

## Reasserting the primacy of broadcast political speech after *Animal Defenders*

### *International? — Rogaland Pensioners Party v Norway*

#### Introduction

It is an axiom that freedom of political expression is essential to the existence of political democracy.<sup>1</sup> There may be some situations, however, in which unbridled freedom of speech will damage the democratic process, rather than foster it. One mode of expression which may give rise to such harm is that of political advertising on radio and television. Because of the great power and pervasiveness of these media it is likely that the domination of the airwaves by a particular political group will translate into electoral success. Consequently those with the funds to buy up airtime on which to put out their message will be at an advantage over their less wealthy political opponents; there is a risk that the playing field of political debate will be distorted in favour of those with the greatest resources to the detriment of the less well off. In order to avoid these consequences — in order to protect equality of political opportunity — many European states have imposed broadcasting bans on political advertising. For example, in the UK the Communications Act 2003 imposes a ban on all political advertising on the broadcast media.<sup>2</sup> During its passage through Parliament the prohibition was justified by the government on the basis that ‘denying

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<sup>1</sup> See generally E Barendt, *Freedom of Speech* (2<sup>nd</sup> edn OUP, Oxford 2005).

<sup>2</sup> Sections 319 and 321. The ban applies to adverts which are ‘by or on behalf of a body whose objects are wholly or mainly of a political nature’ (s 321(2)(a)) or are themselves ‘directed towards a political end’ (s 321(2)(b)).

powerful interests the chance to skew political debate ... safeguard[ed] the public and democratic debate, and protect[ed] the impartiality of broadcasters'.<sup>3</sup>

In recent years, perhaps unsurprisingly, such bans have been subjected to legal challenge, before both the European Court of Human Rights (the Court) and domestic courts, on the grounds that they are incompatible with the right to freedom of expression under article 10 of the European Convention on Human Rights (ECHR). For example in *VgT Verein gegen Tierfabriken v Switzerland (VgT)* the Court held that a Swiss broadcasting ban on political advertising which prevented a small vegetarian organisation from airing an advert responding to commercials by the meat industry constituted a disproportionate interference with its article 10 rights.<sup>4</sup> In particular the Court noted that, whilst the ban was intended to prevent powerful financial groups from gaining undue influence in the political process, the applicant *itself* was not such a group — all it wanted was to 'participate in an ongoing general debate on animal protection and the rearing of animals'.<sup>5</sup> When deciding what restrictions upon commercial advertising are necessary the Court acknowledged that states are usually entitled to a margin of appreciation. In a case such as this, however, concerning participation in a 'debate affecting the general interest', this margin of

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<sup>3</sup> Hansard HC vol 395 col 788 (3 December 2002) (Tessa Jowell MP, Secretary of State for Culture, Media and Sport).

<sup>4</sup> (App No 24699/94) (2002) 34 EHRR 4. Subsequent to this judgement VgT applied to the Swiss Federal Court to have the ban on its advertisement lifted. The Swiss court declined. The European Court found there to be a further breach of article 10 in *VgT Verein gegen Tierfabriken v Switzerland* (App No 32772/02) ECHR 4 October 2007. The case was heard by the Grand Chamber on 9 July 2008—judgment pending.

<sup>5</sup> *ibid* para 75.

appreciation was reduced.<sup>6</sup> Indeed, in the subsequent case of *Murphy v Ireland*, which concerned a broadcasting ban on *religious* advertising, the Court distinguished *VgT* on the basis of the content of the expression at issue — a much wider margin of appreciation was available to the state when regulating freedom of expression on ‘matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion’.<sup>7</sup> Consequently, in contrast to the political advertising ban in *VgT*, the Irish ban was found not to breach the applicant’s article 10 rights.

The Court has recently revisited the issue of broadcasting bans on political advertisements in *TV Vest AS and Rogaland Pensjonistparti v Norway (Pensioners Party)*, reaffirming the approach that it took in *VgT*, and finding a violation of article 10.<sup>8</sup> This note will examine the Court’s approach in *Pensioners Party* and go on to consider the implications of the case in light of the apparently conflicting decision in *R (Animal Defenders International) v Secretary of State for Culture Media and Sport (ADI)* in which a unanimous House of Lords held that the UK’s ban under the Communications Act 2003 was not incompatible with article 10 ECHR.<sup>9</sup>

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<sup>6</sup> *ibid* para 71.

