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### Political advertising and the Communications Act 2003: tailored suit or old blanket?

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European Convention on Human Rights 1950 Art.10

Human Rights Act 1998 s.3

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

**\*E.H.R.L.R. 290** *In the jurisprudence of the European Convention on Human Rights, political expression receives a high degree of protection. Commercial expression, by contrast, receives far lower levels of protection. In respect of political advertising in the broadcast media the current UK regime inverts this position. Broadcast advertising for any political purpose is prohibited whereas advertising for commercial purposes is permitted. In this article it is argued that the blanket ban on political advertising in the broadcast media comprises a disproportionate interference with the right to freedom of expression. Furthermore, since the Government has made a statement under s.19(1)(b) of the Human Rights Act 1998 in respect of the prohibition, it will be extremely difficult for the court to use its interpretative powers under s.3 HRA or invoke doctrines of judicial deference to save the ban from incompatibility with Art.10 ECHR.*

#### Political advertising in the broadcast media

The use of the broadcast media for paid political advertising is prohibited by ss.319 and 321 of the Communications Act 2003.<sup>1</sup> Section 319(2)(g) imposes a duty on the new 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". These same terms were used in the current ban's predecessor contained in s.92 of the Broadcasting Act 1990. Their breadth became apparent in *R. v Radio Authority Ex p. Bull*<sup>2</sup> **\*E.H.R.L.R. 291** in which the Court of Appeal upheld a refusal to broadcast a radio advertisement by Amnesty International bringing attention to the genocide occurring in Rwanda. In the 2003 Act the terms have been comprehensively defined to include *inter alia*: influencing the outcome of elections or referenda, influencing governmental policy and bringing about changes of the law or influencing the legislative process. These definitions include activity not just within the United Kingdom but anywhere in the world. Furthermore, the definition includes "influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy".<sup>3</sup>

The stated reasons for the retention of the ban centre on the proposition that it is important not to let wealthy interests buy up large slots of advertising time to fill with their own political messages. These were summed up by Tessa Jowell M.P., Secretary of State for Culture, Media and Sport:

"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."<sup>4</sup>

#### The ECHR and political advertising

Freedom of expression is protected by Art.10 of the European Convention on Human Rights ("ECHR"). In particular, *political* expression has received a very high degree of protection from the European Court of Human Rights due to its importance in maintaining democracy: "freedom of political debate is at the very core of the concept of democratic society which prevails throughout the Convention".<sup>5</sup> It is not just narrow, party political expression that falls within this higher echelon. The European Court of Human Rights has observed that "there is no warrant in its case law for

distinguishing ... between political discussion and discussion of other matters of public concern".<sup>6</sup> One of the main indices of the high value placed on political expression is that a narrow margin of appreciation is accorded to states as to what restrictions can be imposed under Art.10(2).<sup>7</sup> Other forms of arguably lower value expression, notably commercial speech, are accorded lower levels of protection.<sup>8</sup>

The European Court of Human Rights considered the specific issue of political advertising on television in *VgT Verein gegen Tierfabriken v Switzerland*.<sup>9</sup> The applicant, a vegetarian organisation, produced a short film comparing the idyllic life of wild pigs in the forest with the traumatised existence of their factory farmed counterparts, and urging consumers to "eat less meat". The Swiss broadcaster refused to screen the film on the ground that it was a "political" advertisement banned by Swiss law. The Swiss court upheld the ban noting *inter alia* that it helped prevent financially powerful groups \*E.H.R.L.R. 292 from obtaining political advantage and fostered equality of opportunity among different forces in society.

