United Kingdom House of Lords Decisions

Parliamentary Archives, HL/PO/JU/18/251

Regina

v.

Secretary of State for the Home Department (Respondent) ex parte Brind and others (Appellants)

JUDGMENT

Die Jovis 7° Februarii 1991

Upon Report from the Appellate Committee to whom was referred the Cause Regina against Secretary of State for the Home Department ex parte Brind and others, That the Committee had heard Counsel as well on Monday the 19th as on Tuesday the 20th, Wednesday the 21st and Thursday the 22nd days of November last, upon the Petition and Appeal of Donald Malcolm Brind of 30 Cloudesdale Road, London SW17, Fred Albert Emery of 4 Woodsyre, London SE26, Alexander Graham of 31 Stanhope Gardens, London N6, Victoria Leonard of 138 Thorpedale Road, London N4, Scarlett McGwire of 102 Finsbury Park Road, London N4, Thomas Edward Nash of 25 Avenall Road, London N5 and John Edward Pilger of 57 Hambalt Road, London SW4, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 6th day of December 1989, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of the Secretary of State for the Home Department lodged in

answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

Tt is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal (Civil Division) of the 6th day of December 1989 complained of in the said Appeal be, and the same is hereby, **Affirmed** and that the said Petition and Appeal be, and the same is hereby, dismissed this House: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondent the Costs incurred by him in respect of the said Appeal, the amount thereof to be certified by the Clerk of the Parliaments if not agreed between the parties.

Cler: Parliamentor:

Judgment: 7.2.91

REGINA

v.

SECRETARY OF STATE FOR THE HOME DEPARTMENT

(RESPONDENT)

ex parte

BRIND AND OTHERS
(APPELLANTS)

Lord Bridge of Harwich
Lord Roskill
Lord Templeman
Lord Ackner
Lord Lowry

LORD BRIDGE OF HARWICH

My Lords,

This appeal has been argued primarily on the basis that the power of the Secretary of State, under section 29(3) of the

Broadcasting Act 1981 and under clause 13(4) of the Licence and Agreement which governs the operations of the BBC, to impose restrictions on the matters which the IBA and the BBC respectively may broadcast may only be lawfully exercised in accordance with Article 10 of the European Convention on Human Rights. Any exercise by the Secretary of State of the power in question necessarily imposes some restriction on freedom of expression. The obligations of the United Kingdom, as a party to the Convention, are to secure to every one within its jurisdiction the rights which the Convention defines including both the right to freedom of expression under Article 10 and the right under Article 13 to "an effective remedy before a national authority" for any violation of the other rights secured by the Convention. It is accepted, of course, by the appellants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it. But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. Hence, it is submitted, when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the Convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the Convention imposes. I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific

statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it. If such a presumption is to apply to the statutory discretion exercised by the Secretary of State under section 29(3) of the Act of 1981 in the instant case, it must also apply to any other statutory discretion exercised by the executive which is capable of involving an infringement of Convention rights. When Parliament has been content for so long to leave those who complain that their Convention rights have

been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.

But I do not accept that this conclusion means that the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited, in a way which infringes fundamental human rights. Most of the rights spelled out in terms in the Convention, including the right to freedom of expression, are less than absolute and must in some cases yield to the claims of competing public interests. Thus, Article 10(2) of the Convention spells out and categorises the competing public interests by reference to which the right to freedom of expression may have to be curtailed. In exercising the power of judicial review we have neither the advantages nor the disadvantages of any comparable code to which we may refer or by which we are bound. But again, this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it. The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment.

Applying these principles to the circumstances of the case, of which I gratefully adopt the full account given in the speech of my learned and noble friend Lord Ackner, I find it impossible to

say that the Secretary of State exceeded the limits of his discretion. In any civilised and law-abiding society the defeat of the terrorist is a public interest of the first importance. That some restriction on the freedom of the terrorist and his supporters to propogate his cause may well be justified in support of that public interest is a proposition which I apprehend the appellants hardly dispute. Their real case is that they, in the exercise of their editorial judgment, may and must be trusted to ensure that the broadcasting media are not used in such a way as will afford any encouragement or support to terrorism and that any interference with that editorial judgment is necessarily an unjustifiable restriction on the right to freedom of expression. Accepting, as I do, their complete good faith, I nevertheless

cannot accept this proposition. The Secretary of State, for the reasons he made so clear in Parliament, decided that it was necessary to deny to the terrorist and his supporters the opportunity to speak directly to the public through the most influential of all the media of communication and that this justified some interference with editorial freedom. I do not see how this judgment can be categorised as unreasonable. What is perhaps surprising is that the restriction imposed is of such limited scope. There is no restriction at all on the matter which may be broadcast, only on the manner of its presentation. The viewer may see the terrorist's face and hear his words provided only that they are not spoken in his own voice. I well understand the broadcast journalist's complaint that to put him to the trouble of dubbing the voice of the speaker he has interviewed before the television camera is an irritant which the difference in effect between the speaker's voice and the actor's voice hardly justifies. I well understand the political complaint that the restriction may be counter-productive in the sense that the adverse criticism it provokes outweighs any benefit it achieves. But these complaints fall very far short of demonstrating that a reasonable Secretary of State could not reasonably conclude that the restriction was justified by the important public interest of combating terrorism. I should add that I do not see how reliance on the doctrine of "proportionality" can here advance the appellants' case. But I agree with what my noble and learned friend Lord Roskill says in his speech about the possible future development of the law in that respect.