<sup>7</sup> (App No 44179/98) (2004) 38 EHRR 182 para 67. See A Geddis ‘You Can’t Say “God” on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media after *Murphy v Ireland*’ [2004] EHRLR 182.

<sup>8</sup> (App No 21132/05) ECHR 11 December 2008.

<sup>9</sup> [2008] UKHL 15; [2008] 1 AC 1312.

### **The Pensioners Party case**

In the run up to local and regional elections in 2003, TV Vest AS, a Norwegian broadcaster, transmitted three different 15 second commercials by the Rogaland Pensioners Party, a small political party representing the interests of the elderly. The advertisements aimed to portray the party's values and included invitations to vote for it. The text of one of the adverts, representative of the others in tone and content, read:

Tor Kristian Rønneberg, Pensioners Party: A sufficient number of good nursing home places. Secure jobs, particularly for older workers, and decent pension schemes. If you are interested in any of this, vote for the Pensioners Party.

Picture with text:

We need your vote on 15 September! Vote for the Pensioners Party.

The adverts were aired despite prior warnings from the State Media Authority that to do so would breach section 3-1(3) of the Broadcasting Act 1992 which imposed a blanket ban on all political advertising on Norwegian television. After the transmission the broadcaster was fined NOK 35 000 by the Media Authority for violation of the ban. A series of domestic appeals claiming a breach of article 10 of the ECHR, ending in the Supreme Court, failed.

The broadcaster and the party applied to the European Court of Human Rights claiming that a complete ban on all political advertising on television in Norway

constituted a violation of their rights under article 10 ECHR.<sup>10</sup> The applicants argued that, because the Pensioners Party was small and impecunious, it ‘seldom got any focus in editorial television broadcasting and thus had a real need to establish direct communication with the electorate’.<sup>11</sup> The absence of a system of free party political broadcasts in Norway meant that political speech on television was ‘canalised through broadcasters’ editorial staff functioning as gate keepers’. This had the effect of favouring established political parties, while small parties were ‘prevented from gaining access to public space through television’.<sup>12</sup>

The Norwegian government argued that this was not primarily a case about freedom of expression, but rather about ensuring that ‘all political parties could compete on an equal footing’.<sup>13</sup> Given the fact that television was a pervasive and powerful medium and because there was no international consensus on the issue, the government claimed that it should be afforded a wide margin of appreciation in reaching the decision that a blanket ban was necessary to achieve the aim of preventing the airwaves being dominated by those political parties with the greatest financial resources at the expense of less wealthy groups.

*The judgment of the Strasbourg court*

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<sup>10</sup> (App No 21132/05) ECHR 11 December 2008.

<sup>11</sup> *ibid* para 33.

<sup>12</sup> *ibid* para 34.

<sup>13</sup> *ibid* para 41.

The Strasbourg court, having recited its usual mantra that there is little scope under article 10 for restrictions of political speech, nevertheless acknowledged that the audio-visual media are more powerful and immediate than the print media and that sometimes it might be necessary to restrict freedom of political expression in order to protect the integrity of democracy itself, to ensure the ‘free expression of the people in the choice of the legislature’ which itself is protected by article 3 of protocol 1 ECHR.<sup>14</sup>

On the facts of the *Pensioners Party* case, however, the Court found there to be a breach of article 10. The indisputably ‘political nature of the advertisements ... called for a strict scrutiny on the part of the Court and a correspondingly circumscribed national margin of appreciation with regard to the necessity of the restriction’.<sup>15</sup>

Whilst the absence of a European consensus on the issue might justify a wider margin than would normally be accorded with respect to restrictions on political speech, the Court could not accept that the prohibition in this case came within Norway’s margin of appreciation. For a start, whilst the ban may have been intended to prevent wealthy interests from obtaining unfair political advantage, the Pensioners Party *itself* did not fall into this group.<sup>16</sup> Rather it belonged to that very category of parties (small and impecunious) whose interests the ban was intended to protect. Whilst the major political parties ‘were given a large amount of attention in the edited television coverage the Pensioners Party was hardly mentioned’. Consequently, paid advertising on television was the only way for the Pensioners Party to get its message across to

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<sup>14</sup> *ibid* para 61.

<sup>15</sup> *ibid* para 64.

<sup>16</sup> *ibid* para 72.

the public in this medium; and by being denied this possibility it was placed at a disadvantage compared to the major parties which could not be offset by the access it did have to other less potent media, such as newspapers.<sup>17</sup> Consequently the ban constituted a disproportionate interference with the applicants' article 10 rights.

