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Rights lost in translation? Fact-insensitive laws, the Human Rights Act and the United Kingdom's ban on political advertising

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R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport [2006] EWHC 3069 (Admin); [2007] E.M.L.R. 6 (DC)

VgT Verein gegen Tierfabriken v Switzerland (24699/94) (2002) 34 E.H.R.R. 4 (ECHR)

***E.H.R.L.R. 663** *This article explores the issue of blanket legal prohibitions and how these sit with proportionality under the ECHR and the HRA as interpreted by the European Court of Human Rights and English courts. The author first looks at Strasbourg case law and factors examined by the European Court in deciding whether a fact-insensitive law is proportionate. He then considers the domestic decision of R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport and finally analyses the difficulties this approach raises in giving effect to Convention rights under the mechanisms of the HRA.*

Introduction

In his most famous work, *The Concept of Law*, H.L.A. Hart recognised a fundamental tension inherent in all legal systems: on the one hand there is a need for laws to be certain so that individuals are able to conduct their lives in a reasonably predictable environment, knowing in advance what the consequences of their actions will be; set against this is the need for laws to be sufficiently flexible or fact-sensitive so as to be able to take account of differing factual situations.¹ This tension becomes yet more acute in those systems in which human rights norms are afforded enhanced legal protection against legislative incursion. In the interests of legal certainty legislatures sometimes enact laws that create “bright line” rules or blanket prohibitions which admit of very little flexibility or very little scope for discretion to be exercised by those charged to apply the rule. Such inflexible rules may well impinge on the human rights of those they affect. Moreover they may catch within their broad sweep or fine mesh those upon whom the impact, because of their individual circumstances, is particularly harsh. They may even catch those whose circumstances are at the very periphery, or even out-with, the justifications for the existence of the bright line rule or blanket prohibition in the first place. The question arises as to whether, and if so when, such inflexible blanket rules ***E.H.R.L.R. 664** which do not take account of individual circumstances can meet with the requirement of proportionality as prescribed by the European Convention on Human Rights (ECHR) and Human Rights Act 1998 (HRA).² This question has been considered recently by the Administrative Court in the case of *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport*³ which concerned the absolute, blanket prohibition on broadcast political advertising under s.321 of the Communications Act 2003.

This article will explore the issue by briefly reviewing the Strasbourg case law and suggesting that a crucial factor in determining whether a fact-insensitive law will be found to be proportionate will be the margin of appreciation that the European Court is prepared to afford the state. Then the decision in *Animal Defenders* will be considered, and in the following section it will be contended that the way the Administrative Court interpreted its role, in the context of assessing the proportionality (and thus human rights compliancy) of the blanket ban on broadcast political advertising, highlights some hitherto unforeseen problems with the mechanism chosen by Parliament to give effect to Convention

rights in the HRA. It will be argued that the approach strongly steers the judges into a position where they will almost inevitably be forced to resolve the Hartian tension outlined above in favour of certainty at the expense of fact-sensitivity. This will often lead to a very different approach to that adopted by the European Court of Human Rights and will lead to rights being lost in translation between Strasbourg and the United Kingdom. Finally, a potential solution to this problem will be tentatively suggested.

The approach of the European Court of Human Rights to fact-insensitive laws

There have been several cases brought before the European Court of Human Rights in which the question of whether rigid, fact-insensitive laws can meet with the strictures of proportionality has been addressed. The answers provided as to how the tension between fact-sensitivity and legal certainty should be resolved have been widely divergent. Two examples of this divergent approach can be seen in the recent Grand Chamber decisions in *Hirst v United Kingdom*⁴ and *Evans v United Kingdom*.⁵ In *Hirst* the fact-insensitive law imposing a blanket ban on all convicted prisoners voting in the United Kingdom⁶ no matter what their offence or sentence, was held to be a disproportionate interference with the right to vote under Art.3 of Protocol No.1 ECHR. The Court stated that the principle of proportionality required a “discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned”.⁷ By contrast, in *Evans v United Kingdom* a fact-insensitive law requiring the continuing consent of both donors in the *in vitro* fertilisation process (IVF) *E.H.R.L.R. 665 (up until the point at which the embryo was implanted in the woman’s body) failing which the embryos would be destroyed,⁸ was found to be a proportionate interference with the right to respect for a private and family life under Art.8 ECHR. This was held to be the case even where the application of the rigid rule meant that the applicant’s chances of having genetically related children were ended for ever.

One of the factors the European Court of Human Rights takes into account in deciding whether a fact-insensitive law is a proportionate interference with a Convention right is the degree of difficulty that the state would encounter if it did introduce a more fact-sensitive rule, for example, the likelihood that the primary policy aim would, in practice, be frustrated by such a law or that such a law might have other undesirable consequences, especially, for example, unduly compromising legal certainty.⁹ Thus in *Evans* the Court accepted that:

“the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis ... ‘entirely incommensurable’ interests.”¹⁰

Furthermore the Court noted the painstaking deliberation that had taken place in drawing up the legal regime in relation to IVF.¹¹ By contrast in *Hirst* the Court accepted that whilst *some* restriction on prisoner voting might be acceptable, there was no justification for such a “general, automatic and indiscriminate restriction on a vitally important Convention right”.¹² Very little was advanced by way of governmental justification for a *blanket* ban on *all* prisoner voting (as opposed to some restriction). The Court also noted the distinct absence of any serious debate on the issue when it had been before Parliament.¹³