I would dismiss the appeal.

LORD ROSKILL

My Lords,

I agree that this appeal must be dismissed. For the reasons given in the speech of my noble and learned friend Lord Bridge of Harwich which I have had the advantage of reading in draft and with which I entirely agree. I add some observations of my own only on one matter, namely, the principle of "proportionality." Reliance was placed on behalf of the appellants upon a passage in the speech of my noble and learned friend, Lord Diplock, in C.C.S.U. v. Minister for the Civil Service [1985] AC 374 at 410, where, after establishing his triple categorisation of the fields in which judicial review might operate, he added:

> "That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the

European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice."

In that passage my noble and learned friend was concerned to make plain, first, that his triple categorisation was not exhaustive and, secondly, that the time might come when further grounds might require to be added notably by reason of the "possible adoption" of that principle in this country. He clearly had in mind the likely increasing influence of Community law upon our domestic law which might in time lead to the further adoption of this principle as a separate category and not merely as a possible reinforcement of one or more of these three stated categories such as irrationality. My noble and learned friend emphasized that any such development would be likely to be on a case by case basis. I am clearly of the view that the present is a not a case in which the first step can be taken for the reason that to apply that principle in the present case would be for the court to substitute its own judgment of what was needed to achieve a particular objective for the judgment of the Secretary of State upon whom that duty has been laid by Parliament. But so to hold in the present case is not to exclude the possible future development of the law in this respect, a possibility which has already been canvassed in some academic writings.

LORD TEMPLEMAN

My Lords,

Freedom of expression is a principle of every written and unwritten democratic constitution. That principle is not absolute; there are exceptions. The principle and the exceptions are the subject of Article 10 of the European Convention on Human Rights and the decisions of the European Court of Human Rights. The United Kingdom adheres to the Convention and Her Majesty's Government are satisfied that the laws of the United Kingdom are in conformity with their obligations under the Convention.

The Home Secretary, in the exercise of powers conferred on him by Parliament, has imposed restrictions on freedom of expression within the terms and for the reasons set forth in the evidence and in the speech of my noble and learned friend, Lord Ackner. The Home Secretary has forbidden the television and radio authorities knowingly to allow a member or supporter of a recognised terrorist organisation to make a live transmission. The Home Secretary has imposed this restriction because, supported by a majority of the members of the House of Commons, he believes that the live appearances of terrorist members and supporters cause outrage and fear and to give a wholly false impression of the strength and legitimacy of terrorism, thus encouraging terrorism which is a foul crime.

The discretionary power of the Home Secretary to give directions to the broadcasting authorities imposing restrictions on freedom of expression is subject to judicial review, a remedy invented by the judges to restrain the excess or abuse of power. On an application for judicial review, the courts must not substitute their own views for the informed views of the Home Secretary. In terms of the Convention, as construed by the European Court, a "margin of appreciation" must be afforded to the Home Secretary to decide whether and in what terms a restriction on freedom of expression is justified.

The English courts must, in conformity with the Wednesbury principles discussed by Lord Ackner, consider whether the Home Secretary has taken into account all relevant matters and has ignored irrelevant matters. These conditions are satisfied by the evidence in this case, including evidence by the Home Secretary that he took the Convention into account. If these conditions are satisfied, then it is said on Wednesbury principles the court can only interfere by way of judicial review if the decision of the Home Secretary is "irrational" or "perverse."

The subject matter and date of the Wednesbury principles cannot in my opinion make it either necessary or appropriate for the courts to judge the validity of an interference with human rights by asking themselves whether the Home Secretary has acted irrationally or perversely. It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable. In terms of the Convention, as construed by the European court, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent.

My Lords, applying these principles I do not consider that the court can conclude that the Home Secretary has abused or exceeded his powers. The broadcasting authorities and journalists are naturally resentful of any limitation on their right to present a programme in such manner as they think fit. But the interference with freedom of expression is minimal and the reasons given by the Home Secretary are compelling.

I, too, would dismiss this appeal.

LORD ACKNER

My Lords,

In October 1988 the Government reached the conclusion that it was no longer acceptable in the national interest that spokesmen for terrorist organisations, para-military organisations and those who support them should have direct access to television and radio. The Secretary of State for the Home Department, the

respondent, accordingly exercised his powers under Clause 13 of the Licence and Agreement between the Secretary of State and

the British -Broadcasting Corporation ("the BBC") and section 29 of the Broadcasting Act 1981. By directives, dated 19 October 1988, as further explained and defined in a letter dated 24 October 1988 from the Home Office he required the BBC and the Independent Broadcasting Authority ("the IBA") to refrain from broadcasting the direct statements (not the reported speech) by a person who represents or purports to represent a specified organisation or who supports or solicits or invites support for such an organisation.

The organisations concerned are those proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1984 and the Northern Ireland (Emergency Provisions) Act 1978 together with Sinn Fein, Republican Sinn Fein and the Ulster Defence Association. These organisations are involved in terrorism, or in promoting or encouraging it, that is to say they are organisations which exist to further a political aim by the use of violence. It is an offence to belong to such proscribed organisations or to support any of them in particular ways. Although not proscribed, Sinn Fein, from which Republican Sinn Fein broke away, is known to be the political arm of the Provisional Movement; its spokesmen are apologists for the use of violence for political ends. The Ulster Defence Association is a para-military organisation, some of whose members engage in terrorism, often claiming terrorist acts in the name of the Ulster Freedom Fighters, itself proscribed under the Northern Ireland emergency provisions. These facts deposed to by Mr. Scoble, an Assistant Under-Secretary of State in the Home Office and Head of the Broadcasting Department, in his affidavit sworn on 15 March 1989, have not been challenged.

