to holders of frequency authorisations, as distinct from licensees. The issue which arises is whether the Respondent was obliged to apply the same penalty to the N(7) offence as was applied to licensees by Regulation 103(1)(h) of LI 1991. It would appear not.

The Appellants further contend that the Schedule of Penalties was intended to provide punishment for offences for which the Act or Regulations had not provided. The Respondent had no power to either create or modify any offence through the publication of the Schedule of Penalties.

In response to these arguments, the Respondent contends that Act 775 authorises the Respondent to impose pecuniary penalties on licensees for a breach of a condition of a licence. It cites section 72(1)(e) in support of its position. It also prays in aid Regulation 137 of LI 1991 which provides as follows:

> "(1) Where there is a breach of a provision of these Regulations, the Authority may impose a pecuniary penalty as the Authority may determine, unless a penalty is otherwise provided for in these Regulations.
>
> (2) The Authority shall for the purposes of sub-regulation (1) publish the pecuniary penalties for breaches in a manner as the Authority determines."

Accordingly, if a penalty has not yet been provided in the Regulations for a breach of any of its provisions, the Respondent has the power to impose a pecuniary penalty for that breach by publishing the penalty.

The Statement of Case of the Respondent contains the following passage:

"Respectfully, the Act only requires the Respondent to publish a notice on its website and in the Gazette of the penalties it may impose for them to be effective. Section 72(4) of Act 775 provides as follows:

> *The Authority shall specify by periodic notices in the Gazette and on it website the circumstances under which a pecuniary penalty and other penalties may be imposed and the basis on which they may be calculated.*

The Respondent followed this procedure by gazetting its Schedule of Penalties on 20th April 2015 (**Exhibit 1** attached to the Statement of Case) and publishing same on its website. Neither Act 775 nor L.I. 1991 provides for the penalty for failing to submit documents to the Respondent and the Respondent therefore had the mandate to provide penalties for the failure to produce documents in the Schedule. The Respondent did not act ultra vires by doing this."

Finally, the Respondent points out that section 97(3) of Act 775 on which the Appellants rely to maintain that a penalty for contravention of the Regulations shall be a fine not exceeding two thousand penalty units was repealed by the Electronic Communications (Amendment) Act, 2016 (Act 910). Section 4 of Act 910 provides that: "The principal enactment is amended by the repeal of subsection (3) of section 97." Thus there is no longer any upper cap on the quantum of fines that may be imposed to sanction offences under Act 775. The quantum of a fine cannot therefore be the only ground on which an argument of ultra vires under Act 775 is based.

After considering the arguments from both sides, the Tribunal finds that N(7) of the Schedule of Penalties is not ultra vires the Respondent.

GROUND (c) OF THE APPELLANTS' GROUNDS OF APPEAL

It will be recalled that the Appellants' ground (c) is that the Respondent erred when it sought to apply the penalties against the Appellants in a retrospective manner. This ground may have been sustainable, had the Respondent not granted its general amnesty in December 2017, but, as the Respondent points out in its Statement of Case, the issue raised

by this ground of appeal became moot because of events which occurred after the initial invocation of the penalties.

The Appellants contend that since the publication of the Schedule of Penalties in the Gazette and on the Respondent's website was in 2015, the offence of failure to submit documents cannot be enforced in respect of any date earlier than 20th April 2015, which was when the Respondent published the punishment for the offence. The Appellants argue further that any application of the Schedule of Penalties to them before 2015 is unconstitutional as it is in breach of Article 19(11) of the 1992 Constitution, since the offence and its penalty were not prescribed in a written law before April 2015.

The Tribunal does not consider it necessary to rely on this constitutional point. It can reach the same conclusion by applying the common law principle that an alleged offence which did not have any legal backing at the time it was committed cannot be the basis for imposition of a penalty. The purported imposition of penalties on the Appellants stretching back to 2000 was therefore unlawful.