VgT applied to the European Court of Human Rights claiming a breach of Art.10. The Court accepted that the desire to safeguard the "formation of public opinion ... from the pressures of powerful financial groups" might fall within the "protection of the ... rights of others" aspect of Art.10(2).<sup>10</sup> The Court then considered the question of whether the ban was "necessary in a democratic society", *i.e.* whether it corresponded to a pressing social need, was proportionate and whether the reasons adduced were "relevant and sufficient".<sup>11</sup> The Swiss authorities did have a certain margin of appreciation on the question of whether there was a pressing social need to broadcast an advertisement--indeed this was "particularly essential ... in an area as complex and fluctuating as advertising". But the expression here was not 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 was banned was because it was regarded as "political". Because of this the state's margin of appreciation was reduced. In view of the fact that the primary reason for the ban was that it was intended to prevent wealthy commercial groups from skewing the political process, and given that the organisation here was patently not such a group, the Government's reason could not have been "relevant and sufficient" to justify this particular restriction. Further, there was no prohibition of political advertising in the print media. This may have been due to the fact that television "had a stronger effect on the public on account of its dissemination and immediacy" but the Court said that it must have meant that the prohibition could not have been of a "particularly pressing nature".<sup>12</sup> Thus the ban constituted a violation of Art.10.

This was the European backdrop to the UK Government's decision to retain the ban on broadcast political advertising. It meant that the Government had to take the serious and unusual step of making a statement under s.19(1)(b) HRA.<sup>13</sup>

## Section 19

Section 19 HRA requires that Ministers responsible for government Bills either make a written statement that in their view the Bill is compatible with Convention rights (s.19(1)(a)) or that, even though they are unable to make such a statement, they wish the House to proceed with the Bill anyway (s.19(1)(b)). In order for a s.19(1)(a) statement to be made it must be "more likely than not that the provisions ... will stand up to challenge on Convention grounds".<sup>14</sup> If a s.19(1)(b) statement is made this does not necessarily mean "that the provisions of the Bill are incompatible ... but [merely] \*E.H.R.L.R. 293 that the Minister is unable to make a statement of compatibility".<sup>15</sup> Consistent with the intention to retain parliamentary sovereignty, s.19 clearly envisages that legislation may be passed which is not human rights compatible, although during the passage of the Human Rights Bill itself it was stated that ministers would "want to make a positive statement whenever possible".<sup>16</sup>

The Joint Committee on Human Rights, having earlier voiced serious concerns about the ban on broadcast political advertising,<sup>17</sup> eventually accepted that the Government's action did "not evince a lack of respect for human rights, and [was] legitimate in the circumstances". Particularly influential was the Government's promise that, if the section were to be found incompatible with Convention rights, it would introduce remedial legislation.<sup>18</sup>

## The likely approach of the courts

The Communications Act, with its s.19(1)(b) statement, is an invitation to legal challenge from any disgruntled group with a "political" programme which it wishes to publicise over the air waves. The Government stressed that the s.19(1)(b) statement did not mean that it believed the Bill to be

incompatible with the ECHR and that it would “mount a robust defence if it were legally challenged”.<sup>19</sup>

Assuming that it is accepted that freedom of expression is being restricted in order to pursue the legitimate aim of safeguarding the integrity of the democratic process by preventing the undue influence of wealthy groups, the key question in any future challenge will be whether the ban is “necessary in a democratic society”--in particular whether it is proportionate.<sup>20</sup> In *R. v Secretary of State for the Home Department Ex p. Daly*, Lord Steyn elaborated upon the meaning of proportionality under the HRA and adopted a three-stage test: whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative object are rationally connected to it; and (iii) the means used to impair the right are no more than is necessary to accomplish the objective.<sup>21</sup>

Even if the ban were found to satisfy stages (i) and (ii) of the test, it is very difficult to see how it could be found to pass muster under stage (iii).<sup>22</sup> There are various ways in which Parliament could have restricted the use of political broadcasts in a more finely tuned way, short of a wholesale ban, and yet still achieved the objective of preventing wealthy interests skewing the political process. For example there could be *\*E.H.R.L.R. 294* restrictions on airtime allowed or the imposition of spending limits.<sup>23</sup> Even to have inserted the word “party” before the word “political” would have effected a more finely tailored approach and would have permitted a much wider range of groups to express their views whilst still meeting the legislative objective.

