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Free speech, politics and animal rights



(Featuring my dog Frits)

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On 22 April the European Court of Human Rights in its Grand Chamber judgment in the case of Animal Defenders International v. the United Kingdom held, with the narrowest majority (9-8) possible, that there had been no violation of Article 10 (freedom of expression) of the European Convention on Human Rights. ([read judgment](#)).

The case concerns the complaint by a non-governmental organisation that it has been denied the possibility to advertise on TV or radio. The applicant is a non-governmental organisation, Animal Defenders International ("ADI"), based in the United Kingdom. Its aims include protecting animals from suffering. ADI campaigns against the use of animals in commerce, science and leisure, seeking to achieve changes in law and public policy and to influence public and parliamentary opinion to that end. Given the organisation's campaigning objectives, it is not eligible for registration as a charity.

The Court found in particular that: the reviews of the ban by both parliamentary and judicial bodies had been exacting and pertinent, taking into account the European Court's caselaw; the ban only applied to advertising and the applicant NGO had access to alternative media, both broadcast and non-broadcast; and, the lack of European consensus on how to regulate paid political advertising in broadcasting meant that the UK Government had more room for manoeuvre when deciding on such matters as restricting public interest debate. Overall, the Court found that the reasons given to justify the ban were convincing and that the ban did not therefore go too far in restricting the right to participate in public debate.

'MY MATE'S A PRIMATE'

In 2005 ADI began a campaign called 'My Mate's a Primate' which was directed against the keeping and exhibition of primates in zoos and circuses and their use in television advertising. It aimed to raise public awareness of such exploitation. As part of the campaign, ADI wished to screen a 20-second television advertisement. [The proposed advertisement opened with an image of an animal's cage](#) in which a girl in chains gradually emerged from the shadows.



The screen then went black and three messages were then relayed in sequence: "A chimp has the mental age of a four year old"; "Although we share 98% of our genetic make-up they are still caged and abused to entertain us"; and "To find out more, and how you can help us to stop it, please order your £10 educational information pack". In the final shot, a chimpanzee was in the same position as that of the girl.



The proposed advertisement was submitted to the Broadcast Advertising Clearance Centre ("the BACC"), for a review of its compliance with relevant laws and codes. The BACC refused to clear the advert, drawing attention to the political nature of ADI's objectives, which as such prohibited the broadcasting of the advert under section 321(2) of the Communications Act 2003. In a letter of 6 May 2005 the BACC confirmed this decision and explained:

"...we only carry advertising for registered charities and this affords the stations some protection that the activities of the charity will not breach Section 4 of the ASA Code by becoming wholly or mainly political during the life of the commercial. This is because the Charity Commission only registers charities that can demonstrate that they are not wholly or mainly political and monitors their activities. Even though your proposed script did not ask for donations per se and offered a product for sale, the income generated and its subsequent use would not be regulated by any authority and the stations would be exposed to the risk that they would be carrying an unacceptable advertiser. This is not to say that we suspect the intentions of this advertiser, but rather it is a dangerous precedent to set. Likewise if any advertiser was to use the income generated from a product advertised in a commercial for wholly or mainly political means it would be unacceptable under the code."

That decision was upheld by the High Court in December 2006 and by the House of Lords in March 2008. The House of Lords' judgment held, in particular, that the prohibition on political advertising under UK law was justified by the aim of preventing the public debate from being distorted by the highest spender so that the legislative choice made in the 2003 Act was not incompatible with Article 10 of the European Convention on Human Rights (freedom of expression).

THE COURT'S DECISION

The dispute between the parties concerned whether the interference was "necessary in a democratic society". The applicant maintained that the prohibition was disproportionate because it prohibited paid "political" advertising by social advocacy groups outside of electoral periods

The Government argued that the prohibition was necessary to avoid the distortion of debates on matters of public interest by unequal access to influential media by financially powerful bodies and, thereby, to protect effective pluralism and the democratic process. The term political advertising used herein includes advertising on matters of broader public interest.

The Government had maintained that Parliament had considered the prohibition necessary to avoid the unacceptable risk that the political debate would be distorted in favour of deep pockets funding advertising in the most potent and expensive media. Unregulated broadcasting of paid political advertisements would turn democratic influence into a commodity which would undermine impartiality in broadcasting and the democratic process. The objective was to enhance the political debate and not to restrict it.

The applicant responded that the different approach to the broadcast and other media was unproven, inexplicable and unnecessary. The Government had presumed that the broadcast media was uniquely powerful and expensive without any proof, analysis or comparative studies. Given the growing impact of other forms of pervasive media, there were convincing reasons to believe that those ideas might now be false. The Government incorrectly relied on the prior findings of this Court as to the power of the audio-visual media. In any event, it made no sense to restrict access to the broadcast media and allow access to other persuasive and pervasive media. If the broadcast media was particularly powerful, that would be a reason to broadcast political speech and if it was no longer that powerful compared, for example, to the internet, the State's justification for the prohibition fell away. The Government's aim of preventing the hijacking of the broadcast media by the rich and powerful

The Court did not consider the prohibition to amount to a disproportionate interference with the applicant's right to freedom of expression.

