**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**PUBLIC LAW DIVISION**

**2021/PUB/jrv/0027**

**IN THE MATTER** of an application by **CABLE BAHAMAS LTD.** for leave to apply for Judicial Review. **AND IN THE MATTER OF** the Decision and Interim Order of the Respondent issued on the 22nd day of July A.D. 2021 (**the Decision**).

**AND IN THE MATTER OF** the Communications Act ("**the Act"**).

**BETWEEN**

**CABLE BAHAMAS LTD.**

**Applicant**

**V.**

**UTILITIES REGULATION AND COMPETITION AUTHORITY**

**Respondent**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Kahlil D. Parker with him Ms. Roberta W. Quant of Cedric L. Parker & Co. for the Applicant
Mr. John F. Wilson QC with him Ms. Alexandria Russell of McKinney Bancroft & Hughes for the Respondent,

**Hearing Date:** 13 September 2021

**Public Law - Judicial Review - Illegality - Procedural Fairness - Unreasonableness – Whether the Respondent was bound to follow the procedural guidelines set out in the Revised Code of Content Regulation ECS 8/2021 ("the Code") – Broadcast regulation of content carriage services – Whether the Respondent's decision to issue an urgent Interim Order was ultra vires its jurisdiction pursuant to section 96 of the Communications Act, Ch.304 – Duty to give reasons – Duty to consult - Whether Application for Judicial Review is premature.**

These judicial review proceedings relate to the Respondent, Utilities Regulation Competition Authority (URCA)'s decision by Interim Order dated 22 July 2021, which, pursuant to section 96 of the Communications Act, Ch. 304 prohibited the Applicant, Cable Bahamas Ltd. ("CBL") from broadcasting a certain advertisement on the Honourable Philip E. "Brave" Davis until further notice by reason that the advertisement may have breached the Content Code and could have caused serious and irreparable harm. CBL alleges that (i) URCA had no jurisdiction to issue the Interim Order in the circumstances (ii) the Interim Order was open-ended in time contrary to the Communications Act (iii) there were several procedural irregularities which were contrary to the Communications Act and the principles of natural justice and due process and (iv)the Interim Order was unreasonable.

**HELD: dismissing the application for judicial review with costs to the Respondent:**

1. By section 96 of the Communications Act, URCA has the jurisdiction to issue Interim Orders with or without being prompted by a complaint.

2. What made the situation an urgent one to justify issuing the Interim Order was the risk that the intended advertisement could cause serious and irreparable damage.

3. As it was a case of urgency, URCA was not bound to follow all of the procedural guidelines set out in Clause 10.10 of the Code. It followed that there was no obligation on URCA to limit the Interim Order in time.

4. The threshold for determining whether to issue the Interim Order pursuant to section 96 of the Communications Act was whether there was risk of serious irreparable harm in URCA's opinion, so that there was no duty to consult CBL and one cannot be properly implied. The failure to consult CBL did not amount to unfairness.

5. It was not unreasonable for URCA to have issued the Interim Order as the risk that the Ad could cause serious and irreparable damage by defaming the Complainants was a sufficient reason to issue the Interim Order.

6. URCA is entitled to its costs of the Action to be paid by CBL, to be taxed if not agreed.

## JUDGMENT

**Charles J:**

**Introduction**

[1] This is an application by the Applicant, Cable Bahamas Limited ("CBL") for judicial review, following this Court's grant of leave on 25 August 2021 of the Respondent,

Utilities Regulation and Competition Authority (URCA)'s decision by an Interim Order to prevent CBL from broadcasting a particular advertisement.

[2] Aggrieved by the prohibition of the broadcasting of the advertisement, CBL seeks the following relief, namely:

a. An Order of Certiorari to remove into this Court and quash URCA's Decision and the Interim Order dated 22 July 2021;

b. A Declaration that the said exercise, or purported exercise, by URCA of its statutory power to issue the Interim Order complained of herein without proper, or any, due process or reasonable or lawful justification, was *ultra vires* the Communications Act, 2009, arbitrary, oppressive, irrational, unlawful, unreasonable, null, void and/or of no legal effect;

c. A Declaration that URCA's Decision to issue the Interim Order was so manifestly unreasonable that no reasonable authority or tribunal, entrusted with its powers, could reasonably have come to that decision in all the circumstances of this case;

d. A Declaration that URCA's Decision was arbitrary, oppressive, irrational, unreasonable, unlawful, null and void and of no legal effect;

e. A Declaration that in all the circumstances, URCA's Decision to issue the Interim Order was taken in bad faith;

f. A Declaration that URCA's actions constituted an intentional and/or malicious failure and/or refusal to perform its statutory duty;

g. A Declaration that URCA's conduct toward CBL was *ultra vires,* arbitrary, oppressive, discriminatory and/or otherwise unconstitutional.