Whilst such factors are highly relevant to the European Court’s determination of whether a fact-insensitive rule meets with the requirements of proportionality, it is apparent that another crucial factor is the width of the margin of appreciation that it is prepared to allow to the defendant state.¹⁴ The importance of the margin of appreciation *E.H.R.L.R. 666 can be seen when comparing two outwardly very similar cases in the field of broadcast advertising: *VgT Verein gegen Tierfabriken v Switzerland*¹⁵ and *Murphy v Ireland*.¹⁶

VgT concerned the blanket prohibition in Swiss law on broadcast “political” advertising.¹⁷ The applicant, a vegetarian organisation, produced a short film contrasting the life of factory farmed pigs with that of their wild, forest dwelling cousins and imploring viewers to “eat less meat”. The Swiss authorities refused to screen the film on the ground that it was a political advertisement. *VgT* applied to the European Court claiming a breach of the right to freedom of expression under Art.10.

The Government argued that the ban was needed to:

“protect public opinion from the pressures of powerful financial groups and from undue commercial influence, to provide a certain equality of opportunity among different forces in society, to ensure editorial independence from powerful sponsors and support the press.”¹⁸

The Court accepted that powerful financial groups can obtain competitive advantages through commercial advertising and may thereby exert pressure on broadcasters--an eventuality which would undermine the fundamental role of Art.10 in preserving democratic and pluralistic society.¹⁹ However the applicant organisation was not such a "powerful financial group"; it did not have the resources to cause those damaging consequences that, the Government asserted, constituted the reason for the ban. Rather than trying to abuse a competitive advantage, all it intended to do with its commercial was to participate in an "ongoing general debate on animal protection and the rearing of animals".

As to the width of the appropriate margin of appreciation, the Government argued that since the case concerned the regulation of advertising, an area on which the European Court has generally allowed states much latitude, it should be afforded a wide margin. However the Court noted that this case did not involve regular commercial advertising in the sense that it was intended to persuade the public to buy a particular product. Rather it "reflected controversial opinions pertaining to modern society in general"; indeed the very reason the advert had been banned by the Swiss authorities was because it was regarded as "political".²⁰ Because the issue concerned the applicants' "participation in a debate affecting the general interest", the margin of appreciation was correspondingly narrow.²¹

Thus the Court held there to be a breach of Art.10 because the blanket ban caught within its fine meshed net not just those wealthy organisations who could pose the **E.H.R.L.R. 667* threat which constituted the *raison d'être* for the ban, but also those who manifestly could not.

Murphy v Ireland concerned, on the face of it, strikingly similar facts to those of *VgT*. Mr Murphy, a pastor for the Irish Faith Centre, submitted an advertisement for a religious gathering to a local commercial radio station for transmission. In Irish law, however, there was a blanket ban on, amongst other things, broadcast religious advertisements.²² Consequently his submission was refused. Mr Murphy therefore applied to Strasbourg claiming a breach of Art.10 on the same basis as had been claimed by *VgT*: that a blanket ban constituted a disproportionate interference with his freedom of expression.

The Court accepted that the state's aims of ensuring respect for religious doctrines and beliefs of others met the Art.10(2) aims of ensuring public order and safety and the rights and freedoms of others.²³ The key question, as in *VgT*, was whether a blanket prohibition on a type of broadcast expression was a proportionate way of attempting to achieve these aims.

The applicant claimed that, rather than impose a blanket ban, the state could have achieved its aims by way of a more fact-sensitive rule which could take more account of *his particular circumstances*. After all *he* did not pose any threat to religious harmony or the rights and freedoms of others. The Court, however, accepted the Government's arguments that a more finely tuned approach would not have been practicable:

"a provision allowing one religion, and not another, to advertise would be difficult to justify and ... a provision which allowed ... filtering by the State or any organ designated by it, on a case by case basis, of unacceptable or excessive religious advertising would be difficult to apply fairly, objectively and coherently."²⁴

The Court accepted the Government's argument that the exclusion of *all* religious groupings generated "less discomfort than any filtering of the amount and content of such expression by such groupings".²⁵ Further, it was reasonable for the state to conclude that such a system would favour the dominant religion over those with fewer adherents and resources--the level playing field between religions in the medium with the most powerful impact, would be jeopardised; finally there was no consensus on the delicate matter of religion or religious advertising throughout Europe.

Even though the actual advertisement in issue in *Murphy* was not offensive, was innocuous and informational, and the applicant was not a wealthy organisation that would have been able to buy up large chunks of airtime and dominate the airwaves, the ban was still held to be proportionate.

