HOUSE OF LORDS

**House of Lords**

**Session 2007 - 08**



# Judgments - R (On The Application of Animal Defenders International) V Secretary of State For Culture, Media and Sport (Respondent)

HOUSE OF LORDS

SESSION 2007-08

[2008] UKHL 15

***on appeal from: [2006] EWCH 3069***

# OPINIONS

# OF THE LORDS OF APPEAL

# FOR JUDGMENT IN THE CAUSE

**R (on the application of Animal Defenders International) (Appellants)
v Secretary of State for Culture, media and Sport (Respondent)**

## Appellate Committee

## Lord Bingham of Cornhill

## Lord Scott of Foscote

## Baroness Hale of Richmond

## Lord Carswell

## Lord Neuberger of Abbotsbury

**Counsel**

***Appellants*:**

**Michael Fordham QC**

**Shaheed Fatima**

**(Instructed by Bindman & Partners)**

***Respondents*:**

**David Pannick QC**

**Martin Chamberlain**

**(Instructed by Treasury Solicitors)**

***Hearing date:***

**17-18 DECEMBER 2007**

## ON

## WEDNESDAY 12 MARCH 2008

**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT**

**IN THE CAUSE**

**R (on the application of Animal Defenders International (Appellants) v Secretary of State for Culture, Media and Sport (Respondent)**

**[2008] UKHL 15**

**LORD BINGHAM OF CORNHILL**

My Lords,

1. In these proceedings the appellant, Animal Defenders International, seeks a declaration under section 4 of the Human Rights Act 1998 that section 321(2) of the Communications Act 2003 is incompatible with article 10 of the European Convention on Human Rights as given effect in this country by the 1998 Act. The section is said to be incompatible as imposing an unjustified restraint on the right to freedom of political expression. The Queen's Bench Divisional Court (Auld LJ and Ouseley J) refused to make a declaration of incompatibility ([2006] EWHC 3069 (Admin), [2007] EMLR 158) but granted a leapfrog certificate under section 12(1) of the Administration of Justice Act 1969 and the House granted the appellant leave to appeal.

2. The appellant is a non-profit company whose aims include the suppression, by lawful means, of all forms of cruelty to animals, the alleviation of suffering and the conservation and protection of animals and their environment. It campaigns against the use of animals in commerce, science and leisure, seeking to achieve changes in law and public policy and to influence public and parliamentary opinion towards that end. Because of its campaigning objectives it is not eligible for registration as a charity.

3. In 2005 the appellant launched a campaign entitled "My Mate's a Primate" with the object of directing public attention towards the use of primates by humans and the threat presented by such use to the survival of primates. The campaign was to include newspaper advertising, direct mailshots, and also an advertisement on television.

4. The appellant's advertising agents prepared an advertisement which they submitted to the Broadcast Advertising Clearance Centre ("BACC"), an informal body funded by commercial broadcasters to monitor proposed advertisements for compliance with the governing law and current codes of practice. On 5 April 2005 BACC declined to clear the advert on the ground that its transmission would breach the prohibition on political advertising in section 321(2) of the 2003 Act, the appellant being a body with mainly political objects as defined by the Act. This decision was confirmed by BACC on 6 May 2005. No objection has ever been raised to the content of the advertisement, which was entirely inoffensive but consistent with the aims of the appellant. The appellant issued its application for judicial review on 4 August 2005. It is accepted that the Secretary of State for Culture, Media and Sport, as the minister with overall responsibility for broadcasting, is the appropriate respondent.

*Statutory control of broadcasting*

5. Until enactment of the Television Act 1954, radio and television broadcasts in the United Kingdom were transmitted by the British Broadcasting Corporation, a body committed to a high ideal of public service broadcasting. Then, as now, the BBC broadcast no paid advertising. The 1954 Act opened the market to independent broadcasters dependent for their finance on advertising revenue. The Independent Television Authority was established to provide or

arrange for the provision of programmes, and it was the duty of the Authority under section 3 to satisfy itself that, so far as possible, the programmes maintained a proper balance in their subject matter and a high general standard of quality, presented the news (in whatever form) with due accuracy and impartiality, preserved due impartiality on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy and, lastly, included no matter designed to serve the interests of any political party; but this last provision was subject to the qualification that it should not prevent the inclusion in programmes of relays of the whole (but not some only) of a series of BBC party political broadcasts, or the including in programmes of properly balanced discussions or debates where the persons taking part expressed opinions and put forward arguments of a political character. The Authority was obliged by section 4 to secure that the rules in the Second Schedule to the Act were complied with in relation to any advertisements, and one of these rules was that

> "No advertisement shall be permitted which is inserted by or on behalf of any body the objects whereof are wholly or mainly of a religious or political nature, and no advertisement shall be permitted which is directed towards any religious or political end or has any relation to any industrial dispute."