h. An award for aggravated and exemplary damages;

i. An award of vindicatory damages for URCA's unlawful interference with, and violation of, CBL's statutory, constitutional, and due process rights;

j. Costs and any other relief.

**Background facts**

[3] The facts are largely not in dispute. To the extent that there may be a departure from the agreed facts, then what is expressed is gleaned from the affidavits and documentary evidence which were presented to the Court. The Court is mindful that there was no cross-examination of any of the affiants so greater weight is placed on the contemporaneous documentary evidence.

[4] CBL is, and was at all material times, a duly licensed communications provider, delivering residential and corporate broadband internet, cable television, fixed line and mobile telephone and data services to the Bahamian population. Prior to the announcement of the date for General Elections, which was held on 16 September 2021, CBL commenced the broadcasting of political advertisements including an advertisement regarding the Honourable Philip E. "Brave" Davis ("Hon. Davis") and, at that time, the Opposition Progressive Liberal Party ("the PLP") ("the Ad").

[5] URCA is a public authority established under the Utilities Regulation and Competition Authority Act and is the regulator of the Electronic Communications Sector under the provisions of the Communications Act, No. 10 of 2009, Ch.304 (the "Comms. Act") and the provisions of the Utilities Regulation & Competition Authority Act, No. 12 of 2009 Ch. 306 ("the URCA Act"). URCA's duties, among other things, extend to making rules for the regulation of content of carriage services broadcast in The Bahamas to do so URCA has issued the Revised Code of Conduct for Content Regulation ECS8/2021 ("the Code") to be observed by broadcasters.

[6] By letter dated 9 July 2021, Political Communications Advertising ("PCA") lodged a complaint with CBL concerning CBL's failure to run the Ad. PCA is a political communications company engaged by the FNM to create advertisements.

[7] By letter dated 14 July 2021, CBL rejected to broadcast the Ad by reason that "*the FNM's proposed political advertisement as originally presented violated the letter and spirit of the Code*."

[8] By letter dated 15 July 2021, URCA received notification from CBL of a code complaint filed by PCA. The PCA complaint alleged that CBL was in breach of the Code by rejecting the Advertisement based on CBL's concern that the content "bordered on defamation".

[9] On 20 July 2021, URCA received a complaint in writing against CBL on behalf of Hon. Davis and the PLP ('the Complainants") alleging that it was in breach of Clause 6.8 of the Code by its broadcast of the Ad, which they said, defamed and slandered Hon. Davis. Additionally, an addendum to the initial complaint of 21 July 2021 alleged that CBL also breached Clause 6.6 of the Code when it broadcasted the Ad in failing to identify at the beginning and at the end of the Ad that it was a political Ad and on whose behalf it was being broadcasted.

[10] On 22 July 2021, URCA issued an Interim Order pursuant to its power under section 96 of the Comms. Act and Clause 10.11 of the Code. The Interim Order directed CBL to immediately "*cease and desist"* from broadcasting the Ad "*until further notified in writing by URCA*" on the basis that the Ad may be in breach of the provisions of the Code and that there was a risk of serious and irreparable harm being caused. The Interim Order expressed what gave rise to its issuance ("*Rationale for issuance of this Interim Order*"): (i) the Complainants' complaint (ii) URCA's prima facie determination that the Ad may be in breach of the Code and (iii) CBL's widespread reach. The Interim Order also particularised the "*likely serious and irreparable damage*": (i) damage to the Complainants' reputation; and (ii) a precedent that political advertisements could violate the Code.

[11] On that same day, URCA wrote to CBL, making it aware of the Interim Order and advising that it [URCA] had commenced an investigation.