The key to understanding the differing resolutions of the certainty/fact-sensitivity tension in *Murphy* and *VgT* lies in the margin of appreciation that the European Court **E.H.R.L.R. 668* was willing to allow.²⁶ This in turn depended on the nature of the right being claimed. Indeed the Court in *Murphy* expressly stated that it was the *religious* nature of the expression that resulted in a wider margin of appreciation being afforded than was the case in *VgT* where *political* expression was concerned:

"... there is little scope under Art.10 (2) of the Convention for restrictions on political speech or on debate of questions of public interest ... However, a wider margin of appreciation is generally

available to ... States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion ... it is this margin of appreciation which distinguishes [Murphy] from [VgT]. In the latter case ... the advertisement ... concerned a matter of public interest to which a reduced margin of appreciation applied."²⁷

Freedom of political expression has an obvious instrumental value: the goal of securing effective representative democracy--the *sine qua non* of effective rights protection²⁸ --is served by having a strong protection for public interest "political" expression. Freedom of political speech underpins the entire system. The Court has stated on numerous occasions that the "freedom of political debate is at the very core of the concept of democratic society which prevails throughout the Convention".²⁹ It is in tune with a long and authoritative line of Convention case law that the margin of appreciation accorded in *VgT*, a public interest/political expression case, was very narrow.³⁰ By contrast the instrumental value of *religious* expression is less obvious; it primarily benefits the *individual* who chooses to engage in it. As Andrew Geddis says:

"because religious expression is not thought to generate as great an externalised benefit for society as a whole when compared to political expression, there is less of a 'thumb on the scale' when it comes to weighing the value of the speech against the possible harms it may engender."³¹

***E.H.R.L.R. 669** To summarise: the attitude of the Strasbourg Court to the proportionality of fact-insensitive laws depends on the ability of the state to argue that the detrimental consequences (usually in terms of uncertainty and arbitrariness) of having a more fact-sensitive law would outweigh the advantages (in terms of being able to fine-tune the law's application to the facts of the individual case).³² The margin of appreciation accorded is critical in the allocation of weight to the factors involved in this balancing act and this in turn will depend on the nature and content of the right at stake.³³

The United Kingdom's statutory blanket ban on broadcast political advertising and the Animal Defenders International case

The question of how to resolve the Hartian tension appropriately has recently been revisited in *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport (Animal Defenders International)*.³⁴ The case concerned the blanket ban on the use of the broadcast media for political advertising under the Communications Act 2003.³⁵ During the parliamentary debates on the Communications Bill, the Secretary of State for Culture, Media and Sport, Tessa Jowell M.P., summed up the rationale for the prohibition: "By denying powerful interests the chance to skew political debate, the current ban safeguards the public and democratic debate, and protects the impartiality of broadcasters".³⁶

To this end s.319(2)(g) imposes a duty on broadcasting regulator Ofcom to ensure that political advertising is not included in television or radio services. Section 321(2) states (a) that an advertisement will contravene the prohibition if it is inserted "by or on behalf of a body whose objects are wholly or mainly of a political nature" or (b) if it is "directed towards a political end". Section 321(3) defines "objects of a political ***E.H.R.L.R. 670** nature" and "political ends" extremely widely so as to include, inter alia, "influencing the policy of any government" or of "any persons carrying out public functions in any country" and "influencing public opinion on a matter of public controversy in the United Kingdom". Once an advertisement is deemed to fall within these parameters Ofcom has no discretion to allow it.

During the passage of the Communications Bill the Government was so unsure as to its compatibility, especially in the light of the European Court's judgment in *VgT*, that it took the unusual step of including a statement under s.19(1)(b) HRA that "although ... unable to make a statement of compatibility [it] nevertheless wishes the House to proceed with the Bill".³⁷

In 2005 Animal Defenders International, a non-profit, non-charitable organisation whose objects are to protect animals and alleviate their suffering began to prepare a campaign, entitled *My Mate's a Primate*, against the use of primates for human entertainment in zoos and circuses. A 20 second television advertisement was proposed, depicting a girl in a cage with a voice-over talking about man's ill-treatment of primates, and inviting the public to find out more by sending £10 for an information pack. The script was submitted for pre-clearance but the regulator refused on the grounds that it would fall foul of the statutory prohibition on political advertisements.³⁸

Animal Defenders International applied for a judicial review claiming that the s.321 ban constituted a

breach of its rights under Art.10 ECHR.³⁹ Section 3 of the HRA imposes a duty on UK courts, as far as it is possible to do so, to read and give effect to all legislation in a way which is compatible with Convention rights. In the hearing before the Administrative Court it was accepted by both parties that the terms of the prohibition were so clear and all-encompassing that, if it were found to be incompatible, s.3 of the HRA could not be used to read it compatibly. The only question before the court, therefore, was whether a declaration of incompatibility under s.4 of the HRA should be made.

Whilst UK courts are obliged to “take into account” the Strasbourg court's case law they are “not strictly required to follow [its] rulings”.⁴⁰ Nevertheless Lord Bingham stated in *Kay v Lambeth LBC* that it is:

“ordinarily the clear duty of ... domestic courts, save where and so far as constrained by primary legislation, to give practical recognition to the principles laid down by the Strasbourg Court ... That Court is the highest judicial authority on the interpretation of [Convention] rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down.”⁴¹

***E.H.R.L.R. 671** Having regard to the European Court's line on blanket bans, its stance on political expression and, in particular, the decision in *VgT* it might have been thought that whilst *some* restrictions on broadcast political advertising may have been legitimate so as to protect the integrity of the democratic process, such a widely drawn blanket prohibition which took no account of the circumstances of the individual case must have been disproportionate. Admittedly here the Court was, in Lord Bingham's terms, “constrained by primary legislation”, but the authority of *VgT* would seem to have supported a finding that the ban was disproportionate.

