

April 2013

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## ***Animal Defenders International v. the United Kingdom [GC] - 48876/08***

Judgment 22.4.2013 [GC]

### **Article 10**

#### **Article 10-1**

##### **Freedom of expression**

Refusal of permission for non-governmental organisation to place television advert owing to statutory prohibition of political advertising: *no violation*

*Facts* – The Communications Act 2003 prohibits political advertising in television or radio services, the aim being to maintain impartiality in the broadcast media and to prevent powerful groups from buying influence through airtime. The prohibition applies not only to advertisements with a political content but also to bodies which are wholly or mainly of a political nature, irrespective of the content of their advertisements. Before it became law, the legislation was the subject of a detailed review and consultation process by various parliamentary bodies, particularly in the light of the European Court's judgment in the case of *VgT Verein gegen Tierfabriken v. Switzerland* (in which a ban on political advertising had been found to violate Article 10 of the Convention).

The applicant is a non-governmental organisation that campaigns against the use of animals in commerce, science and leisure and seeks to achieve changes in the law and public policy and to influence public and parliamentary opinion to that end. In 2005 it sought to screen a television advertisement as part of a campaign concerning the treatment of primates. However, the Broadcast Advertising Clearance Centre ("the BACC") refused to clear the advert, as the political nature of the applicant's objectives meant that the broadcasting of the advert was caught by the prohibition in section 321(2) of the Communications Act. That decision was upheld by the High Court and the House of Lords, with the latter holding in a judgment of 12 March 2008 ([2008] UKHL 15) that the prohibition of political advertising was justified by the aim of preventing Government and its policies from being distorted by the highest spender.

*Law* – Article 10: The statutory prohibition of paid political advertising on radio and television had interfered with the applicant's rights under Article 10. The interference was "prescribed by law" and pursued the aim of preserving the impartiality of broadcasting on public-interest matters and, thereby, of protecting the democratic process. This corresponded to the legitimate aim of protecting the "rights of others". The case therefore turned on whether the measure had been necessary in a democratic society.

The Court reiterated that a State could, consistently with the Convention, adopt general measures which applied to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases. It emerged from the case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying the measure concerned. The quality of the parliamentary and judicial

review of the necessity of the measure was of particular importance. Also relevant was the risk of abuse if a general measure were to be relaxed. The application of the general measure to the facts of the case remained, however, illustrative of its impact in practice and was thus material to its proportionality. In sum, the more convincing the general justifications for the general measure were, the less importance the Court would attach to its impact in the particular case.

Both parties to the instant case had the same objective of maintaining a free and pluralist debate on matters of public interest, and more generally, contributing to the democratic process. The applicant NGO considered, however, that less restrictive rules would have sufficed. The Court was therefore required to balance the applicant NGO's right to impart information and ideas of general interest which the public was entitled to receive against the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.

In conducting that balancing exercise, the Court firstly attached considerable weight to the fact that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to exacting and pertinent reviews by both parliamentary and judicial bodies and to their view that the general measure was necessary to prevent the distortion of crucial public-interest debates and, thereby, the undermining of the democratic process. The legislation was the culmination of an exceptional examination of the cultural, political and legal aspects of the prohibition and had been enacted with cross-party support without any dissenting vote. The proportionality of the prohibition had also been debated in detail in the High Court and the House of Lords, both of which had analysed the relevant Convention case-law and principles, before concluding that it was a necessary and proportionate interference.

Secondly, the Court considered it important that the prohibition was specifically circumscribed to address the precise risk of distortion the State sought to avoid with the minimum impairment of the right of expression. It only applied to paid, political advertising and was confined to the most influential and expensive media (radio and television).

The Court rejected the applicant NGO's arguments contesting the rationale underlying the legislative choices that had been made over the scope of the prohibition, finding notably that:

- A distinction based on the particular influence of the broadcast media compared to other forms of media was coherent in view of the immediate and powerful impact of the former. There was no evidence that the development of the internet and social media in recent years had sufficiently shifted that influence to the extent that the need for a ban specifically on broadcast media was undermined.

- As to the argument that broadcasted advertising was no longer more expensive than other media, advertisers were well aware of the advantages of broadcasted advertising and continued to be prepared to pay large sums of money for it going far beyond the reach of most NGOs wishing to participate in the public debate.

- The fact that the prohibition was relaxed in a controlled fashion for political parties – the bodies most centrally part of the democratic process – by providing them with free party political, party election and referendum campaign broadcasts, was a relevant factor in the Court's review of the overall balance achieved by the general measure, even if it did not affect the applicant.

- Relaxing the rules by allowing advertising by social advocacy groups outside electoral periods could give rise to abuse (such as wealthy bodies with agendas being fronted by social-advocacy groups created for that precise purpose or a large number of similar interest groups being created to accumulate advertising time). Moreover, a prohibition requiring a case-by-case distinction between advertisers and advertisements might not be feasible: given the complex regulatory background, this form of control could lead to uncertainty, litigation, expense and delay and to allegations of discrimination and arbitrariness.

Further, while there may be a trend away from broad prohibitions, there was no European consensus on how to regulate paid political advertising in broadcasting. A substantial variety of means were employed by the Contracting States to regulate political advertising, reflecting the wide differences in historical development, cultural diversity, political thought and democratic vision. That lack of consensus broadened the otherwise narrow margin of appreciation enjoyed by the States as regards restrictions on public interest expression.

Finally, the impact of the prohibition had not outweighed the foregoing convincing justifications for the general measure. Access to alternative media was key to the proportionality of a restriction on access to other potentially useful media and a range of alternatives (such as radio and television discussion programmes, print, the internet and social media) had been available to the applicant NGO.

Accordingly, the reasons adduced by the authorities to justify the prohibition were relevant and sufficient and the measure could not be considered a disproportionate interference with the applicant's right to freedom of expression.

*Conclusion:* no violation (nine votes to eight).

(See also *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, 28 June 2001; and *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, 11 December 2008, Information Note no. 114; *Bowman v. the United Kingdom* [GC], no. 24839/94, 19 February 1998)

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