

**THE HIGH COURT  
JUDICIAL REVIEW**

2005 267JR

BETWEEN

SCROLLSIDE LIMITED TRADING AS "ZED FM"

APPLICANT

AND  
BROADCASTING COMMISSION OF IRELAND

RESPONDENT

Judgment of O'Sullivan J. delivered the 1st of November, 2005

**The Parties**

1. The applicant is the unsuccessful bidder of two, who were short listed by the respondent, the statutory licensing authority, for the operation of an alternative rock music sound broadcasting service on the FM band in the Dublin area, the successful bidder being Dublin Rock Radio Limited trading as "Phantom FM" which was awarded the contract on 8th November, 2004.

2. The applicant challenges this grant on four grounds, namely:

- (a) the respondent failed to consider the "character" of Dublin Rock as required to do by statute;
- (b) it erred in law in conferring a benefit on Dublin Rock as a result of the illegal broadcasting by a number of individuals who formed part of the consortium comprising Dublin Rock;
- (c) the respondent prejudged the issue of the award of the contract and at all times intended to grant the contract to any applicant involving "Phantom FM"; and
- (d) the respondent erroneously had regard to broadcasting services under the name of "Phantom FM" provided by two distinct entities.

3. Underlying these objections is the applicant's disquiet at the fact that 25% (or more) of the membership comprising Dublin Rock had been engaged in illegal ("pirate") broadcasting for a number of years up to some eighteen months prior to the award of this contract and its contention that the respondent did not adequately test this elements' conversion to legal broadcasting but in fact gave it credit for the experience and expertise gained during the period of illegal broadcasting, erroneously took into account their track record under two separate temporary broadcasting contracts (in circumstances where they were only entitled to credit for one) and, in fact, had made its mind up to grant this contract to any bidder involving Phantom FM.

**The Procedure**

4. The respondent was established by the Radio and Television Act, 1988 to arrange for the provision of sound broadcasting services and to enter into contracts with the providers of sound broadcasting services as it has done in the present case. The procedure adopted by the respondent was first to invite expressions of interest in the proposed contract, next to invite applications (or "bids") of which it received five, these were summarised by the executive of the Commission and considered by it at a meeting where two of the bidders were short listed as already indicated. These two were invited to an oral hearing at which the bidders made a twenty minute submission followed by twenty five minutes of a question and answer session; following this questionnaires were sent out and the answers and all of the material was considered at a final meeting when the decision was made. Finally, the unsuccessful bidders were given "feed back" reports explaining why the Commission decided the way it had. All of these steps were authorised by relevant statutory provisions.

5. The proceedings were by way of affidavit, the principal deponent on behalf of the applicant being Dermot O'Hanrahan and on behalf of the respondent Michael O'Keeffe. There was a lengthy cross-examination of the latter.

6. I propose to consider the evidence in the context of the four grounds of challenge rather than summarise it first.

**Failure to consider "character"**

7. Section 6(2) of the Act requires the Commission when considering applications to have regard to ten matters, the first of which is:

"The character of the applicant or, if the applicant is a body corporate, the character of the body and its directors, manager, secretary or other similar officer and its members and the persons entitled to the beneficial ownership of its shares."

8. This list of ten matters was increased to eleven by s. 60 of the Broadcasting Act, 2001 which provided that the overall quality of the performance of the applicant under any contract held by him should also be considered.

9. The word "character" is not defined in the Act. The definitions given in the concise Oxford Dictionary include "distinctive mark", "collective peculiarities", "style"; "distinction, individuality"; "moral strength, esp. if highly developed or evident" "Reputation, good reputation" "written description of person's qualities; testimonial".

10. Mr. O'Moore S.C. submitted that "character" means "moral fibre". He relied on the observation of Murray J. (as he then was) in *Spin Communications Limited v. The Independent Radio and Television Commission and Another* [2001] 4 I.R. 411, at page 438 where he said:-

"Furthermore, as indicated above, it is incontestable that the policy or attitude of a member of a body applying for a radio licence to issues of drug abuse may be a relevant consideration for the respondent and its members both with regard to the question of the character of an applicant and generally."

11. Mr. Cush S.C. acknowledges that "character" includes the element of "moral fibre" but submits that it goes wider than that.