The Respondent, however, saves its case on this ground by the amnesty referred to above. In its Statement of Case, it provides the following information:

> "By a press release issued on 19th December 2017 (**Exhibit 2** attached to the Statement of Case) the Respondent granted a general amnesty to defaulting radio stations. The press release stated that the penalties for offences would be imposed for periods commencing from 28th July 2016. The press release stated specifically as follows:
>
> a. *All sanctioned commercial FM Stations (Revoked and Fined) are to rectify all outstanding issues by Monday 15th January 2018, and pay a pecuniary penalty. The penalty shall be based on:*
>
> - *The number of days of violation from 28th July 2016 but shall not exceed one year in any case."*

The Respondent, therefore, contends, justifiably, that this press release renders this ground of appeal moot. Accordingly, for the reasons set out above, the Tribunal dismisses this ground of appeal.

GROUND (d) OF THE APPELLANTS' GROUNDS OF APPEAL

The final ground of appeal of the Appellants is that the Respondent erred when it imposed penalties on the Appellants without offering them the opportunity to remedy the alleged infractions as provided for under Act 755.

The Appellants invoke section 13 of Act 755 which grants the Respondent power to revoke or suspend licences in accordance with specified procedures. They claim that these procedures were not complied with. Under section 13(2) of Act 755, the Respondent is required, before exercising its power of suspension or revocation under section 13, to give the licensee or authorisation holder thirty days notice in writing of its intention to do so and specify in the notice the grounds on which it proposes to suspend or revoke the licence or the frequency authorisation. The Authority is also obliged to give the licensee or authorisation holder an opportunity to present its views; to remedy the breach which had occasioned the decision to suspend or revoke and to submit to the Authority within the time specified by the Authority a written statement of objections to the suspension or revocation of the licence or the frequency authorisation.

In their Statement of Case, the Appellants state that:

> "It is the view of the Appellants that the decision of the Respondent was arrived at after substantial breach of the provisions with regard to hearing the Appellants' side of the story, giving them the opportunity to present their views and also giving them the time within which to present its objections to the intended suspension or revocation of their frequency authorizations. To the extent that the Respondent failed to comply with the Act as far as revocations and suspensions are concerned, the Appellants argues (sic) renders the decision a nullity."

The Respondent's answer to these arguments of the Appellants is to point out that the Appellants' licences or authorisations had expired on various dates and therefore by operation of law they were not entitled to operate. The Appellants, whose

authorisations had expired, were therefore operating illegally and the Respondent, instead of immediately sanctioning them, rather gave them an opportunity to remedy their infractions, before it sanctioned them. The Respondent relies on section 2(4) and 3(1) of Act 775 which provide respectively as follows:

> "Except as provided by this Act or any other law not inconsistent with this Act, a person shall not operate a broadcasting system or provide a broadcasting service without a frequency authorisation by the Authority"
>
> "Except as otherwise provided under this Act a person shall not operate a public electronic communication service or network or provide a voice telephony service without a licence granted by the Authority."

The Appellants' case on this ground is thus based on facts which do not aid their case. The fact that their authorisations had expired makes a material difference to the obligation they want to impose on the Respondent. Section 13 of Act 775, relied on by the Appellant, is relevant only to licences and authorisations which are still in force. The letters exhibited by the Respondent as attachments to its Statement of Case show that all the authorisations of the Appellants had expired before they were notified to renew them. Where the authorisation of a holder has expired, the statutory obligation to afford the holder an opportunity to remedy its infraction does not apply.

If the Appellants wanted to prove otherwise, that is, that their authorisations had not expired, the burden was on them to use Regulation 10 of the Electronic Communications (Rules of Procedure of the Electronic Communications Tribunal) Regulations, 2016 (LI 2236) to provide the relevant evidence. Regulation 10 provides for the Tribunal to conduct a hearing at which a party may give evidence of any kind. Having failed to use the hearing to establish the facts which are precondition to the remedy they seek on this ground, the Appellants cannot succeed on this last ground.