The appellants are neither the BBC nor the IBA. They are (with one exception) broadcast journalists who are members of the National Union of Journalists ("the NUJ"). The exception is Mr. Nash, who is employed by the NUJ and who relies on broadcasting for the provision of information about current affairs.

The relevant legislative and contractual provisions

"(i) By sections 2 and 3 of the Broadcasting Act 1981 the functions, duties and powers of the IBA are defined.

"(ii) By section 4(1) of the Broadcasting Act 1981, 'it shall be the duty of the Authority to satisfy themselves that, so far as possible, the programmes broadcast by the Authority comply with the following requirements' including:-

'(a) that nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling;

'(b) that a sufficient amount of time in the programmes is given to news and news features and that all news given in the programmes (in whatever form) is presented with due accuracy and impartiality,' and

'(f) that due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy.'

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"(iii) By section 29(3) of the Broadcasting Act 1981, 'Subject to sub-section (4) the Secretary of State may at any time by notice in writing require the Authority [the IBA] to refrain from broadcasting any matter or classes of matter specified in the notice; and it shall be the duty of the Authority to comply with the notice.'

"(iv) By Clause 13(4) of the Licence and Agreement made between the BBC and the Secretary of State on 2nd April 1981, 'the Secretary of State may from time to time require the Corporation to refrain at any specified time or at all times from sending any matter or matters of any class specified in such notice."

The Directives

The text common to both directives is as follows:

"1. . . . to refrain from broadcasting any matter which consists of or includes -

any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where -

'(a) the person speaking the words represents or purports to represent an organisation specified in paragraph 2 below, or

'(b) the words support or solicit or invite support for such an organisation,

other than any matter specified in paragraph 3 below.

2. The organisations referred to in paragraph 1 above are -

'(a) any organisation which is for the time being a proscribed organisation for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and

'(b) Sinn Fein, Republican Sinn Fein and the Ulster Defence Association.

3. The matter excluded from paragraph 1 above is any words spoken -

'(a) in the course of proceedings in Parliament, or

'(b) by or in support of a candidate at a parliamentary, European parliamentary or local election pending that election."

The essential parts of the letter of 24 October, which further defined and explained the directives, read as follows:

"It was asked whether the Notice applied only to direct statements by representatives of the organisations or their supporters or whether it applied also to reports of the words they had spoken. We confirmed, as the Home Secretary has made clear in Parliament, that the correct interpretation (and that which was intended) is that it applies only to direct statements and not to reported speech, and that the person caught by the Notice is the one whose words are reported and not the reporter or presenter who reports them. Thus the Notice permits the showing of a film or still picture of the initiator speaking the words together with a voice-over account of them, whether in paraphrase or verbatim. We confirmed that programmes involving the reconstruction of actual events, where actors use the verbatim words which had been spoken in actuality are similarly permitted.

"For much the same reason, we confirmed that it was not intended that genuine works of fiction should be covered by the restrictions, on the basis that the appropriate interpretation of 'a person' in paragraph 1 of the Notice is that it does not include an actor playing a character.

"The BBC also asked whether a member of an organisation or one of its elected representatives could be considered as permanently representing that organisation so that all his words, whatever their character, were covered by the Notice. We confirmed that the Home Office takes the view that this is too narrow an interpretation of the word 'represents' in paragraph l(a) of the text. A member of an organisation cannot be held to represent that organisation in all his daily activities. Whether at any particular instance he is representing the organisation concerned will depend upon the nature of the words spoken and the particular context. Where he is speaking in a personal capacity or purely in his capacity as a member of an organisation which does not fall under the Notice (for example, an elected

> Council), it follows, from that interpretation, that paragraph l(a) will not apply. Where it is clear, from the context and the words, that he is speaking as a representative of an organisation falling under the Notice, his words may not be broadcast directly, but (as mentioned above) can be reported. (He may, of course, come within the scope of paragraph Kb), if his words contain support for the organisation.) Although there may be borderline occasions when this distinction will require a careful exercise of judgment, we believe that the great majority of broadcast material will fall clearly within one case or the other."

It can thus be seen that the directives, as further defined and explained, do not restrict the reporting of statements made by terrorists or their supporters. What is restricted is the direct appearance on television of those who use or support violence, themselves making their statements ("actuality reporting"). Thus the activities of terrorist organisations and statements of their apologists may still be reported, as they are in the press; but such persons are prevented from making the statement themselves on the television and the radio. Publicity for their statements can be achieved, inter alia, by the dubbing of what they have said, using

actors to impersonate their voices. These limited restrictions can be contrasted with those which have been in operation for many years in the Republic of Ireland, where not only is the direct appearance on television of those who use or support violence banned, but even the very statements which they make.

The issue

The appeal is concerned with a challenge by way of judicial review. It is contended by the appellants that the Secretary of State in issuing these directives has acted unlawfully. The attack has concentrated essentially on section 29(3) of the Broadcasting Act 1981, and for the purpose of this appeal the point has not been taken as to whether different principles might be applied to the contractual powers of the Secretary of State under and by virtue of clause 13(4) of the Licence and Agreement. It is of course common ground that section 29(3) gives to the Secretary of State a wide discretion. The issue, expressed quite shortly, is whether in issuing these directives he has exceeded his discretionary powers, thus acting ultra vires and therefore unlawfully.