12. In my opinion if "character" were to be confined to "moral fibre", as distinct from including it, the Act would have defined the word to make this clear. By leaving it undefined the word retains its ordinary meaning which certainly includes moral fibre but also

elements such as "distinctive mark" "collective peculiarities" and "distinction, individuality". One thinks of phrases such as "the character of a team" "a bit of a character"; "a woman of character" as well as "a reformed character" in reaching a conclusion that the word includes more than moral fibre.

13. Mr. O'Moore S.C. has submitted that there was no consideration at all as to whether Phantom's conversion to legal broadcasting (eighteen months prior to the process described above, Phantom had announced that it would cease illegal broadcasting) particularly against a background that it had a history of twice suspending illegal broadcasting, applying for a contract and reverting to illegal broadcasting when its application proved unsuccessful. The respondent simply ignored all this history and thereby failed to consider 'character' under the Act.

14. The evidence is that, in the evaluation of Phantom's bid by the executive there was merely a reference that the largest shareholder in Dublin Rock (Wireless Media Limited) comprises "nine individuals who had a strong involvement and practical experience operating the radio station Phantom FM. Phantom FM operated as a pirate station and more recently under two temporary licences pursuant to s. 8 of the Radio and Television Act, 1988".

15. Whilst this material was before the respondent there is nothing in any minute to indicate they considered the matter further.

16. In response Mr. Cush submitted that "character" included a consideration of individuals and companies comprising Dublin Rock which clearly were considered and furthermore that the Commission in considering "character" is free to place greater or less emphasis on any one or more of the elements that go to make up "character" as defined as is clear and well established, as for example, in the speeches of Lords Keith and Hoffmann in *Tesco Stores Limited v. Secretary of State for the Environment* [1995] 1 WLR 759 where Lord Keith stated at p. 764

"it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit..."

and where Lord Hoffmann said at p. 780

"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority."

17. It is true, of course, in the present case that the statute provides that where the respondent intends to give other than equal weight to the eleven matters for consideration it must notify the bidders and that this has not been done and therefore equal weight must be given to those considerations. It is another matter, however, when it comes to considering the elements comprising each of these considerations and in regard to those the Commission is free under established authority to attach to it whatever weight it considers material. In the present case the elements comprising "character" have all been considered including the history of illegal broadcasting of some individuals involved with the successful bidder which in the executive summary is a fact specifically drawn to the attention of the respondent.

## **Conclusion**

18. This issue must, I think, be seen against the background that it is the established policy of the respondent to encourage illegal broadcasters by accepting applications from them provided they have ceased illegal broadcasting prior to the application being made. The evidence is that this policy was authorised by the distinguished first Chairman of the respondent and in my opinion it is entirely consistent with the objectives of the Act which include the arranging of contracts for legal broadcasting. The involvement of some individuals with Dublin Rock who had been involved in illegal broadcasting was known to the Commission. It is well established that it is a matter for the Commission and not for the courts as to what weight they would attach to this element in their consideration of the character of that particular bidder. It is not for me or, with respect, for the applicant in these proceedings, to assert what weight should have been assigned to this element of the evidence before the respondent or what should have been the outcome of their deliberation, once it is clear, as it is, that the several elements that comprise "character" were considered by the respondent.

19. It seems to me that this challenge was based, at least in part, on an interpretation of "character" which in my opinion is too narrow. There is no allegation of irrationality in the sense that is not alleged that the outcome of the respondent's consideration of the character of Dublin Rock is so utterly irrational as to be beyond the contemplation of their statutory function: absent such a challenge, once it is clear that the topic of character (including the relevant history of illegal broadcasting) was before the Commission, then in my view of the law, that it is an end of the matter.

20. Accordingly this challenge must fail.

## **The winner benefited from illegal broadcasting**

21. I do not think it is axiomatic that a contract bidder cannot, legally, derive any substantial benefit from prior illegal broadcasting. Nonetheless I am prepared initially to consider the evidence grounding this submission because the respondent defended this challenge on the basis that in fact there was no such consideration.