[12] On 6 August 2021, URCA issued an amendment to the Order which provided that the duration of the Interim Order would be limited to three (3) months from that date thereof (until 21 October 2021) (Amended Interim Order"). On the same day, URCA sought information from CBL and the Complainants to facilitate its investigation.

[13] On 28 July 2021, CBL lodged an appeal against the Decision to the Utilities Appeal Tribunal ("UAT") pursuant to and in accordance with section 111(1)(e) of the Comms. Act.

[14] On 29 July 2021, CBL was advised by the Office of the Attorney General that although approval has been given for the appointment of the members and officers of the UAT, they have not yet received their Instruments of Appointment and are not presently competent to hear appeals. URCA says that, whilst this may be so, there is a Registrar in place who is functioning. At the time that this Court heard the application for leave to bring these judicial review proceedings on 18 August 2021, the UAT was incompetent to hear CBL's appeal which was filed almost a month prior. Further, the Attorney General was unable to advise CBL as to a timeline for the regularization of the UAT to become functional.

[15] On 4 August 2021, CBL filed a Notice of Application for leave to apply for Judicial Review supported by the affidavit of its Vice President, Media, David Burrows ("Mr. Burrows"). On the same day, CBL also filed an *Ex Parte* Summons and Certificate of Urgency.

[16] On 19 August 2021, the then Prime Minister Hon. Hubert Minnis dissolved Parliament and announced that the nation's General Elections would be held on 16 September 2021.

**Law on judicial review**

[17] In **Brian R. Christie v The Civil Aviation Authority (Bahamas Air Navigation Services Division)** [2017/PUB/jrv/00010], this Court, at para 16 of that Judgment, set out the role of the Court in judicial review matters and stated:

**"Judicial Review is the method by which the Court exercises a supervisory jurisdiction over public decision-making bodies to ensure that those bodies observe the substantive principles of public law and do not exceed or abuse their powers while performing their duties."**

[18] In **Kemper Reinsurance Company v Minister of Finance and others (Bermuda)** Privy Council App. No. 67 of 1997 at para 18, Lord Hoffman described the judicial review process in this way:

**"In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. In the case of a restriction on the right of appeal, the policy is to limit the number of times which a litigant may require the same question to be decided. The court is specifically given power to decide that a decision on a particular question should be final."**

[19] Judicial review is only available against decisions of public bodies exercising public functions. Purchas L.J. in **Regina v East Berkshire Health Authority ex parte** 7 Walsh (1965) 1GB 152 and quoted at para 27 of **Bain (Re)** [1993] BHS J. No. 16 emphasised the importance of demonstrating that the decision was public:

**"Finally, at page 181 Purchas L.J. posed the very question which, mutatis mutandis, I must address in the instant case: "did the remedies sought by the applicant arise solely out of a private right and contract between him and the authority or upon some breach of public duty placed upon that authority which related to the exercise of the powers granted by statute to them to engage and dismiss him in the course of providing a national service to the public?"**

[20] Generally, there are three well-established heads upon which judicial review may be brought with a caveat for further development on a case-by-case basis which may add further grounds such as the principle of "proportionality". In the landmark case of **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 at 410-411, the House of Lords has confirmed that powers derived from the prerogative are public law powers and their exercise amenable to the judicial review jurisdiction. Lord Diplock conveniently classifies under three heads the grounds upon which administrative action is subject to control by judicial review as

illegality, irrationality or "*Wednesbury* unreasonableness" and procedural impropriety. He explained the three well-established heads in this fashion:

> **"By "illegality, as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."**
>
> **By irrationality, I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 K.B. 223). 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. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…."**
>
> **I have described the third head as "procedural impropriety" rather than 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".**

**Preliminary objection**

[21] Mr. Wilson QC, who appeared as Counsel for URCA, made a preliminary objection to the judicial review application in respect of the Interim Order. Mr. Wilson QC contended that the Interim Order is an interlocutory decision, which courts typically do not grant judicial review in respect of. In support of his contention, he referred to the cases of **R v Association of Future Brokers and Dealers Ltd. ex parte Mordens** (1991) 3 Admin LR 254 QBD and **R (M Sport Ltd.) v Revenue and Customs Comrs** (2021) 4 WLR 62. In the latter case, the Court of Appeal found that the judicial review application of tax notices was premature since the taxpayer had a right to make representations to the Board which would then make a final decision after having considered the representations. He said that the judicial

review application is premature because the statutory process has not been completed.