The Administrative Court, however, declined to follow *VgT*. The approach of the Strasbourg Court was castigated as overly fact-sensitive, rendering it, according to Ousley J., “one of those ECtHR decisions which suffers from unclear or unsound reasoning”, one that the “UK Courts should not follow”⁴² and “simply ... not a case which can be applied to other cases”.⁴³ Auld L.J. put it thus:

“Given the Strasbourg Court's focus on the *particular facts* in *VGT*, including its disregard [sic] of the fact that *VGT* was not a powerful player, that it was in opposition to powerful commercial interests, and that, because the nature of their interests was respectively ‘political’ and ‘economic’ the prohibition was, on that account, discriminatory, it is hard to see why such fact-sensitive and, in any event, arguably aberrant reasoning should be a basis for concluding that similar legislation within the HRA framework should be regarded as incompatible with Art.10.”⁴⁴

The Court was, however, prepared to follow the approach adopted by the Strasbourg Court in *Murphy* notwithstanding the fact that it concerned religious rather than political expression.⁴⁵ In that case, the Court said, the great power of the broadcast media had been taken into account (thus justifying differential treatment between the broadcast media and other media and buttressing the argument that the ban was proportionate)⁴⁶; and it had been accepted that it would have been impossible in practice to have adopted a more fact-sensitive regime.⁴⁷

The Court held that the question of whether restrictions should be imposed on broadcast political advertising, and the way in which they should be imposed, was one ***E.H.R.L.R. 672** on which deference should be shown to Parliament. Indeed “the permissible width of the discretionary area of judgment allowed to Parliament in relation to its prohibition on political advertising” was the “central issue” in the claim.⁴⁸ Auld L.J. said:

“... in such matters of social and political judgment, the executive and legislative authorities--particularly the latter--... may normally be expected to have a better or surer grasp of its democratic needs and their practicalities than the Strasbourg Court or its own courts. Therein lies the notion of deference which ... still stands as a caution to our courts against interfering too readily with the Government's policies or Parliament's legislative schemes in implementation of them.”⁴⁹

According to the Court Parliament was best placed to decide that broadcasting political advertisements should be banned in the broadcast media--because of its (broadcasting's) perceived greater potency as compared to other media and the risk of the democratic process being skewed by wealthy interests dominating the airwaves.

Alternative, less restrictive, more fact-sensitive schemes proposed by the claimants may have been *possible*, for example restricting the ban to election periods, or drawing a distinction between party political matters and “social advocacy” on other matters of public concern. But the Court accepted the

Government's arguments that to have enacted a more nuanced rule would have tended to undermine the policy objective underpinning the ban:

"[T]o have attempted to limit the prohibition by amore restricted and more precise definition of such bodies or ends would have defeated the overriding objective of preventing the distortion of political debate which takes many forms and embraces a vast range of matters of public importance and interest."⁵⁰

Furthermore it would have introduced uncertainty and arbitrariness into an otherwise certain system:

"[I]t would have engendered much uncertainty and scope for litigation, and would have invited evasion by political parties thus disadvantaged to 'contract' out their political advertising to other bodies or individuals."⁵¹

"It is clear that part of the justification for the complete ban is the real difficulty of drawing any rational, practicable distinctions between parties, groups and types of advertisements."⁵²

Consequently this was appropriately a matter for Parliament:

"No doubt Parliament could have devised a form of words which would present a solution of sorts to any problem as to where a line was drawn as between types and advertiser or advertisement. However, the complexities and inevitable arbitrariness **E.H.R.L.R. 673* of any solution, such as it might be called, are proper matters for Parliament to consider in deciding that a complete ban on broadcasting advertisements is the only practicable and fair answer."⁵³

As a consequence of the above reasoning the Court found that the provision was not incompatible with Art.10.⁵⁴

To summarise: the Administrative Court held that it was necessary to restrict access to broadcasting facilities in order to protect the integrity of the democratic process. Parliament was particularly well qualified to make this call and it should be afforded a discretionary area of judgment. Furthermore the manner in which it chose to do that was a matter for Parliament which was better placed than the Court to assess the potential pitfalls of more fact-sensitive solutions.

Rights lost in translation?

It will be contended that the Administrative Court's approach to the question of fact-insensitive law will inexorably steer the judges towards resolving the tension between legal certainty and fact-sensitivity in favour of the former. This will result in a divergence of approach between the Strasbourg Court and domestic courts leading to Convention rights being lost in translation.

It will be recalled that in *Animal Defenders International* s.3 of the HRA was not in play: ss.319 and 321 of the Communications Act used language which was so clear and all-encompassing that it was obvious to the Court that it represented a "deliberate policy choice by Parliament to impose a ban on broadcast advertising in as wide and all embracing terms as possible".⁵⁵ The only option open to *Animal Defenders International* was to challenge the legislation under s.4 of the HRA. Under s.4(2) the court is empowered to declare legislation incompatible with Convention rights. However the Administrative Court expressly disavowed an approach that would have permitted it to examine the precise impact of a legislative measure and assess whether there had been a disproportionate interference with rights on the precise facts of *Animal Defenders International's* case. Under the HRA:

"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 particular circumstances of the case."⁵⁶