"The impact of the prohibition in the present case outweighs the above-described convincing justifications for the general measure. The Court notes, in this respect, the other media which remain open to the present applicant and it recalls that access to alternative media is key to the proportionality of a restriction on access to other potentially useful media. In particular, it remains open to the applicant NGO to participate in radio or television discussion programmes of a political nature (ie. broadcasts other than paid advertisements). It can also advertise on radio and television on a non-political matter if it sets up a charitable arm to do so and it has not been demonstrated that the costs of this are prohibitive. Importantly, the applicant has full access for its advertisement to non-broadcasting media including the print media, the internet (including social media) as well as to demonstrations, posters and flyers. Even if it has not been shown that the internet, with its social media, is more influential than the broadcast media in the respondent State (paragraph 119 above), those new media remain powerful communication tools which can be of significant assistance to the applicant NGO in achieving its own objectives."

DISSENTS

The dissenting judges noted that the case was almost identical to previous cases before the Court where the outcome had been a finding of violation ([VgT Verein gegen Tierfabriken v. Switzerland](#)):

"We find it extremely difficult to understand this double standard within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it. We are perplexed with an approach which attempts to justify for the purposes of the Convention a severe restriction on freedom of expression by reference to a variety of regulatory frameworks which do not specifically address the issue under examination. Even if – which we do not for a moment believe should be the case – one were to give some weight to the alleged lack of consensus, in the presence of an uncontested Convention right (and unlike in those Article 8 cases where the scope or extent of privacy rights is the issue) the lack of European consensus cannot justify a departure from established standards of what is a pressing need in a democratic society. Nothing has been shown in this case to suggest that the state of democracy in the United Kingdom requires, by way of a "pressing need", the wide ban on paid "political" advertisements that is in issue here; or that the said democracy is less robust than in other States parties to the Convention and cannot afford risk-taking with "issue-advertising". On the contrary, tradition and history force one to assert the very opposite."

COMMENTS

ADI on its website expresses "its profound disappointment" after the European Court of Human Rights found in favour of the UK government in a landmark test case concerning a TV advertisement produced by ADI in 2005, and subsequently banned under the Communications Act 2003. Jan Creamer, Chief Executive:

"This is a profoundly sad day for democracy. It is unjust that companies can advertise without being challenged. This judgment has denied the right of ADI and other similar campaign and advocacy groups to refute advertising claims made by companies." - "At present, advertising laws effectively ban the broadcast of any advertisement on a matter of controversy. So whilst primates and other animals can be used to sell products or services, it is not permitted to create awareness about the impacts of these actions on those animals. The injustice of the situation was highlighted at the time by the fact that soft drinks giant Pepsi were using a performing chimpanzee in a TV commercial."

Rosalind English ([‘Strasbourg ties itself in knots over advertising ban’](#)):

"The verdict was carried through by a majority of one – eight out of seventeen judges dissented. And the reference to “democracy” in ADI’s response to the judgment is not overblown. The general trend of the majority appears to suggest that it is legitimate, in a democracy, for a government to impose a blanket restriction on the exercise of freedom in the name of broadcasting freedom. Such an aim is not one of those listed in Article 10(2). As some of the dissenting judges pointed out, it is telling that it took over a year for the Grand Chamber to make up its mind – the hearing was in March 2012, and the decision has only come out now. The length of both the judgment and its gestation, along with the vigour of the dissent, suggest this is a problematic ruling, to say the least. Unfortunately it is not appealable."

Indeed, the key issue in the case seems to be whether a blanket ban (or ‘general measure’) was a proportionate restriction of the freedom of expression, or whether some class of exception (a ‘case-by-case’ approach) for groups such as the NGO in this case ought to be recognized. Jeff King [UK Constitutional Law Group](#), Rónán Ó Fathaigh ([Strasbourg Observers](#)) and Antoine Buyse ([ECHR Blog](#)) quite rightly focus on this problematic issue.

But others welcome the Court’s decision. [Jacob Rowbottom](#), a Fellow of University College, Oxford:

"I think these criticisms are misplaced. TV is not a politics free zone, so I don’t think the gates are locked. It is just one type of transaction that is blocked. I think the state plays an important role in ensuring that the opportunities for communication are not skewed in favour of those with the deepest pockets. The case for the ban is not that people cannot decide for themselves, but that different groups should have equal opportunities to persuade people of the merits of their position. The decision in Animal Defenders International has come as a surprise to me, but – and many will disagree with me on this point – it is a pleasant surprise. It is one in which the Strasbourg Court has moved away from its earlier jurisprudence and emphasized the importance of insulating political debate from the inequalities in wealth."

And [Joshua Rozenberg](#) ("Government will be mightily relieved at decision to uphold political ads ban") comments:

"I have nothing against ADI or any other lawful campaign group. I support free speech. But – like many people, I suspect – I have no wish to see US-style political advertising on television, forcing our political parties to raise ever larger funding by increasingly dubious means. The margin of appreciation is a wonderful thing and I am glad to see it has lost none of its elasticity."