22. In his affidavit in extracts which are too long to cite in full in this judgment Dermot O'Hanrahan refers to several instances in Phantom's application of references to Phantom's record and reputation which clearly indicate a history going back for several years, that is to the days of illegal broadcasting before the first of the two temporary licences. These include a reference to the building on a solid foundation and reputation, numerous references to the prior activities of Phantom FM, specific reference to seven years of audience feedback, seven years of operation, the unique position of Phantom in its ability to profile existing listenership, a reference to a credible and respected "lighthouse brand" and the fact that there was a recall amongst young Dublin listeners to the Phantom brand (7% unprompted and 61% prompted). Dermot O'Hanrahan refers to similar references made at the oral hearing and asserts that the respondent was clearly influenced in a positive way by the illegal broadcasting which had been carried out by Phantom FM. He further refers to the comparison made by the respondent between Dublin Rock and the applicant as contained in the feedback report, and expresses disagreement with a number of the conclusions referred to therein.

23. In an affidavit sworn by the respondent's Chief Executive, Michael O'Keeffe, he says that it is not accepted that Dublin Rock was given an unfair advantage from illegal broadcasting and makes the point that there is a world of difference between encouraging illegal broadcasters to become legitimate and actively favouring the application of an illegal broadcaster over that of a legal broadcaster. Amongst the papers before the respondent was what is known as a "s. 60 Report". This means a report arising from s. 6 of the Act of 1988 as amended by s. 60 of the Broadcasting Act, 2001 which requires the Commission to have regard:-

"To the overall quality of the performance of the applicant with respect to the provision by him of a sound broadcasting

service under any sound broadcasting contract held by him at, or before, the date of the making of the application.”

24. Two temporary contracts were relevant, namely, one granted to Wireless Media Limited in October, 2003 for broadcasting for thirty days between October of that year and January, 2004 and later to Coxstone Limited in March, 2004 for broadcasting for thirty days between that month and June. Both companies broadcasted under the name of “Phantom FM” from the same location and using the same equipment as they had done when Phantom FM was broadcasting illegally. Coxstone Limited is the owner of the premises from which Wireless Media Limited broadcast. The report before the Commission into the provision of services under these two temporary contracts included a reference to the fact that Wireless Media Limited had operated successfully and generally in compliance with the contractual terms then stated “the company’s experience as a pirate broadcaster is not relevant in the context of s. 60 as it was not licensed under the 1988 Act”.

25. Mr. O’Keeffe was cross-examined at length but refused to accept that Phantom FM got a benefit from its illegal broadcasting history. He said the Commission took the two temporary licence periods solely into account and did not take into consideration the unlawful broadcasting. They did not consider it. He reasserted this in a number of different ways under cross-examination while accepting that there was no document recording a formal decision not to consider illegal broadcasting. He said if it were not for the two temporary licences there would have been no question of the Commission taking on board the experience and history claimed by Phantom FM.

26. He acknowledged that in their application Phantom FM did seek to gain advantage from the illegal broadcasting history but asserted notwithstanding that this was not taken into account by the Commission. He further pointed out that Phantom FM had ceased illegal broadcasting eighteen months prior to the commencement of the process leading to the instant contract.

27. In the course of his evidence under cross-examination he made the distinction between the grant of temporary contracts which was done by the executive and not by the Commission and the grant of permanent contracts which were. He also said that it was a relatively speedy and straight forward process and that once an applicant had satisfied the appropriate criteria the attitude of the executive was that a temporary contract should be granted. There was no element of competition for temporary contracts as there was in the case of contracts granted under s. 6. He further acknowledged that there had been a breach of the terms of the contract by Coxstone Limited relating to a sponsorship message. Details of the breach were not given in evidence. Michael O’Keeffe said he considered the breach was minor and acknowledged that he did not draw it to the attention of the Commission for this reason. He was present at the meetings of the Commission and there was no discussion of illegal broadcasting at those meetings at all. The method employed at these meetings was that the Chairman would ask each individual member of the Commission for his or her views on all aspects of the bid under discussion and whilst he did not direct them to ignore illegal broadcasting, the members referred only to the experience gained under the temporary contracts. He accepted that no member expressly said that they were not looking at the history of illegal broadcasting.

28. There is a full transcript of the cross-examination. I am satisfied having heard it and considered that transcript that at no point did Mr. O’Keeffe waiver in his assertion in one form or another that the respondent did not take into account or give benefit to Dublin Rock for its experience of Phantom FM as an illegal broadcaster.

29. Characteristic of the evidence is the following exchange occurring at p. 15 of day two of the transcript:

“A. The Commission took into account what was done under the two licences.