[22] I agree with Mr. Wilson QC that the statutory process was not complete. The Interim Order was a mere temporary measure to secure the status quo pending URCA's investigation and a final decision. However, I do accept that the cases cited by Mr. Wilson QC are authority for the proposition that there is a *general* rule against judicial review of interlocutory decisions.

[23] Although the Interim Order was intended to be a temporary measure, it effectively became a final decision in that the General Elections were called before the expiration of the three-month investigation. The very purpose of the Ad having been eroded, the remainder of the statutory process became irrelevant because nothing was realistically going to be changed. Even if URCA had completed the investigation and issued a final decision, it would have been of no consequence because the General Elections, for which the Ad was being broadcasted, had past.

[24] To my mind, the preliminary objection is untenable and must fail.

**Issues**

[25] The issues to be determined by the Court are:

1. Whether URCA had the jurisdiction to issue the Interim Order, the complaint from PCA/the PLP not being an express "urgent complaint";

2. Whether the Interim Order, having failed to identify a specific end date, was ultra vires;

3. Whether there were procedural irregularities: whether URCA was required by the Act, the Code or principles of natural justice/due process to consult with CBL before making the Interim Order, notify and give reasons and;

4. Was the Interim Order was unreasonable in the circumstances?

**Issue 1: Whether the issue of the Interim Order was ultra vires having regard to the absence of a complaint directly from PCA?**

[26] Learned Counsel for CBL Mr. Parker argued that URCA's issuance of the Interim Order was ultra vires (illegal) as URCA had no jurisdiction to issue it without an urgent complaint.

[27] It is apposite therefore to re-direct our attention to section 96(1) of the Comms. Act which confers upon URCA the power to make interim orders in cases of risk of serious and irreparable damage. Section 96(1) of the Comms. Act provides:

> **"(1) In cases of urgency due to the risk of serious and irreparable damage, URCA, acting, on its own initiative or at the request of any affected party, may issue an interim order.**
>
> **(2) Any interim order shall be -**
>
> **(a) limited in time to such reasonable period of time as URCA may expect to require to complete its investigation; and**
>
> **(b) shall only address those actions or omissions that are likely to result in serious and irreparable damage.**
>
> **(3) Any interim order should be followed by a full investigation, upon completion of which an order shall be issued by URCA that either reinforces, changes or revokes the interim order."**

[28] The Code was published by URCA to provide further rules for the regulation of content pursuant to section 55 of the Comms. Act which gives URCA the power to publish codes of practice applicable to content provision. Clause 10.10 sets out the procedure for investigations and referrals of complaints. Clause 10.11 specifically deals with Urgent Complaints and Interim Orders. It provides:

> **"Urgent Complaints and Interim Orders**
>
> **(1) In cases of urgency due to the risk of serious irreparable harm, any person, party or entity whose election programme or political advertisement has been rejected by a Licensee under Clause 6.14(1) and any other person *may* refer the matter to URCA as an urgent complaint under section 96 of the Communications Act and Clause 10.9(21) of this Code.**
>
> **(2) Where the circumstances of the complaint so require, URCA may, within forty-eight (48) hours of receiving the complaint, issue an interim order for a limited period of time under section 96(1) and (2) of the Communications Act while it fully investigates the matter. The**

**interim order will only address those actions or omissions that are likely to result in serious and irreparable damage.**

**(3) <u>Upon completion of its full investigation, URCA will issue an order</u> under section 95 of the Communications Act <u>that either reinforces, changes or revokes the interim order</u>.** [Emphasis added]

[29] Mr. Parker submitted that URCA lacked the jurisdiction to issue the Interim Order since the complaint(s) which gave rise to the Interim Order was a general complaint and not an urgent one. He stated that PCA, the party that suffered harm by CBL's rejection of the Ad, never made a complaint directly to URCA. He said that, at best, the complaint made was a general complaint. Accordingly, said Mr. Parker, URCA did not have a complaint to have effected its power to issue an Interim Order, rendering it ultra vires section 96 of the Comms. Act. Mr. Parker next contended that, in the absence of an urgent complaint, URCA had no jurisdiction to issue the Interim Order. Had the complaint been an "urgent complaint", said Mr. Parker, Clause 10.11 of the Code would have applied to give URCA the jurisdiction to issue the Interim Order. In the circumstances, says Mr. Parker, Clause 10.10 and not Clause 10.11 applies.