### **Implications of the *Pensioners Party* case**

The judgment of the Court in *Pensioners Party* is highly significant for the UK since, as noted above, the Communications Act 2003 imposes a blanket broadcasting ban on political advertising similar to that in Norway.<sup>18</sup> In *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* the House of Lords held that, notwithstanding its all embracing nature, the Communications Act ban did not infringe the article 10 rights of a non-charitable animal welfare organisation that had been prevented from broadcasting an advertisement publicising the suffering of primates.<sup>19</sup> Their Lordships held unanimously that the question of how to balance freedom of expression and the protection of the political process was best resolved by elected MPs. Given the power and pervasiveness of TV, 'great weight' had to be accorded to Parliament's view that it was necessary to impose a blanket broadcasting ban on *all* 'political' advertisements, and that a more nuanced regime which did take account of individual cases, or a system of rationing or capping, was not workable

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<sup>17</sup> *ibid* para 73.

<sup>18</sup> See s 319 and s 321. The term 'political' is defined very widely in s 321 so as to include not just adverts by political parties but also, amongst others, those 'influencing the policies or decisions of governments' in the UK or elsewhere (s 321(3)(c)) and those 'influencing public opinion on a matter which, in the UK, is a matter of public controversy' (s 321(3)(f)).

<sup>19</sup> *ADI* (n 9).

since it would lead inevitably to uncertainty, unfairness and to many legal challenges.<sup>20</sup>

The decision in *ADI* was reached against the backdrop of *VgT* in which, it will be recalled, the Strasbourg court had held that a similar Swiss broadcasting ban on political advertising breached article 10.<sup>21</sup> The judgment in *VgT* has been the subject of much criticism by British judges. For example in *R (ProLife Alliance) v BBC* Lord Hoffmann referred to it as a ‘guarded and somewhat opaque decision’<sup>22</sup> whilst Lord Walker criticised the Court for its failure to ‘give full or clear reasons for what seems to be a far reaching conclusion’, adding that the ‘true significance of the ... case [was] therefore rather imponderable’.<sup>23</sup> In *ADI*, at first instance, the reasoning in *VgT* was dismissed as ‘fact-sensitive and ... arguably aberrant’<sup>24</sup> and when the (leapfrogged) appeal reached the House of Lords *VgT* was side-stepped by Lord Bingham who stated that the argument that it was necessary to keep the ‘playing field of debate ... so far as practicable level’, in order to protect democracy, had not been ‘deployed’ to its ‘full strength’ in that case. Furthermore, he noted, *VgT*’s advert had been in *response* to commercials by the meat industry — whereas *ADI* were not *responding* to anything.<sup>25</sup>

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<sup>20</sup> *ibid* paras 31 - 33 (Lord Bingham). See T Lewis and P Cumper, ‘Balancing Freedom of Political Expression against Equality of Political Opportunity: the Courts and the UK Broadcasting Ban on Political Advertising’ [2009] PL 89.

<sup>21</sup> *VgT* (n 4).

<sup>22</sup> [2003] UKHL 23; [2004] 1 A.C. 185. [64] (Lord Hoffmann).

<sup>23</sup> *ibid* paras 128 – 129 (Lord Walker).

<sup>24</sup> [2006] EWHC 3069 (Admin) para 30 (Auld LJ). See also paras 118 – 120 (Ousley J).

<sup>25</sup> *ADI* (n 9) para 29 (Lord Bingham). See also para 43 (Lord Scott) and para 52 (Baroness Hale).



Strongly indicative of the British *government's* approach to the issue of political advertising on television is the fact that, in *Pensioners Party* itself, the UK intervened as a third party, arguing that a wide margin of appreciation should be afforded to the state and that the Court should either confine *VgT* to its precise facts or depart from its reasoning.<sup>26</sup>

The Court's judgment in *Pensioners Party*, strongly reaffirming as it does its earlier approach in *VgT*, undermines the decision of the House of Lords in *ADI*, as well as the view of the UK government. Firstly, it will be recalled, Lord Bingham distinguished *VgT*, partly on the grounds that the argument that it was necessary to protect the level playing field of political debate from the 'potential mischief of partial political advertising' had not been 'deployed' to its 'full strength' in that case. It is safe to say, however, that in *Pensioners Party* the Norwegian government, as well as the intervening governments of Ireland and the UK, unreservedly *did* deploy the arguments in favour of the prohibition to their full strength. The UK even went so far as to include a copy of the House of Lords' judgment in its submissions to the Court; and yet still the Strasbourg court found there to be a breach of article 10.