67 Q. And only that?

A. And only that.”

30. It is clear on the evidence that the applicant has not established in any way, and certainly not as a matter of probability, that the Commission gave an advantage to Dublin Rock arising out of its illegal broadcasting experience. The evidence and the supporting documentation goes the other way in my opinion. That therefore concludes the matter and it is not necessary for me to consider, and I do not consider, the effect in law if the evidence had been that some advantage had been accorded to Dublin Rock Limited arising out of the history of illegal broadcasting by Phantom FM.

### **Bias and Prejudgment**

31. In the outline legal submissions of the applicant its submission on this aspect of the case may be summarised as follows:-

32. Two temporary contracts were granted to linked companies of which one was the landlord of the other and both trading under the name of Phantom FM using the same equipment and premises as Phantom FM had done in the days of illegal broadcasting. This was not alone curious but unexplained. Moreover, it was the first time a temporary contract was granted to a commercial broadcaster (as distinct from sporting or charity groups). The applicant’s concern was highlighted when it was discovered that an unscripted purpose for the two licences was ‘to pilot the service in anticipation of a forthcoming licensing round in Dublin this year’. These curious unprecedented grants were in fact of advantage to Phantom FM in achieving the instant contract and all this was done with the cooperation of the respondent with intent to confer this contract to whatever bidder included Phantom FM.

33. Moreover, there appears to have been contact between the respondent and these two applicants as can be seen from the respondent’s reply to a letter from the independent broadcasters of Ireland expressing anger at the granting of a temporary licence to a company associated with a prior illegal broadcaster, which reply indicated that the respondent had received assurances that the group had no further intention to operate illegally and is anxious to embrace the legitimate licensing regime. This can only mean, it is submitted, that there was contact between the respondent and Phantom FM. Further reference is made to e-mails suggesting additional contact beyond those referred to in discovery and notwithstanding an unambiguous denial in the affidavit of Michael O’Keeffe. The suggestion is that a Mr. Maher on behalf of Phantom FM received clarification from the respondent as to effect, if any, the awarding of the instant contract may have on the temporary contract.

34. These and a number of other factors were put to Mr. O’Keeffe in cross-examination. Whilst there is a full transcript I will refer to the more significant of these matters as follows. Mr. O’Keeffe was challenged as to the speed with which the temporary contracts were granted. He pointed out that prior to the year 2000 temporary contracts were granted by the Commission which was becoming over burdened with work and as a result since then they have been delegated to the executive. It was suggested that the contracts were granted before these applicants had identified their sponsors. Michael O’Keeffe pointed out that the applicants were funded by sponsors or patrons even if the list had not been supplied before the contract was granted.

35. He was taken to task on the basis that the two companies which were linked in the manner already described were the recipients

of temporary contracts which between them authorised sixty days broadcasting within a single twelve month period whereas under the Act a broadcaster was entitled only to a maximum of thirty days. Michael O'Keeffe's response was that technically there were two separate companies and that under the then existing guidelines the view taken by the respondent was that once the applications were in order there was no reason not to give the contracts to the applicants. The respondents were, however, aware that in effect the same people were getting the benefit of two licences and that this was contrary to the spirit if not the letter of the Act and as a result changed the guidelines to avoid this happening again. The view taken at the time, however, was that under the guidelines as they existed the applicants complied with the requirements and ought to be given the contracts.

36. It was further suggested that the applications for the temporary contracts were not specific about the musical events intended to be broadcast. Whilst this was so Michael O'Keeffe pointed out that they were well known to the Commission. It was suggested that the instant contract was granted before the Commission had a report back on the monitoring of the services provided by Phantom FM under the first temporary contract before granting the second. Michael O'Keeffe indicated that there was no issue as to compliance and that this situation was acceptable where temporary contracts were concerned as the reports into monitoring could take considerable time.

37. With regard to the allegation that the purpose of the temporary contract as a pilot in anticipation of the permanent contract had not been disclosed he acknowledged that this was not in the written application but said it was discussed with Mr. McLoughlin who was the officer who actually granted the temporary contracts. The complaint from the Independent Broadcasting Association was referred to the Commission but as a routine matter of information. It was put to Mr. O'Keeffe that the proof that the temporary contract holders were insured for libel and slander was only tendered to the respondent a month after the contract had expired. Mr. O'Keeffe's response was that there was insurance cover albeit that the proof was not submitted until after it should have been. Moreover the respondent had received correspondence indicating that these applicants were in the process of seeking the insurance. A further complaint was that the purpose given for these contracts namely to support Irish events was not particularised. Mr. O'Keeffe indicated that these events were well known to the executive of the Commission and that it was in order, accordingly, to grant the temporary contracts.