"The Strasbourg Court in *VGT*, ... accorded the Swiss Court only a narrow margin of appreciation as to the consistency with Art.10 of the application of the prohibition in the circumstances of the particular case. An English court, in considering the **E.H.R.L.R. 674* compatibility of a statutory provision under section 4 of the HRA has a different and broader task, namely 'whether a provision of primary legislation is compatible with a Convention right'. "⁵⁷

"[I]n relation to ... *VGT* ... the task for this Court in determining whether a UK statute is incompatible with an ECHR obligation is broader and not so fact sensitive, otherwise the compatibility of 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--another way of expressing the 'bright line'

approach.”⁵⁸

The import of these dicta is that if a UK court is considering whether to make a declaration of incompatibility it cannot and should not adopt a fact-sensitive approach. Its task is to decide whether the provision as a *whole* is incompatible; *not* to determine whether, on the facts of a particular case, it has resulted in an *outcome* that is incompatible. According to this reasoning, if the provision is globally *capable* of justification, irrespective of the impact on a particular claimant, and irrespective of whether the rationale behind the provision is in alignment with the circumstances of the individual claimant, it will not be found to be incompatible. According to the Administrative Court s.4 is a zero sum game. If the provision is *capable* of being applied compatibly *at all* then the fact that it may have a particularly harsh impact on an individual claimant will not render it disproportionate.

It becomes apparent that there is a gap in rights protection under the HRA's scheme. The mechanism introduced to make rights enforceable in UK courts seems to contain a strong systemic impetus to resolve the Hartian tension in favour of legal certainty at the expense of fact-sensitivity. If legislation is drafted in a clear and all-encompassing way so as to make the intention of Parliament crystal clear, it will be safe from reading down under s.3. The only hope for the claimant then will be to argue for a declaration under s.4--that the legislation is disproportionate because of its overly harsh application in their particular case. But the court will not be able to adopt such a fact-sensitive approach: it cannot, all it can do is to declare the entire provision to be incompatible, and if it is *capable* of justification this will not be possible:

“[The court's] task is not, in the words of the Strasbourg Court ... [to determine] whether the statutory interference with the freedom of expression in question ‘served to justify the interference in the particular circumstances of the ... case’, or, ... whether it has, in the circumstances, ‘achieved the result called for by the Convention’. Their task is [to determine] whether the United Kingdom statutory prohibition in question is in itself, and, given its permissible interpretation and application, compatible in the sense of being capable of justification under Article 10(2).”⁵⁹

***E.H.R.L.R. 675** If this is right then blanket proscriptions are in fact insulated from human rights challenge in the domestic courts. Indeed, paradoxically, in *Animal Defenders International* the very rigidity and absence of fact-sensitivity which, intuitively and in principle, ought to have rendered the provision at least *more* likely to be found to be disproportionate in fact had the opposite effect: it put it beyond the reach of the s.3 interpretive provision; and the very wide cast of the fine meshed net meant that more was *at stake* in s.4 compatibility terms--for the wider the net is cast the more likely it is to catch cases that *are* within the legislative aim as well as those that are not--and if the net catches mainly the tuna (that are within the legislative compass)--the fact that it also catches the occasional dolphin (that are not) does not render it incompatible--they are just, to switch metaphors, collateral damage in an otherwise just war.

The potency of this immunisation from human rights based challenge is augmented when the courts show deference to Parliament and adopt the stance that Parliament *must* have had good reasons and is much better placed than the court to make the call that alternative, more finely tailored approaches would not have been preferable.⁶⁰ Indeed the very fact that it was *Parliament's* decision to impose a blanket ban carried weight in persuading the Court to show deference: “The experience, expertise and judgment of Parliament expressed in the legislation can demonstrate the necessary justification”.⁶¹

“I also give Parliament's *considered view great weight because* of the subject matter. The impact of broadcasting on the topics, framework and intensity of political debate is one which few would be better placed to assess than those who deal on a daily basis with constituents and interest groups, whether to enlist, respond to or resist their influence. They would be well placed to know what manner of groups there were or might be who would take advantage of degrees of alteration to the present ban. It is not contestable that Parliament, through its M.P.s and politically active peers, is far better placed to reach a judgment on those matters than judges. This is not an area which more readily falls into the sphere in which judges are more experienced and expert. This is the more true of non-national judges.”⁶²

The issue of judicial deference has been widely debated and hotly contested both judicially and academically.⁶³ There is not the space to enter that debate here, but it ***E.H.R.L.R. 676** might be ventured that the level of deference accorded by domestic courts ought at least to *mirror* that afforded to states by the Strasbourg court. In an area so jealously guarded by that Court as political expression it might be thought that the generous measure of deference afforded in *Animal Defenders*

International was inappropriate. The contention of the Administrative Court that M.P.s and peers are better placed--have greater institutional capacity--than the courts in regulating broadcast political speech runs counter to the whole tenor of the Strasbourg approach.⁶⁴

Conclusion

One of the difficulties with the Administrative Court's approach in *Animal Defenders International* is that it cuts against the primary motivation for the passage of the HRA in the first place; namely to "bring rights home", to allow human rights claims to be dealt with domestically rather than at the Strasbourg Court.⁶⁵ The Court's opinion in *Animal Defenders International* was that it simply was not furnished with the juridical tools with which to afford protection to those who were caught by the fine meshed net of fact-insensitive legislation in situations where some justification had been given for the necessity of an inflexible rule. It is likely, however, that claimants who fail in such cases will apply to the Strasbourg Court whose task *is* (in some circumstances at any rate) to determine whether a "statutory prohibition is justifiable in the particular circumstances of the case".⁶⁶ Further, in a case such as *Animal Defenders International*, given the narrow margin of appreciation afforded in cases of political expression and the Strasbourg Court's willingness in *those* kinds of cases to adopt an approach that is intolerant of fact-insensitive laws, it is likely that that Court will find a violation. If so the HRA will have failed in its objective.