[30] It is plain that Mr. Parker's assertion that URCA lacked jurisdiction to issue the Interim Order is premised on the complaint having not been an urgent one. However, I agree with Mr. Wilson QC that (i) the jurisdiction to issue an Interim Order pursuant to section 96 of the Comms. Act is not contingent on the filing of any complaint; and (ii) the circumstances, and not the form of the written complaint, determines whether it is an urgent complaint.

[31] URCA's power under section 96(1) of the Comms. Act to issue an Interim Order can be effected of its own volition. No complaint is needed. This is expressly stated in section 96(1) itself which confers the power – "*In cases of urgency due to the risk of serious and irreparable damage, <u>URCA, acting on its own initiative</u> or at the request of any affected party, may issue an interim order".* Mr. Parker has suggested that, in the absence of a complaint filed specifically under Clause 10.11 of the Code, URCA does not have the power to issue an Interim Order. This is wrong. Clause 10.11 of the Code merely refers to section 96(1) of the Comms. Act.

As it is a part of the Code on Urgent Complaints and Interim Orders, it refers to the section in the Comms. Act which gives the power itself. There is no requirement that URCA must have a complaint before issuing an Interim Order. URCA has the authority to issue an Interim Order whether or not a complaint has been filed. It follows that it mattered not whether the complaint was general or urgent.

[32] In any event, the assertion that the complaint made was not urgent is without merit. In its complaint to URCA, Counsel for the Complainants alleged that the Ad was defamatory of the Complainants, which URCA considered to be a risk of serious and irreparable damage. This risk of serious and irreparable damage is what permitted URCA to issue the Interim Order in the first place. Neither section 96(1) of the Comms. Act nor Clause 10.11 of the Code suggests that a complaint, and certainly not an urgent complaint triggers the issuance of an Interim Order. It seems to me that a complaint is considered urgent where the allegations therein pose a risk of causing serious and irreparable damage. Accordingly, the fact that the complaint from the Complainants was not expressly labelled an urgent complaint and did not state that it was being made pursuant to Clause 10.11 of the Code did not affect URCA's ability to issue the Interim Order.

**Issues 2 and 3: Procedural Irregularities**

[33] Both issues relate to the applicability of procedural rules to the issuance of the Interim Order and can therefore be dealt with together.

[34] Mr. Parker submitted that the indefinite period of the Interim Order rendered it *ultra vires*. According to him, the Interim Order ought to have been limited in time. He contended that because the complaint filed was a general and not an urgent complaint, URCA was bound by the procedural rules with respect to handling a complaint under Clause 10.10 of the Code. Additionally, Mr. Parker contended that URCA failed to give CBL due process since it had not consulted CBL before issuing the Interim Order and contrary to Clause 10.9(4), it had not given CBL notice that it received a complaint and had not given reasons for the issuance of the Interim Order.

[35] On the other hand, Mr. Wilson QC argued that neither the legislation nor the Code requires the Interim Order to be limited in time as there is no specific reference to time. He correctly submitted that the Interim Order need only be for the period of investigating the matter and that it is clearly the intention of Parliament that the purpose of the Interim Order is to facilitate an investigation. He further submitted that it follows that the Interim Order can be properly issued pending the investigation, however long that might be, provided that the time is reasonable.

[36] CBL's assertions of due process failures and the obligation to limit the Interim Order in time are premised on the complaint being general as opposed to urgent. It is on that basis that Mr. Parker contends that URCA was obliged to comply with the procedural regularities. However, as I have stated, the authority to issue an Interim Order is not presupposed by any complaint. What brings circumstances within *cases of "urgency due to the risk of serious and irreparable harm*" is just that: the risk. It follows that since URCA determined that this was such a case, the rules relative to those situations apply. In my opinion, Clause 10.10 applies to investigations and complaints otherwise than in urgent circumstances whereas Clause 10.11 applies to urgent circumstances to the exclusion of Clause 10.10, which is why that section bypasses all of the procedural formalities. Therefore, I find that Clause 10.11 and not Clause 10.10 applied.