6. It is unnecessary to refer to the series of statutes pertaining to wireless telegraphy and broadcasting enacted over the succeeding half century, save to observe that the principles summarised above were consistently preserved and given effect: see *R v Radio Authority, Ex p Bull* [1996] QB 169, [1998] QB 294. The 2003 Act is a very comprehensive measure, running to over 400 sections and 19 schedules. Chapter 4 of Part 3 contains regulatory provisions and sections 319-328 are directed to programme and fairness standards for television and radio. By section 319 the Office of Communications ("OFCOM"), a supervisory body established by section 1 of the Act, is required to set standards to achieve a number of objectives, among them that news is reported with due impartiality and accuracy and, in subsection (2)(g), that advertising which contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services. Section 320 requires that programmes should, within a given programme or over a number of programmes taken as a whole or a series, preserve due impartiality in relation to matters of political or industrial controversy and matters relating to current public policy. Section 321(2) is central to this appeal. It provides:

> "(2) For the purposes of section 319(2)(g) an advertisement contravenes the prohibition on political advertising if it is—
>
> (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
>
> (b) an advertisement which is directed towards a political end; or
>
> (c) an advertisement which has a connection with an industrial dispute."

Thus an advertisement may fall foul of the prohibition in section 319(2)(g) either because of the character of the advertiser or because of the content and character of the advertisement. Section 321 continues in (3):

> "(3) For the purposes of this section objects of a political nature and political ends include each of the following—
>
> (a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;
>
> (b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;
>
> (c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;
>
> (d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;
>
> (e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;
>
> (f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;
>
> (g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends."

An exception is provided in subsection (7) for advertisements of a public service nature inserted by government departments and party political or referendum campaign broadcasts covered by later provisions of the Act.

7. In enacting the 2003 Act, Parliament paid close attention to the important decision of the European Court of Human Rights in *VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159, a decision given on 28 June 2001, to which it is now necessary to turn.

*VgT*

8. In *VgT* the court found a violation of article 10 of the European Convention, which so far as material to this case provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of the … rights of others …"

9. The facts in *VgT* were very similar to those in the present case. The applicant was an association dedicated to the protection of animals, with particular emphasis on animal experiments and industrial animal production. In reaction to television commercials broadcast by the meat industry it prepared a TV advertisement contrasting the behaviour of pigs in their natural environment with their treatment in the course of industrial production. The theme of the advert was "eat less meat, for the sake of your health, the animals, and the environment" and the content of the advert was not in any way objectionable. The Commercial Television Company, responsible for handling commercial advertising on behalf of the Swiss Radio and Television Company, declined to broadcast the advert because of its clear political character. The parties reached an impasse, the applicant's attempts to challenge the refusal internally failed and an administrative law appeal to the Federal Court was dismissed. The Federal Court noted the protection of freedom of expression in the Federal Constitution and the ban on political (and religious) advertising in section 18(5) of the Federal Radio and Television Act, and considered the impact of article 10 of the European Convention. It considered that the ban served various purposes: among them, preventing powerful groups from obtaining a competitive political advantage, protecting the formation of public opinion from undue commercial influence, bringing about a certain equality of opportunity among the different forces of society, contributing to the independence of broadcasters, and substantially influencing the democratic process of formation of opinion. The court considered the ban to be the more necessary since television with its dissemination and immediacy would have a stronger effect on the public than other means of communication.

10. The European Court noted the Swiss domestic provisions already referred to, and also section 15 of the Radio and Television Ordinance, which reinforced the ban on political (and religious) broadcasting.

11. In giving judgment the European Court was obliged to consider and reject a number of arguments that were, with respect, obviously unsound. Thus the Swiss Government contended that the application was an abuse of process (rejected by the court in para 34 of its judgment) and that article 10 was inapplicable and the responsibility of the Swiss Government not engaged (rejected in para 47). The applicant contended that its advert was not political (rejected in paras 57-58) and that the ban had no legitimate aim (rejected in para 62). Thus it was not until para 63 of its judgment that the court was able to address the real issue in the case, which was whether the ban was necessary in a democratic society.