The Secretary of State's reasons for his action

The Secretary of State's decision was the subject matter of a statement made on 19 October in both Houses of Parliament and

was followed by debates in both Houses. The statement reads as follows:

> "For some time broadcast coverage of events in Northern Ireland has included the occasional appearance of representatives of paramilitary organisations and their political wings, who have used these opportunities as an attempt to justify their criminal activities. Such
>
> appearances have caused widespread offence to viewers and listeners throughout the United Kingdom, particularly just after a terrorist outrage.
>
> "The terrorists themselves draw support and sustenance from access to radio and television - from addressing their views more directly to the population at large than is possible through the press. The Government have decided that the time has come to deny this easy platform to those who use it to propagate terrorism. Accordingly, I have today issued to the Chairmen of the BBC and the IBA a notice, under the licence and agreement and under the Broadcasting Act 1981 respectively, requiring them to refrain from broadcasting direct statements by representatives of organisations proscribed in Northern Ireland and Great Britain and by representatives of Sinn Fein, Republican Sinn Fein and the Ulster Defence Association. The notices will also prohibit the broadcasting of statements by any person which support or invite support for these organisations. The restrictions will not apply to the braodcast of proceedings in Parliament, and in order not to impair the obligation on the broadcasters to provide an impartial coverage of elections the notices will have a more limited effect during election periods. Copies of the notices have today been deposited in

> the Library, and further copies are available from the Vote Office so that hon. Members will be able to study their detailed effect.
>
> "These restrictions follow very closely the lines of similar provisions which have been operating in the Republic of Ireland for some years. Representatives of these organisations are prevented from appearing on Irish television, but because we have had no equivalent restrictions in the United Kingdom they can nevertheless be seen on BBC and ITV services in Northern Ireland, where their appearances cause the gravest offence, and in Great Britain. The Government's decision today means that both in the United Kingdom and in the Irish Republic such appearances will be prevented.
>
> "Broadcasters have a dangerous and unenviable task in reporting events in Northern Ireland. This step is no

criticism of them. What concerns us is the use made of broadcasting facilities by supporters of terrorism. This is not a restriction on reporting. It is a restriction on direct appearances by those who use or support violence.

"I believe that this step will be understood and welcomed by most people throughout the United Kingdom. It is a serious and important matter on which the House will wish to express its view. For that reason, we shall be putting in hand discussions through the usual channels so that a full debate on the matter can take place at an early date."

On 2 November there was a debate in the House of Commons on the motion that: "This House approves the Home Secretary's action in giving directions to the BBC and IBA to restrict the broadcasting of statements made by Northern Ireland terrorists organisations and their apologists". That motion was carried by 243 votes to 179. On 8 December a motion to take note of the Home Secretary's action was debated and agreed to without a division in the House of Lords. The Secretary of State's reasons for taking the action complained of are set out in the Hansard Reports of those debates and were before your Lordships. The four matters which influenced the Secretary of State were highlighted by Mr. Scoble in his affidavit. These are:-

1. Offence had been caused to viewers and listeners by the appearance of the apologists for terrorism, particularly after a terrorist outrage.

2. Such appearances had afforded terrorists undeserved publicity which was contrary to the public interest.

3. These appearances had tended to increase the standing of terrorist organisations and to create a false impression that support for terrorism is itself a legitimate political opinion.

(4) Broadcast statements were intended to have, and did in some cases have, the effect of intimidating some of those at whom they were directed.

The Challenge

I now turn to the bases upon which it is contended that the Secretary of State exceeded his statutory powers:-

1. The directives frustrated the policy and the objects of the 1981 Act in particular section 4 (1).

It is of course accepted by Mr. Laws on behalf of the Secretary of State that the discretion given to him by section 29(3) is not an absolute or unfettered discretion. It is a discretion which is to be exercised according to law and therefore must be used only to advance the purposes for which it was conferred. It

has accordingly to be used to promote the policy and objects of the Act (see Padfield and others v. The Minister of Agriculture, Fisheries and Food and others [1968] AC 997). It is further accepted on behalf of the Secretary of State that the powers under section 29(3) can be properly categorised as "reserve" powers in the sense that they are to be used infrequently. In fact they have only been used once previously.

In the Divisional Court and Court of Appeal much was made of the words in section 4(l)(f) - "due impartiality". The argument was not repeated before your Lordships. I can find nothing in paragraph 4(1)(f) to suggest that the policy and objects of section 4(1) are in any way frustrated by the Secretary of State's exercise of his reserve powers where, in the proper exercise of his discretion, he considers it appropriate to do so.

2. The directives were unlawful on "Wednesbury" grounds

Save only in one respect, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is the subject matter of a later heading, it is not suggested that the Minister failed to call his attention to matters which he was bound to consider, nor that he included in his considerations matters which were irrelevant. In neither of those senses can it be said that the Minister acted unreasonably. The failure to mount such a challenge in this appeal is important. In a field which concerns a fundamental human right - namely that of free speech - close scrutiny must be given to the reasons provided as justification for interference with that right. Your Lordships' attention was drawn to the case of Regina v. Secretary of State ex parte de Rothschild [1989] 1 All E.R. 933, a case which concerned compulsory purchase and therefore involved, albeit somewhat indirectly, another fundamental human right - the peaceful enjoyment of one's possessions (see article 1 of the First Protocol to the Convention). In that case Slade L.J. at page 939 said:

> "Given the obvious importance and value to land owners of their property rights, the abrogation of those rights in the exercise of his discretionary power to confirm a compulsory purchase order would, in the absence of what he perceived to be a sufficient justification on the merits, be a course which surely no reasonable Secretary of State would take."

