BRADLEY v. THE COMMONWEALTH[1]

When a Government Minister or a Public Body is entrusted with statutory powers which are to be exercised for the welfare of the community at large, problems inevitably arise as to the extent of the powers that are to be exercised. Where the act is enabling or empowering in form, such as an act conferring on a statutory body power to provide electricity or gas or other utilities to the public, usually, as a matter of statutory interpretation, it will be found that there is no initial duty to provide the service in any given area or to any particular person or class of persons unless the act expressly says so. But a distinction should be drawn between the initial setting up and providing of the service and cases where the service has already been provided but at a later date certain persons are refused the right to use such services. In the latter case do we say that the Minister or Public Body in question owes a duty not to withdraw the service from any person unless expressly empowered to do so by the Act or do we say that the Minister or Public Body has a completely arbitrary and unfettered discretion to withdraw the service from any person at any time he thinks fit? This was the problem that faced the High Court in *Bradley v. The Commonwealth.*

The facts of the case are simple enough. The Plaintiff was employed by the Rhodesian Department of Information and was director of the 'Rhodesian Information Centre'. It is interesting to note that he was by no means 'meritorious.' His employment related in effect to disseminating propaganda about Rhodesia. As was noted by Barwick C.J., and Gibbs J., he was 'involved in endeavouring to persuade others to form favourable opinions of a cause which is considered officially and perhaps by many members of the community and perhaps for good reasons to warrant condemnation'.[2] He rented a telephone from the Postmaster-General's Department, was the tenant of a box at the local post office, and sent and received mail and telegrams through the post. He also distributed a publication called *The Rhodesian Commentary,* which was registered for postal transmission as a category B newspaper. In early April 1973 the Postmaster-General acting in accordance with the policy of the Commonwealth Government[3] not to recognize the Rhodesian Regime and, to implement a resolution by the Security Council of the United Nations that member States completely interrupt communications with the Rhodesian Regime, issued a direction that all postal and telecommunication services for the 'Rhodesian Information Centre' should be withdrawn. Accordingly, officers of his department immediately disconnected the plaintiff's telephone, changed the lock on his post office box, stopped mail and telegrams passing to and from him, and deregistered *The Rhodesian Commentary.* Thereupon the plaintiff sought a declaration that the Postmaster-General's actions and those of his officers were wrongful and illegal, an injunction against the continuance of such action and damages, or such other remedy as the Court might think fit.

[1] (1973) 1 A.L.R. 241. High Court of Australia, Full Court.
[2] *Ibid.*
[3] As it was then known.

The High Court was therefore faced with the task of examining the Post and Telegraph Act 1901 (Cth) in order to ascertain whether, on the one hand, it gave the Postmaster-General a completely arbitrary discretion to exercise the powers conferred by the Act or, on the other hand, it gave a right to any member of the public to use the postal and telegraphic services provided by the Commonwealth. Only once before, in *R. v. Arndel*[4] had the High Court dealt with this Act and then only with respect to one particular section. In that case the Postmaster-General made an order under Section 57[5] of the Act directing that postal articles addressed to the prosecutors should not be registered, transmitted or delivered to them. It was held that *mandamus* could not lie in such a case. The High Court said that the Postmaster-General owed no duty to the prosecutors because in acting under Section 57 he was not acting ministerially but was exercising a discretion. However in the course of their judgments Griffith C.J. and O'Connor J. said that the Post and Telegraph Act 1901 (Cth) gave no right to any member of the public to use the postal and telephone services provided by the Commonwealth. Griffith C.J. said 'supposing that Section 57 were not in the Act, it is extremely doubtful whether there would be a right to compel the Postmaster-General to deliver letters because *prima facie* the answer would be that the person affected could bring an action for the detention of the letters'.[6] O'Connor J. said: 'there is no section of the Act which directly or indirectly imposes upon the Postmaster-General or upon any of his officers the duty to deliver or transmit letters under any circumstances.'[7] These *dicta* were relied on by the Postmaster-General to support his contention that although there was no express statutory authorization for his actions, neither he nor the officers of his department are under any duty to any member of the public except where a right or remedy is expressly conferred by statute. This was rejected by the High Court and it was held by a majority of 3:2[8] that there is a statutory duty, subject to the express exceptions in the Act and regulations, on the Postmaster-General and his officers to provide postal and telegraphic services to the plaintiff and that no authority exists for the Postmaster-General's actions and those of his officers. Accordingly the declaration and injunction sought by the plaintiff was granted.

Though both the majority and minority based their decisions on an interpretation of the Post and Telegraph Act 1901 (Cth) they proceeded on the basis of opposite assumptions. Menzies J., with whom McTiernan J. concurred, said that '[t]he basic question to be decided here is whether a private person has by statute a right enforceable against the Commonwealth and the Postmaster-General to the services of this Department of State against the formally expressed will of the Postmaster-General.'[9] He proceeded therefore on the assumption that 'a person has a right such as the plaintiff asserts only if some law of the Commonwealth gives it positively.'[10] The result of proceeding on the basis of such an assumption is obvious. If Parliament has not granted such a right to the plaintiff then the Postmaster-General has an unfettered power with respect to postal and telecommunication services, save only