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<sup>26</sup> *Pensioners Party* (n 8) para 55. Ireland also intervened as a third party, making similar arguments.

It should be remembered that the UK government introduced, and Parliament passed, the Communications Act in full knowledge of the *VgT* judgment. The government even made a s 19(1) (b) HRA statement to the effect that it was unable to make a statement of compatibility, on account of *VgT*, yet wished to proceed with the Bill anyway.

Furthermore, in *ADI* their Lordships stressed the highly fact specific nature of the *VgT* case, thereby down-playing its relevance to the UK.<sup>27</sup> This argument was also put by the Norwegian and intervening governments in *Pensioners Party*.<sup>28</sup> The European Court however was emphatically not prepared to confine *VgT* to its precise facts. On the contrary, it extended protection to a political party that was putting out its message and making itself known in the run up to elections.

In *ADI* the appellants had accepted that it would have been legitimate under article 10 to impose *some* restrictions on TV political advertising, for example those by political parties, especially at election time. For this could be a finely tuned and surgical response to the threats posed to the democratic process by unbridled political advertising. What *ADI* claimed, though, was that an *all enveloping blanket* ban which caught their non-party political ‘social advocacy’ advertisement was a disproportionate interference with their article 10 rights.<sup>29</sup> The *Pensioners Party* case, however, concerned political speech in the *strict sense* — a political party soliciting votes in elections — exactly the sort of advertising that, everyone in *ADI* had assumed, it *was* permissible to prohibit. Yet the European Court, noting the ‘absolute and permanent’ nature of the Norwegian ban, coupled with the extremely limited alternative channels of communication open to the Pensioners Party (in comparison to bigger, more established parties), still found that it violated article 10. The judgment therefore not only reaffirms the Court’s approach in *VgT* but actually goes quite a bit

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<sup>27</sup> *ADI* (n 9) para 43 (Lord Scott) and para 52 (Baroness Hale).

<sup>28</sup> *Pensioners’ Party* (n 8) paras 50, 53 and 54.

<sup>29</sup> For a critique of the impact of the ban on ‘social advocacy advertising’ see A Scott “‘A Monstrous and Unjustifiable Infringement’?: Political Expression and the Broadcasting Ban on Advocacy Advertising’ (2003) 66 MLR 224.

further than that case, pushing the protection afforded into the core territory of political expression — that area where the ‘protecting democracy’ arguments militating in favour of restriction would seem to be at their strongest.

Perhaps the key determinant in all these cases is the degree of latitude that it is appropriate for a court (whether international or domestic) to afford to a state or legislature in deciding how best to strike the difficult balance between protecting freedom of political expression and protecting the integrity of democracy. It has been generally accepted that *some* restrictions on expression may be necessary in order to prevent the field of political debate being unfairly tilted in favour of the wealthiest players. Indeed in *VgT* itself the Court accepted that ‘prohibition[s] of “political advertising” may be compatible with the requirements of Article 10 ... in certain situations’.<sup>30</sup> But how much *weight* should be given to a national legislature’s decision that the ‘line ... be drawn’ in one place rather than another, especially where the decision arrived at is that a *blanket* ban should be imposed because of the difficulties inherent in devising alternative schemes?<sup>31</sup> The House of Lords in *ADI* answered this question by holding that ‘great weight’ had to be given to Parliament’s decision to impose a blanket ban; and that compromise solutions (like filtering, capping or rationing) were not possible since, amongst other reasons, it was ‘reasonable to expect that our democratically-elected politicians [would] be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy [and it

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<sup>30</sup> *VgT* (n 4) para 75. In his concurring opinion in *Pensioners Party* (n 8) Judge Jebens, at para 3, said that he could see no reason why restrictions on paid political advertisements could not be acceptable as long as political parties and interest groups were afforded reasonable access to the media; he stressed the need for ‘individual solutions’ according to the precise facts of the case.