12. On this issue, the applicant submitted (para 63) that the measure was not proportionate since it had no other means to broadcast its advert. The Government relied (para 64) on the margin of appreciation which it enjoyed, and pointed to the alternative means of publicity open to the applicant (para 65). The court (para 66) reiterated the oft-expressed principle that freedom of expression is one of the fundamental foundations of a democratic society, extending not only to received but also to unorthodox and disturbing opinions,

and giving particular protection to political as opposed to commercial speech. The test of necessity is one of pressing social need (para 67), and while member states have a certain margin of appreciation this is subject to European supervision. The question (para 68) is whether a measure is proportionate to the legitimate aim pursued, and whether the reasons for it are relevant and sufficient. The Swiss authorities had a certain margin of appreciation, particularly essential in commercial matters (para 69), but the advert in question (para 70) did not invite the public to buy a particular product and so fell outside the regular commercial context and there was in many European societies an ongoing general debate on the protection and rearing of animals. So in the *VgT* case (para 71) the margin of appreciation was reduced: what was at stake was not an individual's purely commercial interest but his participation in a debate affecting the general interest. In considering proportionality, (para 72) the court had to balance the applicant's freedom of expression on the one hand with the reasons adduced by the Swiss authorities on the other, "namely to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity between the different forces of society; to ensure the independence of the broadcasters in editorial matters from powerful sponsors; and to support the press". The court acknowledged (para 73) that powerful financial groups could obtain competitive advantages in the areas of commercial advertising and noted the Federal Court's view (para 74) that television had a stronger effect on the public on account of its dissemination and immediacy, but was of opinion (*ibid*) that while the domestic authorities might have had valid reasons for this differential treatment, a prohibition of political advertising applicable only to certain media and not to others did not appear to be of a particularly pressing nature. The court summarised its thinking in para 75 of its judgment:

> "75 Moreover, it has not been argued that the applicant association itself constituted a powerful financial group which, with its proposed commercial, aimed at endangering the independence of the broadcaster; at unduly influencing public opinion; or at endangering the equality of opportunity between the different forces of society. Indeed, rather than abusing a competitive advantage, all the applicant association intended to do with its commercial was to participate in an ongoing general debate on animal protection and the rearing of animals. The Court cannot exclude that a prohibition of 'political advertising' may be compatible with the requirements of Article 10 of the Convention in certain situations. Nevertheless, the reasons must be 'relevant' and 'sufficient' in respect of the particular interference with the rights under Article 10. In the present case, the Federal Court in its judgment of 20 August 1997, discussed at length the reasons in general which justified a prohibition of 'political advertising'. In the Court's opinion, however, the domestic authorities have not demonstrated in a 'relevant and sufficient' manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of the applicant association's case."

The court pointed out (para 77) that the applicant had no means other than through the Swiss Radio and Television Company of reaching the entire Swiss public and was not concerned (para 78) with the mechanics of programming. It concluded (para 79) that the ban was not necessary in a democratic society and so violated article 10.

*The 2003 Act*

13. On the introduction of the Bill which became the 2003 Act, the Secretary of State felt unable to make a statement pursuant to section 19(1)(a) of the Human Rights Act 1998 that in her view the provisions of the Bill were compatible with the Convention rights scheduled to the 1998 Act. Instead she made a statement under section 19(1)(b) of that Act that although unable to make a statement under section 19(1)(a) the government nonetheless wished the House of Commons to proceed with the Bill. The government's position was that it believed and had been advised that the ban on political advertising in what became sections 319 and 321 was compatible with article 10, but because of the European Court's decision in *VgT* it could not be sure.

14. The Bill was considered by the Joint Committee on Human Rights, a body comprising members of both Houses of Parliament of differing opinions. In its Nineteenth Report of the Session 2001-2002 (19 July 2002, HL Paper No 149, HC 1102), the committee acknowledged (para 62) that the prohibition of political advertising could well be found to be incompatible with article 10, but urged caution in moving from the current position in the UK, referring (para 63) to the fear mentioned in *VgT* of the annexation of the democratic process by the rich and powerful. It recognised the difficulty of devising a more circumscribed ban, and concluded (para 64) that a total ban was likely to be held incompatible. It recommended (para 64) that the government should examine ways in which more limited but workable and Convention-compliant restrictions could be included in the Bill.

15. The Joint Committee on the Draft Communications Bill, similarly constituted, reported shortly afterwards (25 July 2002, HL Paper 169-1, HC 876-1). It supported (para 301) the principles underlying the proposed ban on political advertising and made a recommendation similar to that of the Joint Human Rights Committee.

16. On 10 October 2002 Sir Robin Biggam, chairman of the Independent Television Commission, the body then having overall responsibility for commercial television, wrote to the respondent. The ITC shared the government's principled objections to political advertising and hoped that the ban, which had been effective, would be maintained. Its assessment was that a scheme of control based around tests of due impartiality and undue prominence would quite quickly prove unworkable in practice. It drew attention to the risk of front organisations formed to campaign on single issues and was concerned that a compromise solution might be both incompatible and ineffectual. It urged the maintenance of a complete ban.