[37] Mr. Wilson QC submitted that, even if the failure to stipulate a time in the initial Interim order was *ultra vires*, the defect was cured by the issuance of the Amended Interim Order. I agree especially having regard to the fact that the amendment was made swiftly.

[38] Mr. Parker took issue with the reasonableness of the time given for the investigation. He submitted that three months was an unreasonably long period of time to have suspended the Ad having regard to the imminence of the General Elections. However, the Court takes judicial notice that, at that time, a specific date for the General Elections had not yet been announced. Accordingly, I do not think

that URCA can be faulted for the effect of the imminence of General Elections on the reasonableness of the time period prescribed for the investigation.

**Whether URCA breached natural justice in the issuance of the Interim Order**

[39] Mr. Parker also argued that fairness dictated that URCA consults CBL before it issued the Interim Order because the Interim Order had the effect of interfering with CBL's business and infringing on its constitutional right of freedom of expression. Mr. Wilson QC argued the contrary. In essence, he contended that there is no express statutory duty to consult before URCA makes an Interim Order under section 96 and one cannot be implied so as to accord with the *audi alteram* right to a hearing or natural justice principles as this would obstruct the practical purposes of the power to make interim orders under the Comms. Act which, by definition, is intended to be issued urgently. Both Counsel relied on a dictum of Lord Mustill in **R v Secretary of State for Home Department ex parte Doody** [1994] 1 AC 531 at page 560 where the law Lord explained that fairness often requires the person being adversely affected to be consulted before. Lord Mustill said:

> **"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness**

**will very often require that he is informed of the gist of the case which he has to answer".**[Emphasis added]

[40] It cannot be disputed that **Ex parte Doody** was an exceptional UK constitutional law case concerning four prisoners serving mandatory life sentences. They requested judicial review after the Home Secretary refused to release the convicts after serving their minimum terms but he gave no reason for the decision. Under common law, there is no duty to give reason for decisions: **(R (on the application of Hasan) v Secretary of State for Trade and Industry** [2008] EWCA Civ 1311).

[41] In the instant case, there is no express provision of section 96 or even within Clause 10.11 of the Code which gives a party the right to make representations to URCA prior to the making of an interim order. As Mr. Wilson QC correctly pointed out, the Comms. Act is replete with other instances of express provisions for representations to be made. Undeniably, immediately following the making of the interim order, CBL is permitted to make representations prior to URCA determining whether the interim order stands or will be revoked on the making of the final order.

[42] Thus, it cannot be properly implied that there is a duty to consult the licensee or give notice prior to the making of the interim order because to do so would frustrate the purpose of the statute. It would also defeat the opportunity to remedy the serious irreparable harm which URCA foresees as likely and indeed, it will render the statutory procedure impotent.

[43] In my considered opinion, the failure to consult CBL did not amount to unfairness. The rationale for the Interim Order is urgency; urgency being the risk of serious or irreparable harm. It was an interlocutory/temporary order pending the final order, a measure to avoid serious or irreparable damage in the circumstances where URCA determined that a risk of such damage was likely. There was nothing to consult CBL on because the threshold for determining whether an Interim Order should be issued was whether there was a risk of serious and irreparable damage in the opinion of URCA, not in the opinion of CBL.

[44] Mr. Parker next submitted that URCA was obliged to give reasons for the issuance of the Interim Order. He said that the reasons produced were vague, arbitrary and unparticularized:

> **"URCA considers that the alleged conduct by CBL and Be Aliv, as set out under Section 2 above may, inter alia, be in breach of Paragraph 6.8(1) and 6.6 of the Content Code respectively."**

[45] Mr. Parker further argued that URCA was not only under a statutory obligation to give reasons, as demonstrated by the requirement that URCA satisfies itself of a likely risk of serious and irreparable damage, but also that the giving of reasons is necessary for the fairness of the process. He asserted that URCA cannot be heard to rely upon statutory safeguards when it admittedly failed to comply with the fundamental safeguards mandated by section 96 of the Comms. Act.