Slade L.J. was in no sense increasing the severity of the Wednesbury test. He was applying that part of it which requires the decision-maker to call his attention to matters that he is

obliged to consider. He was emphasising the Secretary of State's obligation to identify the factors which had motivated his decision

so as to ensure that he had overlooked none which a reasonable Secretary of State should have considered.

There remains however the potential criticism under the Wednesbury grounds expressed by Lord Greene M.R. [1948] 1 K.B. 223, 234 that the conclusion was "so unreasonable that no reasonable authority could ever have come to it." This standard of unreasonableness, often referred to as "the irrationality test", has been criticised as being too high. But it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a Minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable Minister properly directing himself would have reached the impugned decision, the Minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role, will quash that decision. Such a decision is correctly, though unattractively, described as a "perverse" decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the Minister has made, is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision - that is, to invite an abuse of power by the judiciary.

So far as the facts of this case are concerned it is only necessary to read the speeches in the Houses of Parliament, and in particular those of Mr. David Alton, Lord Fitt and Lord Jakobovits, to reach the conclusion, that whether the Secretary of State was right or wrong to decide to issue the directives, there was clearly material which would justify a reasonable Minister making the same decision. In the words of Lord Diplock in The Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] AC 1014 at 1064;-

> "The very concept of administrative discretion involves a right to choose between mere than one possible course of action upon which there is room for reasonable people to hold different opinions as to which is to be preferred".

In his speech in the House of Commons on 2 November 1988 the Secretary of State in emphasising the significance of imposing a restriction, not on the reporting of the material uttered by terrorists and those supporting them, but on their direct appearance on television, said:-

> "It is not simply that people are affronted - we can live with affront - by the direct access of men of violence and supporters of violence to television and radio. That direct access gives those who use it an air and appearance of authority which spreads further outwards the ripple of fear that terrorist acts create in the community. The terrorist

act creates the fear and the direct broadcast spreads it.

> The men of violence and their supporters have used this access with skill. They do not hope to persuade - this is where we get into the cosy luxury of discussion which is unreal - but to frighten. So far from being outlaws hunted by the forces of law and order and pursued by the courts, they calmly appear on the screen and, thus, in the homes of their victims and the friends and neighbours of their victims."

McCowan L.J., in his judgment, pointed out that the criticisms made by the appellants and their supporters were not wholly consistent. He quoted from the affidavit of Donald Malcolm Brind, a news producer for BBC television news and current affairs programmes. In his affidavit he said:-

> "... part of the process of returning Northern Ireland to "normal polities', is to draw nationalist supporters back into the political process, which would be achieved by greater consideration and expression of their views rather than less."

He contrasted this with an affidavit relied on by the appellants from Jonathan Dimbleby, who has worked both for the BBC and Independent Television. In his affidavit he says:-

> "How much better it would be if the electorate were permitted to hear the weasel words, the half-baked logic, the mealy-mouthed falsehoods of the terrorists; how much better to see them subjected to thorough cross-examination in the full and merciless glare of the television lens . . . ".

Your Lordships will, I am sure, need no persuading that all cross-examinations are not thorough. Indeed there are occasions where some may wonder whether an incompetent cross-examination is the product solely of lack of preparation. A deficient cross-examination can significantly advance the terrorist's cause.

I entirely agree with McCowan L.J. when he said that he found it quite impossible to hold that the Secretary of State's political judgment that the appearance of terrorists on programmes increases their standing and lends them political legitimacy, is one that no reasonable Home Secretary could hold. As the learned Lord Justice observed "It is, it should be noted, also the political judgment of the terrorists, or they would not be so anxious to be interviewed by the media or so against the Home Secretary's ban".

Mr. Lester has contended that in issuing these directives the Secretary of State has used a sledgehammer to crack a nut. Of course that is a picturesque way of describing the Wednesbury

"irrational" test. The Secretary of State has in my judgment used no sledgehammer. Quite the contrary is the case.

I agree with Lord Donaldson M.R. who, when commenting on how limited the restrictions were, said in his judgment:

> "They have no application in the circumstances mentioned in paragraph 3 (proceedings in the United Kingdom Parliament and elections) and, by allowing reported speech either verbatim or in paraphrase, in effect put those affected in no worse a position than they would be if they had access

> to newspaper publicity with a circulation equal to the listening and viewing audiences of the programmes concerned. Furthermore, on the applicants' own evidence, if the directives had been in force during the previous twelve months, the effect would have been minimal in terms of air time. Thus, ITN say that eight minutes twenty seconds (including repeats) out of 1200 hours, or 0.01%, of air time would have been affected. Furthermore, it would not have been necessary to omit these items. They could have been recast into a form which complied with the directives."

Thus the extent of the interference with the right to freedom of speech is a very modest one. On the other hand the vehemence of the criticism of the Secretary of State's decision is perhaps a clear indication of the strength of the impact of the terrorist message when he is seen or heard expressing his views.

3. The Minister failed to have proper regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms and in particular Article 10;

Article 10 reads as follows:

> "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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure

> of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Convention which is contained in an international treaty to which the United Kingdom is a party has not yet been incorporated into English domestic law. The appellants accept that it is a constitutional principle that if Parliament has legislated and the words of the statute are clear, the statute must be applied even if its application is in breach of international law. In Salomon v. Commissioners of Customs & Excise [1967] 2 Q.B. 116 Dipiock L.J. at 143 stated:

> "If the terms of the legislation are clear and unambiguous they must be given effect to, whether or not they carry out Her Majesty's treaty obligations."