It has been argued by various commentators that one of the ways in which the HRA was designed to "give further effect"⁶⁷ to Convention rights was by instituting, primarily via the interplay of s.3 and s.4, a dialogue between the different actors within the constitution. During the passage of the Human Rights Bill the then Home Secretary, Jack Straw M.P., said that:

***E.H.R.L.R. 677** "Parliament and the judiciary must engage in a serious dialogue about the operation and development of the rights in the Bill ... this dialogue is the only way in which we can ensure the legislation is a living development that assists our citizens."⁶⁸

Yet the approach in *Animal Defenders International* is to act as a conversation *stopper*. If the analysis in *Animal Defenders International* is right then any judicial ability to signal, via the medium of a s.4 declaration, that there may be a problem with the compatibility of fact-insensitive legislation will be lost; the conversation will be over.

It will be briefly and tentatively suggested that a possible solution to this problem may be found within the text of the HRA itself. It will be recalled that s.3 requires that all legislation, "whenever enacted",⁶⁹ "so far as it is possible ... must be read and given effect in a way which is compatible with Convention rights".⁷⁰ Section 3 therefore must apply to the interpretation of the provisions of the HRA itself, including s.4. The Court in *Animal Defenders International* imposed a self-denying ordinance with regard to its role under s.4 because it perceived *its* task to be "broader" than and "not so fact sensitive" as that of the Strasbourg Court.⁷¹ If, on the other hand, it had interpreted its role under s.4 through the prism of s.3, it would have to have *given effect* to Convention rights *as far as possible*. In the circumstances (namely, not being able to use s.3 to read down s.321) this would have required the making of a declaration of incompatibility and the HRA dialogue could have continued.

A s.4 declaration should be seen as a major part of the machinery by which Parliament intended to bring rights home and give them *further effect* in the United Kingdom (whether or not this is given the label "dialogue").⁷² A s.4 declaration does not affect the continuing validity of the legislation⁷³; it is for government and Parliament to decide what, if any, action should be taken to remedy any defect that has been signalled by the court. This is surely what a claimant in *Animal Defenders International*'s position is entitled to expect under the HRA's scheme; he may not be able to secure an immediate remedy under s.3, but at least the constitutional mechanism for the protection of rights will be utilised. In *that* way his rights will be, to the greatest possible extent in the circumstances, given effect.

***E.H.R.L.R. 678** The Administrative Court's assessment of its role in *Animal Defenders International* has the consequence of systemically favouring certainty at the expense of fact-sensitivity. If the alternative approach suggested above is adopted it will allow a more accurate translation of Strasbourg principles into the domestic sphere. Furthermore it will permit the HRA mechanisms introduced by Parliament in 1998 to be used to their full extent and avoid unnecessary applications to the European Court of Human Rights.

1. H.L.A. Hart, *The Concept of Law* (2nd edn, OUP, Oxford, 1994), p.130.
2. For the most recent high level judicial pronouncement on the meaning of proportionality see *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2W.L.R. 581.
3. [2006] EWHC 3069 (Admin); [2007] E.M.L.R. 6. The case has been appealed the House of Lords using the "leap-frog" procedure.
4. (2006) 42 E.H.R.R. 41.
5. (2007) 95 B.M.L.R. 107; [2007] 2 F.C.R. 5.
6. Representation of the People Act 1983 s.3(1).
7. *Hirst*, at [71].
8. Human Fertilisation and Embryology Act 1990 Sch.3.
9. For a more detailed consideration see P. Sales and B. Hooper, "Proportionality and the Form of Law" (2003) 119 L.Q.R. 426.
10. *Evans*, at [89]. The "incommensurable interests" were the applicant's "right to respect for the decision to become a parent in the genetic sense" versus her ex-partner's "right to respect for his decision not to have a genetically-related child with her".
11. *Evans*, at [86]-[87]; e.g. the Warnock Committee Report 1984 followed by Green and White Papers.
12. *Hirst*, at [82].
13. *ibid.*, at [79]. The domestic court in *R. (on the application of Pearson) v Secretary of State for the Home Department ; Hirst v Att-Gen* [2001] EWHC Admin 239; [2001] H.R.L.R. 39 had shown deference to the legislature saying, at [41], that this was "plainly a matter for Parliament and not the courts". This approach was criticised by the Grand Chamber saying, at [81], "the [domestic] court did not ... undertake any assessment of proportionality of the measure itself".
14. In both *Hirst*, at [82] and *Evans*, at [91], the Court framed its decision by reference to the margin of appreciation. For recent commentary on the margin of appreciation see Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Oxford, OUP, 2002); Kathleen A. Kavanaugh, "Policing the Margins: Rights Protection and the European Court of Human Rights" [2006] E.H.R.L.R. 422; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford, OUP, 2006), Ch.2.
15. (2002) 34 E.H.R.R. 4.
16. (2004) 38 E.H.R.R. 13.
17. Swiss Federal Radio and Television Act s.18.
18. *VgT*, at [72].
19. *ibid.*, at [73].
20. *ibid.*, at [70].
21. *ibid.*, at [71].
22. Radio and Television Act 1988 s.10(3).
23. *Murphy*, at [63]. The Government argued that any "proclamation of the truth of one religion necessarily proclaims the untruth of another. As such even innocuous religious expression can lead to volatile and explosive reactions", at [38].
24. *ibid.*, at [77].