[4] (1906) 3 C.L.R. 557.
[5] This section empowers the Postmaster-General in certain circumstances to refuse the delivery of mail.
[6] (1906) 3 C.L.R. 557, 573.
[7] *Ibid.* 580.
[8] Barwick C.J., Gibbs, Stephen JJ., Menzies and McTiernan JJ. dissenting.
[9] 1 A.L.R. 241, 261.
[10] *Ibid.*

in so far as Parliament has expressly limited such power. This means, therefore, that, subject to the Act and regulations, the Postmaster-General could cut off these services from any one whom he thinks should not use them. In this case it was the 'Rhodesian Information Centre'; the next time it could be a political opponent. In neither case could the injured party have recourse to the Courts. Surely this could not have been the intention of Parliament when it granted the Postmaster-General powers to provide postal and telecommunication services for the public? Furthermore this does not take into account the fact that in the Post and Telegraph Act 1901 (Cth) and the regulations made thereunder there are special provisions providing for the demand of particular services in specified circumstances. And, it is submitted, the answer given by Menzies J. provides no help. He said, whilst referring to Section 57, 'to my mind, however, from the express provision of a special procedure for denying the postal services to gamblers and those connected with a "fraudulent obscene or immoral business or undertaking", to infer, not merely the absence of a general power to discontinue existing services, but the existence of a positive duty to transmit and deliver mail, is to infer too much.'[11] Not being able to find any positive law granting the plaintiff the rights which he asserted, he therefore concluded that his action should fail.

On the other hand the majority proceeded on the basis of a different assumption. In a joint judgment Barwick C.J., and Gibbs J.[12] said '[i]f parliament intended to confer on the Postmaster-General an arbitrary power, subject to no conditions and to no review, to deprive any person of the liberty to use the postal and telephone services, with all the grave consequences that might ensue it would use clear words for that purpose.'[13] It is submitted that this is the better approach for a Court to adopt in a case such as this both on principle and as being more consistent with those situations where Parliament has expressly given the Minister or Public Body power to withdraw the services already provided from any particular person. After an examination of the Act Their Honours concluded, with regard to the use of the postal services, that the Postmaster-General 'has no power to direct that postal articles lodged by a particular person should not be received for transmission or that postal articles addressed to a particular person should not be delivered to him except in the cases for which the Act expressly provides and that the present is not such a case.'[14] *R. v. Arndell*[15] was distinguished on the basis that, in that case the Minister was exercising a discretion conferred on him by the Act. *Mandamus* would not lie, therefore, because he was not acting merely ministerially but was exercising a discretion. Nevertheless they expressed doubt as to the correctness of that decision saying that when the Postmaster-General exercises his discretion under section 57 he should have in fact reasonable grounds to suppose that one of the conditions under that section is applicable.[16] Furthermore, Their Honours said that an order made under that section could at least be examinable in an action for a declaration or injunction. As to the statements made by Griffith C.J., and

[11] *Ibid.* 262.

[12] Stephen J. looked at similar legislation in Canada, America and England and found that in those jurisdictions there is a right in the public to use such services. He therefore concluded that such a right existed in respect of the Post and Telegraph Act 1901 (Cth). He agreed, however, with the analysis made by Barwick C.J., and Gibbs J.

[13] (1973) 1 A.L.R. 241, 247.

[14] *Ibid.* 252.

[15] (1906) 3 C.L.R. 557.

[16] See *Nakkuda Ali v. Jayaratne* [1951] A.C. 66.

O'Connor J., Their Honours dismissed the latter as *dicta* not supported by the other judges and therefore not authoritative and the former as no more than suggesting that 'if there were a legal right to the delivering of letters it would be enforceable by detinue rather than mandamus.'[17]

Similarly it was held that no authority existed for the other actions that were taken by the Postmaster-General and his officers. It is to be noted, however, that it was argued on behalf of the Postmaster-General that he in fact had authority to disconnect the plaintiff's telephone service. This was based on Regulation 8(1) made under the Post and Telegraph Act 1901 (Cth) which provided, *inter alia*, that the Postmaster-General has 'the right to withdraw either totally or partially any telephone or other like service at any time.' A question therefore arose as to the meaning of the word 'withdrawal'. Barwick C.J. and Gibbs J. held that Regulation 8 did not deal 'with the disconnection of an individual subscriber, but with the withdrawal of the service generally in a particular area or during particular times.'[18] Their Honours based this conclusion on the fact that in other regulations which dealt with the disconnection of telephones, but not in Regulation 8, the department was given power to remove the telephone instrument itself. They therefore felt that Regulation 8 must be given a construction compatible with the other regulations and that in the case of an ambiguity a construction should be preferred which would not give the Postmaster-General a completely arbitrary power.

The Court however had a discretion whether or not to grant the declaration and injunction sought by the plaintiff and it was urged on behalf of the Postmaster-General that it should be exercised in his favour for two reasons. First, that he was acting in accordance with a resolution passed by the Security Council of the United Nations. In respect of this argument Their Honours said that 'since the charter and resolutions of the Security Council have not been carried into effect within Australia by appropriate legislation they cannot be relied upon as a justification for executive acts that are otherwise unjustified.'[19] Secondly, that the plaintiff was employed by and acting in aid of an illegal regime. However, Their Honours said that 'to refuse a plaintiff relief to which he is otherwise entitled it should be shown that his own conduct has been illegal or improper[20] and that so long as the Plaintiff abided by the law in Australia he was entitled to its protection, however wrong his opinions might be and however legally and morally blameworthy might be the regime which he served and supported.'

It is submitted that in the field of Administrative law this decision is a welcome ray of light. It is common sense to assume that, where Parliament has empowered either a Minister or Public Body to carry out services for the welfare of the community, such Minister or Public Body does not have an unfettered discretion to withdraw such services from any particular person unless it can be seen from the Act as a whole that that was clearly Parliament's intention. To proceed on any other footing would be to thwart Parliament's intention and to give the Minister or Public Body too broad a power.

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[17] (1973) 1 A.L.R. 241, 254.
[18] *Ibid.* 258.
[19] *Ibid.* 260.
[20] *Ibid.* 260.