<sup>31</sup> *ADI* (n 9) para 33 (Lord Bingham).

could not] be supposed that others, including judges, [would] be more so'.<sup>32</sup>

Likewise, in *Pensioners Party*, the Norwegian government argued that it would be impossible to allow for exceptions to the ban so as to permit adverts by smaller parties; for this would be 'difficult to apply fairly, objectively and coherently ... a total ban would generate less discomfort' than a system of 'filtering' on a case by case basis.<sup>33</sup> On such a question as this, Norway argued, concerning the best way to secure the integrity of its own democratic process, 'the national elected representative bodies' were better equipped than national or international courts to make the assessment as to what level of restriction was necessary.

These arguments were rejected by the Strasbourg court.<sup>34</sup> Whilst it did not pass direct comment on whether, at domestic level, the elected or judicial branches should have the main say, this being a matter of 'national constitutional law' which fell to the 'Contracting States to solve within their own domestic legal systems'<sup>35</sup> it did pronounce quite clearly on the margin of appreciation to be afforded at European level: 'the political nature of the advertisements that were prohibited calls for a strict scrutiny on the part of the Court and a correspondingly circumscribed national margin of appreciation with regard to the necessity of restrictions'.<sup>36</sup>

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<sup>32</sup> *ibid.*

<sup>33</sup> *Pensioner's Party* (n 8) para 48. See also the Norwegian Supreme Court's decision at para 62, cited in *Pensioner's Party* (n 8) para 20.

<sup>34</sup> It should be recalled that the UK Government submitted a copy of the House of Lords *ADI* judgement in its intervention in *Pensioners Party*. The Court rejected the arguments of the intervening governments expressly at para 77.

<sup>35</sup> *Pensioner's Party* (n 8) para 68.

<sup>36</sup> *ibid* para 65.

One further point might be ventured in respect of the degree of latitude to be afforded by courts to states and their legislatures. In *ADI* Lord Bingham had cited the Strasbourg court's judgment in *Murphy v Ireland*,<sup>37</sup> concerning a broadcasting ban on religious advertisements, as authority for the proposition that judges should accept the national legislature's view that devising workable alternatives to a blanket ban would be too difficult:

[I]n *Murphy* ... the European court recognised the difficulty of invigilating religious adverts fairly, objectively and coherently on a case by case basis and *exactly the same difficulty would arise here* [in the case of political adverts], *perhaps even more embarrassingly*.<sup>38</sup> (emphasis added)

But in *Pensioners Party* the Court rejected this explanation of its case law: rather it was the 'sensitivities as to divisiveness or offensiveness', present in the religious advert in *Murphy*, but *absent* in the political adverts in *VgT* and *Pensioners Party*, 'that led [it] to accept that filtering by a public authority on a case by case basis, of unacceptable or excessive religious advertising would be difficult to apply fairly, objectively and coherently and that a blanket ban would generate less discomfort'.<sup>39</sup>

All in all it would seem that, notwithstanding *national* courts' strong inclinations to show a large measure of deference to the will of the democratically elected organs of

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<sup>37</sup> *Murphy* (n 7).

<sup>38</sup> *ADI* (n 9) para 31.

<sup>39</sup> *Pensioner's Party* (n 8) para 75.

governance, this will not be reflected in the approach of the Strasbourg court. After *Pensioners Party* it is clear that the margin of appreciation to be afforded by the European Court to states imposing blanket bans on political advertising in the broadcast media will be narrow indeed. Consequently, it could be argued, the degree of latitude to be shown by domestic courts to national legislatures imposing such bans ought to be correspondingly limited.

*A 'right to broadcast'?*

The question arises: does the judgment in *Pensioners Party*, in combination with that in *VgT*, confer a 'right of access' to broadcasting space in order to be able to transmit political or quasi-political messages? It has often been stated that article 10 confers no such entitlement. For example in *ProLife Alliance*, Lord Hoffmann observed that there was 'no human right to use a television channel'.<sup>40</sup> One possibly far reaching effect of *VgT* and *Pensioners Party*, however, may be to confer some such right of access in order for political groups and NGOs to be able to communicate their messages effectively, in situations where those putting out opposing or competing messages do have such access.