25. *ibid.*
26. See further A. Geddis, "You Can't Say 'God' on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media after *Murphy v Ireland*" [2004] E.H.R.L.R. 181. It should be noted that whilst the State in *VgT* did advance arguments as to why restrictions were necessary it did not address the question of why a rigid blanket ban was necessary. Its reasons were therefore not considered to be "relevant and sufficient", at [75]. By contrast in *Murphy* the State's arguments as to why a *blanket* ban was needed were fully developed, reaching deep into Irish history, at [71] and referring to detailed legislative and judicial consideration of the issue, at [73].
27. *ibid.*, at [67]. Such an analysis might also be applied to the contrasting approaches to the fact-insensitive rules in *Hirst* and *Evans* discussed above.
28. See, e.g. *United Communist Party of Turkey v Turkey* (1998) 26 E.H.R.R. 121 at [45]; *Christian Democratic People's Party v Moldova* (App. No. 28793/02), February 14, 2006, at [63]; A. Mowbray, "The Role of the European Court of Human Rights in the Promotion of Democracy" [1999] P.L. 703.
29. See, e.g. *Lingens v Austria* (1986) 8 E.H.R.R. 407 at [42]; *Castells v Spain* (1992) 14 E.H.R.R. 445 at [43].
30. See, e.g. *Lingens* and *Castells*, *ibid.*; *Bowman v United Kingdom* (1998) 26 E.H.R.R. 1 at [42]; *Malisiewicz-Gasior v Poland* (App. No. 43797/98), April 6, 2006, at [57].
31. Geddis, fn.26 above, p.189.
32. See further Sales and Hooper, fn.9 above, pp.441-450.
33. Whilst there is not the space to develop the point here it may be that the Court is less likely to accept fact-insensitive laws as proportionate in cases where the core principles of democracy and the rule of law are engaged: see, e.g. *Bowman v United Kingdom* (1998) 26 E.H.R.R. 1 (rigid £5 limit on non-party election expenditure); *Tinnelly & Sons Ltd v United Kingdom* (1999) 27 E.H.R.R. 249 ("conclusive evidence" certificates preventing effective access to the courts); *Campbell v United Kingdom* (1992) 15 E.H.R.R. 137 (opening and reading of all prisoner correspondence including that to solicitors). It is more likely to accept them in cases involving sensitive ethical, moral and religious issues on which there is no European consensus: see, e.g. *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1 (absolute ban on assisted suicide); *Odièvre v France* (2004) 38 E.H.R.R. 43 (blanket ban on revelations of maternal identity, even to natural child); *Ahın v Turkey* (2007) 44 E.H.R.R. 5 (blanket ban on Islamic dress in Turkish universities).
34. See fn.3 above. For comment see J. Rowbottom, "The Ban on Political Advertising and Article 10" (2007) 18(3) Ent.L.R. 91; C. Munro, "Time up for the Ban" (2007) 157 N.L.J. 886.
35. Under ss.319 and 321. Political advertisements are to be contrasted with free party political broadcasts, time for which is allocated to registered political parties fielding a certain proportion of candidates at elections. See Communications Act 2003 s.333 and *R. (on the application of ProLife Alliance) v BBC* [2003] UKHL 23; [2004] 1 A.C. 185.
36. *Hansard*, HC Vol.395, col.788 (December 3, 2002). Note the similarity with the reasons advanced by the Swiss Government in *VgT*, fn.18 above. See further A. Scott, "A Monstrous and Unjustifiable Infringement? Political Expression and the Broadcasting Ban on Advocacy Advertising" (2003) 66 M.L.R. 224.
37. See further T. Lewis, "Political Advertising and the Communications Act 2003" [2005] E.H.R.L.R. 290.
38. The body was the Broadcast Advertising Clearance Centre, funded by commercial broadcasters, which acts as an informal clearing body for compliance of proposed broadcast advertisements with the law and Ofcom codes.
39. See fn.3 above.
40. HRA s.2. *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465 at [28] (Lord Bingham).
41. *Kay*, at [28].
42. *Animal Defenders International*, at [121] (Ousley J.).
43. *ibid.*, at [122].
44. *ibid.*, at [30] (Auld L.J.) (emphasis added). The use of "disregard" is presumably in error--the Court in *VgT* did have regard for the fact the *VgT* was not a powerful player. Further, the Court in *VgT* did not find any discrimination to have taken place, nor did it expressly address the issue of discrimination. The Administrative Court also derived support from the *obiter* comments of Lord Hoffmann and Lord Walker in

ProLife (fn.35 above) calling into question the reliability of *VgT*, at [33]-[34] (Auld L.J.) and [118] (Ousley J.).