17. To a letter dated 10 December 2002 the respondent attached a departmental note, which in paras 7-8 explained:

> "Alternative to the current ban
>
> 7 Given the UK's commitment to human rights, officials were asked to examine how the ban might be substantially

> maintained, but in a manner compliant with the ECHR. In particular, consideration was given to an alternative regime based on specific prohibitions, such as banning all party political advertising and all political advertising around the time of elections or referendums; coupled with other rules to avoid the predominance of any particular point of view on one channel, to provide visual or audible identification of political advertisements, and to control the scale of political advertising in terms both of broadcasting time and the proportion of advertising revenue that a broadcaster is permitted to derive from political advertising.
>
> 8 The conclusion was reached, taking account of legal advice, that it would be very difficult to make such a scheme workable, and that in any event it would fall significantly short of the present outright ban, and allow a substantial degree of political advertising to be broadcast across a number of channels"

While the government recognised that it might have to change its position in the light of court decisions, it did not believe the bill to be incompatible. The *VgT* case was summarised, as were counsel's reasons for advising that there was a very strong case for holding the ban to be compatible with the Convention.

18. The Joint Human Rights Committee returned to this subject in its First Report of the Session 2002-2003 (20 December 2002, HL Paper 24, HC 191). It reported (para 16) that it had written to the respondent asking for a fuller explanation of the government's reasons for concluding that it would be impossible to introduce transparent controls on political advertising which would be proportionate to the legitimate aim pursued and would secure a fair balance between competing rights and interests.

19. The respondent replied to the Joint Human Rights Committee in a letter dated 9 January 2003 and issued a Memorandum in Response to its Nineteenth Report of 19 July 2002. She explained:

> "With the Committee's observations in mind, the Government has followed the Committee's recommendation to examine ways in which workable and Convention-compatible restrictions could be included in the Bill. We have in particular considered an alternative regime based on specific prohibitions, such as banning all party political advertising, and all political advertising of any kind around the time of elections or referenda, coupled with other rules to avoid the predominance of any particular point of view, to provide visual or audible identification of political advertisements, and to control the scale of political advertising in terms both of broadcasting time and the proportion of advertising revenue that a broadcaster is permitted to derive from political advertising. We have concluded that it would be very difficult to make such a scheme workable, and that in any event it would fall significantly short of the present outright ban and allow a substantial degree of political advertising to be broadcast."

The government believed there to be a very strong case that the existing ban was compatible with the Convention, and made plain that the ban would apply to any advertisement inserted by or on behalf of a body whose objects were wholly or mainly of a political nature, any advertisement directed towards a political end and any advertisement having any connection with an industrial dispute.

20. Having considered these responses the Joint Human Rights Committee in its Fourth Report of the Session 2002-2003 (10 February 2003, HL Paper 50, HC 397, para 41) was satisfied that the course of action taken by the government in introducing the bill under section 19(1)(b) of the 1998 Act evinced no lack of respect for human rights and was legitimate in the circumstances.

21. In the course of the bill's passage through Parliament, no material amendment was made to the clauses which became sections 319 and 321.

*The competing arguments*

22. In his trenchant argument for the appellant, Mr Michael Fordham QC relied very strongly on the European Court's decision in *VgT* which was, he submitted, correctly decided, indistinguishable and all but conclusive in the appellant's favour. Thus he relied on the high importance of free expression under the Convention regime, the special protection accorded to political speech and the narrowed margin of appreciation enjoyed by member states in this area. He did not need to, and did not, challenge the control of broadcasts by political parties, whether or not at the time of an election, but strongly criticised the breadth of the ban as it applies to bodies, such as the appellant, which were not associated with any political party but were engaged in what he called social advocacy. (I shall henceforward use the expression "political advertising" to describe advertising of this character, falling within sections 319 and 321, but not so as to include advertising by political parties, which is not in issue here.) The excessive breadth of the statutory ban was, he argued, shown by the fact that it would apply, by virtue of sections 319(2)(g) and 321(2)(a), to a wholly non-political advert by any body whose objects were wholly or mainly of a political nature and, by virtue of sections 319(2)(g) and 321(3)(f), to any advert seeking to influence public opinion on any matter which, in the UK, was a matter of public controversy. That no such wide-ranging prohibition was necessary in a democratic society was, he said, shown by the practice of some other states in which there was no such prohibition, and he pointed to a large body of academic commentary supporting his submission.

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