[46] On the other hand, Mr. Wilson QC, submitted that URCA was under no obligation to give reasons for granting the interim Order either under section 96 of the Comms. Act or under the rules of natural justice. He correctly submitted that there is no express duty under section 96 to give reasons for issuing an Interim Order. He also argued that the obligation cannot be implied since in the circumstances, fairness does not so require. He once again relied on **ex parte Doody** where the Court acknowledged that there was no absolute duty to give reasons for an administrative decision. The Court considered the circumstances where failure to give reasons should be challenged. The Court applied several dicta, but more directly applied the dictum of Legatt LJ in the seminal decision of **R v Civil Service Appeal Board, ex parte Cunningham** [1991] 4 All ER 310 at 326:

> **"Since the board has elected as a matter of practice not to give reasons, and has given none to Mr Cunningham, it has been bound by its own logic not to attempt to justify for the benefit of the court the figure awarded. In default of explanation Mr Cunningham's award was so far below what, by analogy with the award of an industrial tribunal, he was entitled to expect as in my judgment to compel the inference that the assessment was irrational, if not perverse. Because there was no general duty to give reasons, the absence of reasons does not by itself entitle the court to hold that the award was not supportable. But the unexplained meagreness of the award does**

**compel that inference. As Lord Keith said in *Lonrho plc v Secretary of State for Trade and Industry* [1989] 2 All ER 609 at 620, [1989] 1 WLR 525 at 539:**

> **'The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons cannot complain if the court draws the inference that he had no rational reason for his decision.'"**

[47] Essentially, decision makers are only *required* to give reasons under due process/natural justice where the decision, on its face, is one which is irrational or unexpected. Applied to the instant facts, it cannot be said that the Interim Order suspending the Ad by reason that it may have caused serious and irreparable damage was unexpected where the Ad was a political one which CBL had previously rejected for the same reason and the Complainants alleged that it was defamatory. Defamation is serious and irreparable. To my mind, the reasons given by URCA were actually quite extensive. It stated that the Interim Order had been issued since, in its view, there was a risk of serious and irreparable damage, which, in my judgment, was a sufficient reason. However, URCA went on to spell out *how* the Ad could cause serious and irreparable damage in the circumstances namely (i) damage to the Complainants' reputation; and (ii) a precedent that political ads could violate the Code.

**Issue 4: Whether the issuance of the Interim Order was unreasonable?**

[48] The question is whether it was reasonable for URCA to have determined that the Ad posed serious and irreparable damage to the violation of the Code's policies on political advertisements. It cannot be said that undue potential defamation of the character of the Complainants on the primary television provider in the jurisdiction does not rise to the standard of serious and irreparable damage. In my opinion, the issuance of the Interim Order was reasonable in all the circumstances.

[49] Mr. Parker submitted that URCA failed to conduct its own independent assessment of the merits of the Complainants' purported complaint of defamation and instead

issued the Interim Order based on its erroneous and unreasonable assumption that CBL "*had previously refused to run the Ad on that basis*". In the Interim Order, where URCA stated what gave rise to its issuance, it made no reference to CBL's previous refusal to run the Ad for fear that it violated the Code. Even if URCA had, it was not an irrelevant consideration. In assessing whether there was a risk of serious and irreparable damage, it was reasonable to give weight to the fact that CBL had previously refused to run the Ad for the very same reason.

**Conclusion**

[50] For all of these reasons, it was reasonable for URCA to have issued an Interim Order. The risk that the Ad could cause serious and irreparable damage by defaming the Complainants was a sufficient reason to issue the Interim Order. The failure of the initial Interim Order to identify a specific end date was not *ultra vires* the Comms. Act. The Interim Order was issued to err on the side of caution pending the final determination as to whether the Ad was actually in breach of the Code. Further, URCA's amendment to the Interim Order only days after the initial one to stipulate the period for which it would last, suggested that it (URCA) had not made the Interim Order arbitrarily. Additionally, in the context of General Elections not having been announced at that time, three months was not, in my opinion, an unreasonably long time to have required URCA to complete the investigation.

[51] URCA, being the successful party, is entitled to its costs to be taxed if not agreed.

**Dated this 6th day of December, 2021**

**Indra H. Charles**
**Justice**