38. In addition it was suggested to Mr. O'Keeffe that the rules for the conduct of the oral submissions indicated that the application could not be changed. Notwithstanding this Dublin Rock was permitted by the Commission to alter its advertising sales representative from an inexperienced company to one which had great experience and had in fact been identified in the applicant's submissions as their primary sales channel.

39. In his affidavit Mr. O'Hanrahan had said that he had queried this with Michael O'Keeffe who had indicated he had not been aware of it and would revert to him which Mr. O'Hanrahan said had not happened.

40. It was submitted that when these matters and the overall history of the application including the applications for temporary contracts are considered it becomes obvious that the Commission had favoured Dublin Rock in a number of instances and were biased in law and indeed had prejudged the instant application because they had an intention (from the beginning) to grant the contract to whichever bidder included Phantom FM. This was strongly denied by Michael O'Keeffe in cross-examination, of which there is a full transcript, and on affidavit. Mr. Cush S.C. on behalf of the Commission submitted that this allegation was not simply an allegation of prejudice and bias but in fact amounted to the far more serious allegation of *mala fides*.

## Conclusion

41. The standard of proof in relation to this allegation is that the court must be satisfied on the balance of probabilities. Where allegations of a fraudulent nature such as bias or indeed *mala fides*, are made, however, the courts have always been particularly insistent that the evidence supporting such an allegation would be unambiguous, clear, and convincing.

42. In the present case there are two affidavits from each of the principal deponents, there has been a lengthy cross-examination of Michael O'Keeffe, Chief Executive of the respondent, an abundance of documentation, written legal submissions and oral legal submissions, all of which I have carefully considered. In my opinion the evidence advanced to support this contention comes nowhere near the standard required to make out a serious allegation of bias, prejudgment, and still less, *mala fides*.

43. The applicant asserts that the respondent had made its mind up effectively from the beginning to award a license to Dublin Rock because they were associated with Phantom FM. In this context it is instructive to consider, in part, the minutes of the initial meeting of the respondent on 6th September, 2004, when they were considering the five applicants for the contract. In relation to Zed FM (the applicant) this, in part, is what the minutes record:-

"In general terms, the contents of the executive evaluation were endorsed. Zed FM was considered to have a credible and relevant mix in the ownership and control structures of the company. Specifically, the mix included well established and leading rock and radio industry figures in the Dublin market. In addition to contributing funds, the shareholders could also significantly contribute to the programme content.

44. The aim of the station to target a community of interest of alternative rock listeners, beyond the narrow focus of other applicant groups also appeals to a number of the members, including the proposal to target women. While some of the members welcomed the wider target group identified for this service, others said it was unclear as to how this might be achieved. This would require further clarification with the group.

45. The station's proposed low cost base was considered prudent, in view of the niche nature of the audience to be served and the need to establish a revenue base for this type of service. However, some members were concerned that this might impact on the quality of the service proposed and were of the view that this would require some further clarification with the group in the context of an oral hearing.

46. The applicant group's research proposals were considered to be well presented with an adequate sample size. In general terms, the applicant group's programming proposals were considered to be satisfactory and reflected the knowledge and commitment of members of the applicant group to serving the target audience. Some questions were raised regarding the staffing levels for the service and whether or not the service could be successfully operated on the levels proposed. This would require further consideration...the proposed management team for the service was considered to be appropriate and very experienced...in summary, this application was considered to be of a high standard and the programming ethos of the proposed service was considered to be relevant and appropriate to the Dublin market and the target audience in particular."

47. The applicant, as already stated, was short listed. At the final meeting on 8th November, 2004, the following appears in the minutes:-

"Zed FM's ownership and control proposals were considered in general terms to be satisfactory by the Commission. The company was considered to have a good mix of radio and music industry experience, as well as financial and business backing... the track record of individuals involved was also considered to be satisfactory.