PROCEDURAL IMPROPRIETY

Although ground (d) has been dismissed, it does raise an important issue which has to be addressed in this Decision, namely, procedural impropriety. This is one of the grounds articulated by Lord Diplock in his classic statement in the *GCHQ Case* earlier referred to. (See *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C.374 at 410). For the Appellants whose penalty has been quashed under ground (a), this ground is not crucial. However, for the appeal of Network Broadcasting Company Ltd this ground is crucial. The point is that no penalty should be imposed without affording the subject of the penalty an opportunity to make representations on its own behalf with regard to the penalty. This means that prior to the levying of a penalty on Network Broadcasting Company Ltd. it should have been afforded an opportunity of defending itself against its imposition.

Earlier in this Decision reference was made to the passage in Date-Bah JSC's judgment in *Awuni v WAEC*, [2003-2004] SCGLR 471 which explained the role of the principles natural justice, epitomised in the twin latin maxims of *nemo iudex causae suae* and *audi alteram partem*. These two maxims play an important role in ensuring that administrative bodies act fairly.

In the *Awuni case* Date-Bah JSC explained the implications of *audi alteram partem* as follows (at p. 563):

> "My interpretation of fairness within the context of Article 23 would be that, in general, unless the circumstances make it inappropriate, for instance for reasons of practicality or of public interest or for any other cogently valid reason, it includes a principle that individuals affected by administrative decisions should be afforded an opportunity to "participate" in the decision in the sense of being given a chance to make representations on their own behalf of some kind, oral or written, to the decision-maker.
>
> Individuals affected or to be affected by administrative decisions obviously have an interest in influencing the outcome of the decision-making process. In general, it is fair that they should be afforded an opportunity to influence the decision. Given the variety, and the width of the continuum, of contexts

in which administrative decisions are taken, however, there is need for flexibility in the ways that are to be worked out to enable individuals to influence decisions about themselves.

Thus, in relation to a particular decision, the circumstances may indicate that there is no need for a formal hearing, in the sense of an adjudication. A consultation, for instance, may be adequate. This flexibility, regarding how the presentation of the views of those affected by administrative decisions may be made, is expressed thus by Lord Bridge in *Lloyd v McMahon* [1987] AC 625 at p. 702:

> "...the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."

> Accordingly, a fair "hearing" does not necessarily connote an opportunity for the person affected to be heard orally. Written representations on his or her behalf may be sufficient, given the context. Also, the nature of the opportunity to be offered to an affected person to be heard may be influenced by public interest considerations and the requirements of efficient administration."

The issue to be determined is whether Network Broadcasting Company Ltd., on the facts as narrated under ground (a) above, was given an adequate opportunity to respond to the decision of the Respondent to "charge" it with the offence of failure to apply for a renewal of its authorisation before its expiry. The evidence on this is rather scanty. However, the Tribunal is not satisfied that the Company was given an

adequate opportunity. Best practice would be for the Respondent to invite a prospective subject of a penalty to show cause why it should not be penalised for a particular offence. For the Tribunal to uphold the penalty imposed on the Company in this case, there has to be evidence on record showing that the Company was given an opportunity to respond to the offence charged before the levying of the penalty. There is inadequate evidence on this. Accordingly, the penalty imposed on Network Broadcasting Company Ltd is also quashed.

CONCLUSION

Accordingly, grounds (b), (c) and (d) are hereby dismissed. For the reasons given in the Tribunal's discussion of ground (a), the appeal is allowed on ground (a) in respect of all the Appellants, bar one, and the penalties imposed on all the Appellants, with the exception of Network Broadcasting Company Ltd., are hereby quashed. The appeal of Network Broadcasting Company Ltd is allowed on the ground of procedural impropriety and therefore its penalty is also quashed.

JUSTICE SAMUEL KOFI DATE-BAH (PRESIDING)

PROFESSOR NII NARKU QUAYNOR (MEMBER)

BIADELA MORTEY AKPADZI (MEMBER)

COUNSEL:

KWAKU OWUSU-AGYEMANG FOR THE APPELLANTS

GOLDA DENYO FOR THE RESPONDENT