Much reliance was placed upon the observations of Lord Diplock in Garland v. British Rail [1983] 2 AC 751 when he said (at 771):

> "... it is a principle of construction of United Kingdom statutes . . . that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."

I did not take the view that Lord Diplock was intending to detract from or modify what he had said in Salomon's case.

It is well settled that the Convention may be deployed for the purpose of the resolution of an ambiguity in English primary or subordinate legislation. The case of Reg. v. Chief Immigration Officer, Heathrow Airport and another, Ex parte Salamat Bibi [1976] 1 W.L.R. 979 concerned a lady who arrived at London Airport from Pakistan with two small children saying that she was married to a man who was there and who met her. She was refused leave to enter and an application was made for an order of certiorari and also for mandamus on the ground that she ought to have been treated as the wife of the man who met her at the airport. During the course of argument a question arose about the impact of the Convention and in particular Article 8 concerning the right to private and family life and the absence of interference by a public authority with that right.

In his judgment at p. 984 Lord Denning M.R. said:-

> "The position as I understand it is that if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear

> up the ambiguity and uncertainty . . . but I would dispute altogether that the Convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament."

In his judgment at p. 988 Geoffrey Lane L.J. said:

> "It is perfectly true that the Convention was ratified by this country . . . nevertheless, the Convention, not having been enacted by Parliament as a statute, it does not have the effect of law in this country; whatever persuasive force it may have in resolving ambiguities it certainly cannot have the effect of overriding the plain provisions of the Act of 1971 and the rules made thereunder."

This decision was followed in Fernandes v. Secretary of State for the Home Department [1981] Imm. A.R. 1 - another case where Article 8 of the Convention was relied upon and where the Court of Appeal held that the Secretary of State in exercising his statutory powers was not obliged to take into account the provisions of the Convention, it not being part of the law of this country. The Convention is a treaty and may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law. These decisions were most recently followed by the Court of Appeal in Chundawadra v. Immigration Appeal Tribunal [1988] Imm. A.R. 161.

Mr. Lester contends that section 29(3) is ambiguous or uncertain. He submits that although it contains within its wording no fetter upon the extent of the discretion it gives to the Secretary of State, it is accepted that that discretion is not absolute. There is however no ambiguity in section 29(3). It is not open to two or more different constructions. The limit placed upon the discretion is simply that the power is to be used only for the purposes for which it is was granted by the legislation (the so-called Padfield doctrine) and that it must be exercised reasonably in the Wednesbury sense. No question of the construction of the words of section 29(3) arises, as would be the case if it was alleged to be ambiguous, or its meaning uncertain.

There is yet a further answer to Mr. Lester's contention. He claims that the Secretary of State before issuing his directives should have considered not only the Convention (it is accepted that he in fact did so) but that he should have properly construed it and correctly taken it into consideration. It was therefore a relevant, indeed a vital, factor to which he was obliged to have proper regard pursuant to the Wednesbury doctrine, with the result that his failure to do so rendered his decision unlawful. The fallacy of this submission is however plain. If the Secretary of State was obliged to have proper regard to the Convention, i.e. to conform with Article 10, this inevitably would result in incorporating the Convention into English domestic law by the back door. It would oblige the Courts to police the operation of the

Convention and to ask itself in each case, where there was a challenge, whether the restrictions were "necessary in a democratic society . . ." applying the principles enunciated in the decisions of the European Court of Human Rights. The treaty, not having been incorporated in English law, cannot be a source of rights and obligations and the question - did the Secretary of State act in breach of Article 10 - does not therefore arise.

As was recently stated by Lord Oliver of Aylmerton in J.H. Rayner Ltd. v. Dept. of Trade (The "International Tin Council Case") [1990] 2 A.C. 418 at 500:

> "Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

4. The Secretary of State has acted ultra vires because he has acted in "in a disproportionate manner"

This attack is not a repetition of the Wednesbury "irrational" test under another guise. Clearly a decision by a Minister which suffers from a total lack of proportionality will qualify for the "Wednesbury unreasonable" epithet. It is, ex hypothesi, a decision which no reasonable Minister could make. This is, however, a different and severer test.

Mr. Lester is asking your Lordships to adopt a different principle - the principle of "proportionality" which is recognised in the administrative law of several members of the European Economic Community. What is urged is a further development in English administrative law, which Lord Diplock viewed as a possibility in C.C.S.U. v. Minister for the Civil Service [1985] A.C. 375 at 410.

In his written submissions, Mr. Lester was at pains to record "that there is a clear distinction between an appeal on the merits and a review based on whether the principle of proportionality has been satisfied". He was prepared to accept that to stray into the realms of appellate jurisdiction involves the Courts in a wrongful usurpation of power. Yet in order to invest the proportionality test with a higher status than the Wednesbury test, an inquiry into and a decision upon the merits cannot be avoided. Mr. Pannick's (Mr. Lester's junior) formulation - could the Minister reasonably conclude that his direction was necessary - must involve balancing

the reasons, pro and con, for his decision, albeit allowing him "a margin of appreciation" to use the European concept of the tolerance accorded to the decision-maker in whom a discretion has been vested. The European test of "whether the interference complained of corresponds to a pressing social need" must ultimately result in the question - is the particular decision acceptable? - and this must involve a review of the merits of the decision. Unless and until Parliament incorporates the Convention into domestic law, a course which it is well-known has a strong body of support, there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country.