The company's management structure was considered to be adequate for a niche service. Aspects of the station's staffing proposals were considered satisfactory. However, members were not convinced that the group could deliver the proposed service with the staffing levels outlined. The members also questioned the adequacy of the resources being committed to staff training.

In respect of the applicant group's programming proposals, the members considered that the station's music offering was not as focussed in respect of *alternative* Rock as that of Phantom FM...the Commission was not convinced about the ability of the station to attract the wider audience being targeted.

The company structure included good financial backing. However, the company's revenue and cost projections were not considered to be as realistic as those of the Phantom FM group."

48. So far from indicating a prejudgment or bias, let alone *mala fides*, on behalf of the respondent these excerpts in my view demonstrate an objective, impartial and indeed appreciative recognition of the merit of the applicant's bid together with a careful and balanced appraisal of its relative strengths and weaknesses when compared with that of Phantom FM. At its strongest the applicant's allegation in this regard amounts to no more than the construction of a series of questions indicating a suspicion of the respondent's attitude but they do not come anywhere near establishing the level of coherent evidence required to make out an allegation of a fraudulent nature such as bias. When placed against the extracts, which I have cited at some length, from the minutes of the two relevant decision making meetings of the respondent these questions in my opinion are met with a complete and satisfactory answer and as soon as these documents were made available to the applicant in my view that should have been an end of this particular allegation.

49. At a more technical level the applicant has not been able to identify a factor external to the process itself by reference to which the Commission could be said to have been guilty of bias as is required under the more recent jurisprudence in relation to bias.

50. Finally, I would acknowledge the validity of a point made by Mr. Kennedy in reply to the effect that the respondent permitted Dublin Rock to mend its hand by reference to its advertising agent contrary to the arrangements made to the effect that the application could not be changed and without reference to the applicant. This point has a validity not in any sense in the context of an allegation of bias but it is, in my view, a departure from the highest standards of procedural fairness and is something which I would hope would not happen again. I would add, however, that in the overall context it is by no means of such significance nor is it such a departure from the proper standards as would justify any kind of intervention by the courts other than perhaps making of the observations which I am now doing.

#### **Two temporary contracts considered**

51. In the statement required to ground the application it is stated that the respondent was not entitled to have regard to the cumulative experience gained by Phantom FM through the operation of the two temporary contracts. In opening the case Mr. O'Moore S.C. did not advance any elaborated argument in regard to this ground nor did he do so in closing it. In response to the argument Mr. Cush S.C. pointed out that technically there was no breach of the Act because the two contracts were in fact held by two different companies but this, clearly, is against the background already indicated that the respondent considered that the holding by the same people of two temporary contracts within a single twelve month period was contrary to the spirit of the Act and as a result changed their guidelines notwithstanding the fact that they felt obliged to grant the contracts in the present case because the applications were technically correct and complied with the then existing guidelines. Mr. Cush also pointed out that there were in fact different directors of the two companies.

52. He also submitted that under the expanded s. 6 of the Act the Commission was obliged to:-

"Have regard to the overall quality of the performance of the applicant with respect to the provision by him of a sound broadcasting service under any sound broadcasting contract held by him at, or before, the date of the making of the application."

53. This authorised the Commission to consider Dublin Rock's performance under any contract and to the extent that 25% of Dublin Rock was owned by Wireless Media Limited the holder of one of the temporary contracts whose landlord was, in fact, the holder of the other temporary contract, and both traded as Phantom FM, there was an obligation under s. 6 to consider the sound broadcasting service provided by Phantom FM under both contracts, and this is what the respondent did.

54. This ground of challenge was not pressed by the applicant. A defence, as indicated above, was advanced on behalf of the respondent and whilst it can be said on the one hand that the awarding of the two temporary contracts in effect to the same group of individuals was contrary to the spirit of the Act (and the respondent has since made arrangements to avoid its repetition), on the other hand it appears to me to be in accordance with the principle of the Act of 2001 that the provision of services under those two temporary contracts once it had occurred should have been considered as was done in the instant case. In the result I am not satisfied that this ground of challenge has been made out by the applicant.

#### **Delay**

55. The respondent has argued in its written submission that the applicant should be refused relief on the grounds of delay and/or acquiescence. In light of my foregoing conclusions it is not necessary that I consider this submission in respect of which Mr. Cush in oral submission relied simply on the written arguments already made.

56. In the result this application must be refused.