It might be noted that a close reading of the speeches in *ADI* itself reveals that their Lordships, perhaps reluctant that their judgment be seen as immunizing the UK ban

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<sup>40</sup> [2003] UKHL 23; [2004] 1 AC 185 para 57 (Lord Hoffmann); see also para 8 (Lord Nicholls) and para 129 (Lord Walker). See also *ADI* (n 9) para 26 (Lord Bingham) and, eg *Haider v Austria* (App No 25060/94) 18 October 1996 at 66.

against future article 10 challenge, suggested that bodies such as ADI might have a right of access in some situations. For example Lord Bingham stated, obiter, that:

[i]f ... a body ... had grounds for wishing to counter the effect of commercial advertising bearing on an issue of public controversy, it would have strong grounds for seeking to put its case in the ordinary course of broadcast programmes. The broadcaster, discharging its duty of impartiality, could not ignore such a request.<sup>41</sup>

Lord Scott, clearly uncomfortable at the ban's 'remarkable' width,<sup>42</sup> went further still, observing that adverts for circuses or zoos might offend members of groups like ADI, or adverts for burgers might offend groups who disagree with the way beef cattle are reared and slaughtered. He posed the question: 'Why should these organisations not counter the broadcasting of advertisements that offend their principles with the broadcasting of their own advertisements promoting their principles?'<sup>43</sup> It may be, therefore, that in some circumstances at least, there can now be said to exist a 'right to broadcast' under article 10 ECHR.

The clear implication of these obiter remarks is that if a challenge were to be brought, based on a different set of facts to those in *ADI* (eg where the proposed 'political' advert is in response to a commercial campaign) a UK court *would* be likely to find the ban to be incompatible with article 10. This leads us, in the

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<sup>41</sup> *ibid* para 34 (Lord Bingham).

<sup>42</sup> *Ibid* para 41 (Lord Scott).

<sup>43</sup> *ibid* para 41 (Lord Scott).

following section, to a brief consideration of the differing adjudicative methodologies used, respectively, by the European and domestic courts.

*Fact-sensitivity versus the 'broad brush'?*

Under the Human Rights Act there are two remedial avenues open to litigants who claim that legislation breaches their rights. Firstly, they can argue that s 3 should be used, so that the legislation is, 'as far as possible', 'read and given effect' in a way that is compatible with the Convention right; secondly, if the s 3 route is not 'possible' because it involves doing too much violence to clear legislative words that demonstrate the intention of Parliament, a declaration of incompatibility under s 4 may be sought.

In *ADI* it was common ground between the parties that the provision was too clearly drafted to be 'read down' using s 3, so as to permit ADI's advert to be transmitted.<sup>44</sup> The applicants therefore sought a declaration under s 4 HRA that s 321(2) of the Communications Act was incompatible with article 10. In other words ADI challenged the compatibility of the legislation itself. In contrast, in *VgT* and *Pensioners Party*, the Strasbourg court addressed a quite different question, namely whether there had been a disproportionate interference with the article 10 rights of the *particular* applicants on the *particular* facts of their case.

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<sup>44</sup> [2006] EWHC 3069 (Admin) para 2 (Auld LJ).



In *ADI*, at first instance, this distinction between the adjudicative roles of the Strasbourg and UK courts had been stressed quite emphatically by Auld LJ. The UK court's task was, he said:

broader and not so fact sensitive [as that of the European Court], otherwise the compatibility with the ECHR of our legislation would be vulnerable to constant challenge and re-challenge according to the individual circumstances of each case. In short, on a compatibility challenge, this Court has often to paint with a broader brush than the Strasbourg Court ...<sup>45</sup>

The concern ... is as to the compatibility of the statutory prohibition, not as to a narrower question, namely whether ... a statutory prohibition is justifiable in the circumstances of the case.<sup>46</sup>

Clearly, if this 'all or nothing' view of s 4 were held to be correct, it would render *any* compatibility challenge to the UK's broadcasting ban on political advertising nigh on impossible.

This approach, however, seems to have been rejected by the House of Lords who seemed to accept the appropriateness of some degree of adjudicative fact-sensitivity, even where a s 4 challenge is being mounted. Thus Lord Scott, having expressed his unease at the breadth of the ban, concluded that there

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<sup>45</sup> *ibid* para 40 (Auld LJ).