I would accordingly dismiss this appeal with costs.

LORD LOWRY

My Lords,

I agree with your Lordships that this appeal should be dismissed. In particular I agree with the observations of my noble and learned friend Lord Ackner, whose speech relieves me from the need to consider the matter in detail and, taken in conjunction with the other observations which have fallen from your Lordships, could well be thought to render unnecessary any contribution by me to the debate.

But the inspiration for the appellants' argument, if not perhaps the facts on which the argument is based, is closely linked with the principle of freedom of speech in a democratic society, so far as compatible with the safety of the state and the well-being of its citizens, which may provide a reason for me to say something.

The directions complained of have been the occasion for an eloquent vindication of freedom of expression and the freedom to hold opinions and to impart and receive information, which is supported by affidavit evidence, the appellants' printed case and counsel's submissions. The case avers that it is clear on the

evidence that the directions "remove an important aspect of editorial control from the broadcasters to the Government" and "prevent the public from being shown (sic) material which may assist to inform them as to current affairs in Northern Ireland" and "oblige broadcasters to make difficult decisions as to whether the material to be broadcast falls within or without the directions". It is further asserted that "the inevitable consequence of the directions will be to hinder the communication of ideas and information about Northern Ireland to the public and to deter broadcasters from reporting Northern Ireland politics."

Administrative acts which had the effect contended for might well be justified, but they would certainly deserve the closest scrutiny. My noble and learned friend has, however, set out the facts, which show that television reporters and commentators, as well as reporting and commenting (like the press) on oral and written statements attributed to terrorists and supporters of terrorism, can, by interviews and other methods, make films of terrorists and supporters of terrorism which record the appearance and gestures of the persons depicted and the precise content, accent and emphasis of the words they use and can show the films on television. The only restriction is that, if the speaker was representing or purporting to represent an organisation specified in the directions, or the words used supported or solicited or invited support for such an organisation, the voice of the speaker must not be heard; on the other hand the words of the speaker can be spoken by someone else, who may be a professional actor using the same local accent, intonation and emphasis as the original speaker used, while the viewers see on the screen that speaker, his facial expression and his gestures, if any. A true appreciation of exactly what the Home Secretary's directions involve makes nonsense of the statement, adduced in evidence before your Lordships, that interviews can no longer be shown on television and also of the wider claim that television reports of and discussions concerning negotiations with and the utterances and activities of members of the scheduled organisations and their supporters are now impossible. Indeed, the issue which seems to arise is whether the disadvantage of exposing the Government to the misrepresentations of its attitude of which your Lordships have seen examples may outweigh the advantage to be derived from the directions themselves.

Put thus (accurately, as appellants' counsel concede) the sole restriction is on transmitting the sound of the speaker's own voice. Therefore anything lost by either the broadcasters or the viewing public is, at best, only tenuously related to the freedoms in defence of which the present proceedings have been brought. My noble and learned friend Lord Ackner has drawn attention to the reasons for imposing this modest restriction which have been given by the Home Secretary and which, as McCowan L.J. has effectively pointed out, are not lacking in cogency. When, in addition, one has regard to the "political exception" and to the contrast between the present directions and the restrictions which have for 30 years existed in the Republic of Ireland, it is difficult to take seriously the appellants' description of the directions as the use of a sledgehammer to crack a nut.

Mr. Lester and his learned junior, Mr. Pannick, put the appellants' case with force and skill, presenting a variety of tests,

as your Lordships have already noted, by which to judge the impugned directions. For my own part, I do not see how the modest invasion of liberties which has occurred in this case could

fail to satisfy any of the criteria which have been suggested, including those criteria which, in point of law, I, in common with your Lordships, have found unacceptable.

I might be content to leave the matter thus, but what seems to me to give this case its importance is the variety and the potential effect of the legal weaponry which the appellants have deployed and the zeal with which the respondent has met the assault, as if both parties were concerned to fight an impending battle in principle as well as the present one in practice.

Because they are of general importance, I will mention just two points, which are closely related, the test of unreasonableness in judicial review and the doctrine of proportionality.

The kind of unreasonableness for which a court can set aside an administrative act or decision is popularly called "Wednesbury unreasonableness" from the name of the famous case reported at [1948] 1 KB 223 in which Lord Greene M.R. spoke of a decision "so absurd that no sensible person could ever dream that it lay within the powers of the authority". In the Tameside case [1977] AC 1014, 1026 Lord Denning M.R. referred to decisions "so wrong that no reasonable person could sensibly take that view". In C.C.S.U. v. Minister for the Civil Service [1985] A.C. 374, 410 Lord Diplock, having used irrationality as a synonym of Wednesbury unreasonableness, said that "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", while in Nottinghamshire County Council v. Secretary of State for the Environment [1986] AC 240, 247 Lord Scarman, when invited to examine the detail and consequences of guidance given by the Secretary of State, said:

> "Such an examination by a court would be justified only if a prima facie case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses."

These colourful statements emphasise the legal principle that judicial review of administrative action is a supervisory and not an appellate jurisdiction. I recall that in R. v. Nat Bell Liquors Ltd. [1922] 2 AC 128, 156 Lord Sumner, admittedly speaking of an attempted challenge to the validity of court proceedings, said that the superior court's jurisdiction was one "of supervision, not of review."