45. Ousley J. at [111] called into question the validity of the distinction between “political” and “religious” expression.
46. See fn.16 above. In *VgT* the fact that the ban did not extend to the print media was stated to constitute evidence that the purpose of the ban could not have been “of a particularly pressing nature”, at [74]. By contrast, in *Murphy* the fact that the ban concerned only the broadcast media was cited as weighing in the *proportionality* side of the scales, namely the applicant still had the opportunity to put his message across via other media and at public meetings, at [74].
47. *Animal Defenders International*, at [39]-[40] (Auld L.J.).
48. *ibid.*, at [68].
49. *ibid.*, at [76].
50. *ibid.*, at [79].
51. *ibid.*
52. *ibid.*, at [104] (Ousley J.).
53. *ibid.*, at [117].
54. *ibid.*, at [81] (Auld L.J.) and [125] (Ousley J.).
55. *ibid.*, at [2] (Auld L.J.) and [83] (Ousley J.). On the potential reach and limitations of s.3 see *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557. See further C. Gearty, “Reconciling parliamentary democracy and human rights” (2002) 118 L.Q.R. 248; A. Kavanagh, “The elusive divide between interpretation and legislation under the Human Rights Act 1998” (2004) 24(2) O.J.L.S. 259.
56. *Animal Defenders International*, at [69] (Auld L.J.).
57. *ibid.*, at [30].
58. *ibid.*, at [40].
59. *ibid.*, at [29].
60. *ibid.*, at [10].
61. *ibid.*, at [85] (Ousley J.).
62. *ibid.*, at [115] (Ousley J.) (emphasis added). See also [116].
63. See, e.g. T.R.S. Allen, “Human rights and judicial review: a critique of ‘due deference’” [2006] 65(3) C.L.J. 671; J. Rivers, “Proportionality and the variable intensity of review” [2006] 65(1) C.L.J. 174; S. Fredman, “From Deference to Democracy: The Role of Equality under the Human Rights Act”(2006) 112 L.Q.R. 53; Lord Steyn, “Deference: a Tangled Story” [2005] P.L. 346; R. Clayton, “Judicial deference and ‘democratic dialogue’: the legitimacy of judicial intervention under the Human Rights Act 1998” [2004] P.L. 33; R. (on the application of *ProLife Alliance*) v BBC [2003] UKHL 23; [2004] 1 A.C. 185 at [74]-[77] (Lord Hoffmann) and [132]-[144] (Lord Walker); F. Klug, “Judicial Deference under the Human Rights Act 1998” [2003] E.H.R.L.R. 125; J. Jowell, “Judicial Deference: Servility, Civility or Institutional Capacity” [2003] P.L. 592; R. Edwards, “Judicial Deference under the Human Rights Act” (2002) 65 M.L.R. 859; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 W.L.R. 344, pp.376-378 (Laws L.J.); P. Craig, “The Courts, The Human Rights Act and Judicial Review” (2001) 117 L.Q.R. 589.
64. There are echoes in *Animal Defenders International* of the deferential approach of the domestic court in *Pearson and Martinez* which was criticised by the Grand Chamber of the European Court in *Hirst v United Kingdom*, see fn.13 above.
65. White Paper, *Rights Brought Home: The Human Rights Bill*, Cm. 3782 (October, 1997), para.1.18; Lord Irvine, *Hansard*, HL Vol.582, cols 1227-1238 (November 3, 1997); Jack Straw, *Hansard*, HC Vol.306, cols 769-782 (February 16, 1998); *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 at [46] (Lord Steyn): “Parliament had before it the mischief and objective sought to be addressed, viz the need ‘to bring rights home’”; R. (on the application of *Begum*) v *Denbigh High School Governors* (2006) UKHL 15; [2007] 1 A.C. 100 at [29] (Lord Bingham): “the purpose of the [HRA] ... was to enable [Convention] rights and remedies to be asserted and enforced by the

domestic courts of this country and not only by recourse to Strasbourg."

66. *Animal Defenders International*, at [30] (Auld L.J.), commenting on how the Strasbourg Court perceived its role in *VgT*, at [75].
67. See preamble to the HRA which states: "An Act to give further effect to rights and freedoms guaranteed under the ECHR."
68. *Hansard*, HC Vol.314, col.1141 (June 24, 1998). See T. Hickman, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2005] P.L. 306; D. Nicol, "Are Convention Rights a no-go Zone for Parliament?" [2002] P.L. 438; F. Klug, "The Human Rights Act--a 'third way' or a 'third wave' Bill of Rights" [2001] E.H.R.L.R. 361; R. Clayton, "Judicial deference and 'democratic dialogue': the legitimacy of judicial intervention under the Human Rights Act 1998" [2004] P.L. 33.
69. s.3(2)(a).
70. It will be noted that the similar phrases "give further effect" and "given effect" occur, respectively, in the Preamble to the HRA and in s.3.
71. See fn.58 above.
72. There is a debate between those for whom s.4 ought to be seen as a "last resort" with s.3 being the "prime remedial remedy", as compared to those who consider that more use should be made of s.4: compare, e.g. Lord Steyn's speech in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 and A. Kavanagh, "Unlocking the Human Rights Act: The 'Radical' Approach to Section 3(1) Revisited" [2005] E.H.R.L.R. 259 with Klug, fn.63 above and Nicol, fn.68 above.
73. s.4(6)(a).

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