<sup>46</sup> *ibid* para 69. See also paras 29 and 30. See T Lewis "Rights Lost in Translation? Fact-insensitive Laws, the Human Rights Act and the UK's ban on Broadcast Political Advertising" [2007] EHRLR 663.

may be respects in which sections 319 and 321 are incompatible with article 10. But the power to make a declaration of incompatibility ... is a discretionary power ... and as a general rule that discretion ought not to be exercised unless the circumstances of the case ... show that the legislative provision in question has affected a Convention right of the applicant ... in a manner that is incompatible with that right.<sup>47</sup>

The necessary implication of this statement is that the s 4 discretion *ought* to be exercised where the circumstances of the case *do* show that the legislation has affected the applicant's Convention right in an incompatible manner. Likewise Baroness Hale noted that the issue in the case was 'whether the ban, *as it applies to these facts*, was proportionate to the legitimate aim of protecting the democratic rights of others'.<sup>48</sup> Moreover, as noted above, having found the legislation to be compatible with article 10 on the facts of ADI's case, their Lordships went on to suggest that there may be instances in which a challenge based on slightly different factual matrices might succeed after all, for example where an NGO was seeking to *respond* to commercial advertisements, or where an advert was deemed to be 'political' *solely* because it sought to influence public opinion on a matter of public controversy (under s 321(3)(f)), or where a body whose objects were mainly or wholly of a political nature sought to broadcast an advertisement that was unconnected to its objects.<sup>49</sup>

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<sup>47</sup> ADI (n 9) para 42 (Lord Scott).

<sup>48</sup> *ibid* para 52 (Baroness Hale) (emphasis added).

<sup>49</sup> *ibid* para 34 (Lord Bingham). See also para 41 (Lord Scott) and para 52 (Baroness Hale), and text accompanying n 41 and n 43 above.

It is apparent, therefore, that their Lordships did envisage the possibility of future challenges, based on different sets of facts; they acknowledged that a degree of adjudicative fact-sensitivity might be appropriate, even given the apparent remedial rigidity of s 4 HRA.<sup>50</sup>

Nevertheless, given the wide latitude afforded by their Lordships to Parliament on this issue in comparison to that granted by the European Court to states in *VgT* and *Pensioners Party*, coupled with the dauntingly powerful symbolic impact of a declaration of incompatibility under the HRA, it is likely that any challenger claiming that the legislation is incompatible on the facts of its particular case will have a more difficult task than an applicant at Strasbourg who merely has to show the disproportionality of the *impact* of the legislation upon him.

## **Conclusion**

As far as the UK is concerned there are still ways in which the *Pensioners Party* case is distinguishable from the British situation. In particular, in contrast to Norway, the UK *does* have a system of party political broadcasts, which entitles registered political parties to free airtime.<sup>51</sup> However, whilst this argument might have some force in respect of a *political party* in the UK being denied access to paid television advertising time, it has no application to groups like ADI that are *not* political parties

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<sup>50</sup> Lord Bingham considered that in limited circumstances, a s 3 HRA challenge might be possible, para 34.

<sup>51</sup> See *ProLife Alliance* (n 40) paras 33 – 36 (Lord Hoffmann).

and, as a consequence, do not have access to such free broadcast time. ADI was in exactly the same position as the Pensioners Party in as much as the only way for it to communicate its message using television was through paid advertising.

It is reasonably clear, after *Pensioners Party*, that the Court's earlier judgment in *VgT* cannot be regarded as an aberration and banished to the adjudicative wilderness. The judgment confirms that the Court was plumbing deep free speech waters in *VgT* rather than, as has been suggested by some, merely skimming their surface. It confirms that blanket broadcasting bans on political and social advocacy advertising will be likely to breach article 10 in those situations where there are limited opportunities to communicate such messages on television in comparison to others.

In November 2008 Animal Defenders International made an application to the European Court of Human Rights claiming *not* that s 321 of the Communications Act was incompatible with article 10 (as it had, of necessity, claimed before the national courts), but rather that *its* right to freedom of expression had been violated by the denial of the chance to broadcast its message. Given the Strasbourg court's continuing strong defence of broadcast political speech in *Pensioners Party*, and its focus on the impact of restrictions on individual applicants, it would seem as though the organisation has a very strong chance of success.

Of course it is still legitimate for states to impose limitations on political advertising in the broadcast media in order to protect the integrity of the democratic process. But the easy 'legislative fix' of imposing a blanket ban on the basis that it is 'just too difficult' to devise a more finely tuned solution will not pass muster at Strasbourg. As

noted above, the obiter dicta of their Lordships in *ADI* itself nudged the door ajar for future challenges to the Communications Act ban.<sup>52</sup> The judgment of the European Court of Human Rights in *Pensioners Party*, it is submitted, flings that door wide open.

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<sup>52</sup> See Lewis and Cumper (n 20) at 106.