I believe that the subject is nowhere better discussed than by Sir William Wade in Chapter 12 "Abuse of Discretion" (pp. 388-462) of his authoritative textbook "Administrative Law" 6th edition (1988). The learned author, with the aid of examples covering more than a century, clearly demonstrates that what we are accustomed to call Wednesbury unreasonableness is a branch of the abuse, or misuse, of power: the court's duty is not to interfere

with a discretion which Parliament has entrusted to a statutory body or an individual but to maintain a check on excesses in the exercise of discretion. That is why it is not enough if a judge feels able to say, like a juror or like a dissenting member of the Cabinet or fellow-councillor, "I think that is unreasonable; that is not what I would have done." It also explains the emphatic language which judges have used in order to drive home the message and the necessity, as judges have seen it, for the act to be "so unreasonable that no reasonable Minister etc would have done it." In that strong, and necessary, emphasis lies the danger. The seductive voice of counsel will suggest (I am not thinking specifically of the present case) that, for example, Ministers, who are far from irrational and indeed are reasonable people, may occasionally be guilty of an abuse of power by going too far. And then the court is in danger of turning its back not only on the vigorous language but on the principles which it was intended to support. A less emotive, but, subject to one qualification, reliable test is to ask, "Could a decision-maker acting reasonably have reached this decision?" The qualification is that the supervising court must bear in mind that it is not sitting on appeal, but satisfying itself whether the decision-maker has acted within the bounds of his discretion. For that reason it is fallacious for those seeking to quash administrative acts and decisions to call in aid decisions of a Court of Appeal reversing a judge's finding, it may be on a question of what is reasonable. To say what is reasonable was the judge's task in the first place and the duty of the Court of Appeal, after giving due weight to the judge's opinion, is to say whether they agree with him. In judicial review, on the other hand, the task of the High Court is as described above, and the task of the Court of Appeal and, when necessary, this House is to decide whether the High Court has correctly exercised its supervisory jurisdiction.

Of course, whichever kind of jurisdiction is being exercised on the subject of reasonableness, there is bound to be a subjective element in the decision. There is no objective standard in either case which would allow the result to be foretold with certainty. The important requirement, however, is to ask the right question.

The appellants have relied on the doctrine of proportionality. That is, in one sense of the word, a deeply rooted and well understood idea in English law. In a claim for damages for personal injuries suffered by a workman allegedly through his employer's negligent system of work the court has to weigh the risk of an accident, the likely severity of the consequences, the expense and difficulty of taking precautions and the resources of the employer with a view to deciding whether the employer failed to take reasonable care for the safety of the workman. In another field, as counsel once contended in R. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd. [1988] 1 W.L.R. 990, 1001D, proportionality is simply a way of approaching the Wednesbury formula: was the administrative act or decision so much out of proportion to the needs of the situation as to be "unreasonable" in the Wednesbury sense?

Mr. Lester, however, frankly relied on proportionality, a well-known concept of European law, as a doctrine calculated to advance his cause further than Wednesbury unreasonableness, but conceded that there was a clear distinction between an appeal on

the merits and a review based on the principle of proportionality. Mr. Pannick equally frankly drew the same distinction and posed the test, "Could the Minister reasonably conclude that his direction was necessary?" Here, of course, one comes back to the word "reasonably". I shall try to avoid repeating what has been said by my noble and learned friend Lord Ackner who has already referred to such phrases as "margin of appreciation" and "pressing social need".

In my opinion proportionality and the other phrases are simply intended to move the focus of discussion away from the hitherto accepted criteria for deciding whether the decision-maker has abused his power and into an area in which the court will feel more at liberty to interfere.

The first observation I would make is that there is no authority for saying that proportionality in the sense in which the appellants have used it is part of the English common law and a great deal of authority the other way. This, so far as I am concerned, is not a cause for regret for several reasons:-

1. The decision-makers, very often elected, are those to whom Parliament has entrusted the discretion and to interfere with that discretion beyond the limits as hitherto defined would itself be an abuse of the judges' supervisory jurisdiction.

2. The judges are not, generally speaking, equipped by training or experience, or furnished with the requisite knowledge and advice, to decide the answer to an administrative problem where the scales are evenly balanced, but they have a much better chance of reaching the right answer where the question is put in a Wednesbury form. The same applies if the judges' decision is appealed.

3. Stability and relative certainty would be jeopardised if the new doctrine held sway, because there is nearly always something to be said against any administrative decision and parties who felt aggrieved would be even more likely than at present to try their luck with a judicial review application both at first instance and on appeal.

4. The increase in applications for judicial review of administrative action (inevitable if the threshold of unreasonableness is lowered) will lead to the expenditure of time and money by litigants, not to speak of the prolongation of uncertainty for all concerned with the decisions in question, and the taking up of court time which

could otherwise be devoted to other matters. The losers in this respect will be members of the public, for whom the courts provide a service.

Volume 1(1) of Halsbury's Laws of England 4th edition, issued in 1989, recognises proportionality in the context of administrative law at p. 144 as follows:

> "78. Proportionality. The courts will quash exercises of discretionary powers in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where

> punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground of review in English law, but is regarded as one indication of manifest unreasonableness."

(The High Court's decision in the instant case is cited in the copious footnotes to this paragraph as the authority for the concluding statement.)

It finally occurs to me that there can be very little room for judges to operate an independent judicial review proportionality doctrine in the space which is left between the conventional judicial review doctrine and the admittedly forbidden appellate approach. To introduce an intermediate area of deliberation for the court seems scarcely a practical idea, quite apart from the other disadvantages by which, in my opinion, such a course would be attended.