In the free speech jurisprudence of the Supreme Court of Canada it has been held, under the “minimal impairment” doctrine, that:

“ ... full prohibition will only be constitutionally acceptable ... where the government can show that only a full prohibition will enable it to achieve its objective. Where ... no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required ... to save the violation of free speech is not established.”<sup>24</sup>

It is submitted that this approach is apposite to the United Kingdom and, if adopted, would result in the ban being held to be a disproportionate interference with Art.10.

One possible basis for a governmental “robust defence” of the ban would be to distinguish *VgT* : under Swiss law there was a prohibition on broadcast political advertising but there were *no alternative* means for political parties to broadcast their policies. The United Kingdom, by contrast, has a system of free Party Political Broadcasts available to political parties who meet certain criteria as to the number of candidates fielded.<sup>25</sup> Thus *overall* the blanket ban on broadcast political advertising is compensated for by such free airtime.<sup>26</sup>

It is submitted that this argument does not fully address the problem. Take, for example, an organisation like *VgT* or Amnesty which has a “political” programme, but which would not qualify for a free Party Political Broadcast. It will be completely denied access to the broadcast media if its proposed broadcast falls within the broad parameters of s.321(3)(a)-(g). It is no answer to the *specific* complaint of such a group that its expressive rights have been infringed to say that the system *overall* is generally compliant. Indeed it could be argued that such organisations are discriminated against because some registered parties do have free access to at least some form of broadcast media airtime--but other groups, wishing to convey a “political” message, have no access whatsoever.<sup>27</sup>

### A right to broadcast?

One argument that any challenger of s.321 may have to overcome will be that, as Lord Hoffmann stated, *obiter*, in *ProLife*, there “is no human right to use a television channel”. This, he said, did not mean that Art.10 had no application to broadcasting but it did mean that, “instead of being a right not to be prevented from expressing one’s opinions, [Art.10 became] a right to a fair consideration of being afforded the *\*E.H.R.L.R. 295* opportunity to do so; a right not to have one’s access to public media denied on discriminatory, arbitrary or unreasonable grounds”.<sup>28</sup> Thus the standard of review in cases involving denial of access to the broadcasting media will be less stringent than in other free speech cases where Art.10 is fully engaged.

It is true that the European Commission on Human Rights has stated that Art.10 “cannot be taken to include a general and unfettered right ... [of] access to broadcasting time”.<sup>29</sup> However the approach of the European Court of Human Rights in *VgT* was to hold that a “refusal to broadcast ... amounted to an ‘interference by public authority’ in the exercise of the rights guaranteed by Art.10”.<sup>30</sup> Similarly in *Murphy v Ireland*, a case concerning the Irish ban on religious advertising, a different section of the

Court considered that:

“ ... the matter essentially at issue in the ... case [was] the applicant's exclusion from broadcasting an advertisement, an issue concerning primarily the regulation of his means of expression ... Article 10 protects not only the content and substance of information but also the means of dissemination since any restriction on the means necessarily interferes with the right to receive and impart information.”<sup>31</sup>

Thus, whatever the precise relationship between Art.10 and broadcasting, whatever the answer to the question “does Art.10 confer a right to broadcast?”, the European Court of Human Rights has treated denial of broadcasting space as an “interference” with expression.

The contention that those denied broadcasting time should not be entitled to full proportionality review under Art.10(2) but rather a diminished level of protection (of not being denied access on discriminatory, arbitrary or unreasonable grounds) seems not to be in accord with the approach of the European Court of Human Rights in recent cases. In referring to its own “supervisory jurisdiction” in *VgT* the Court stressed that its supervision was not

“ ... limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference ... in the light of the case as a whole and determine whether it was *proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities were relevant and sufficient.*”<sup>32</sup> (emphasis added)

In *Murphy* the Court stated that “[n]o restriction on freedom of expression ... can be compatible with Article 10 unless it satisfies, *inter alia*, the test of necessity as required by the second paragraph of that Article”.<sup>33</sup> Thus in both *VgT* and *Murphy* the European Court of Human Rights proceeded on the basis that there *had* been a restriction of \**E.H.R.L.R. 296* expression and that, in order to avoid a finding of a violation, the state had to be able to justify it under Art.10(2).<sup>34</sup>

Under s.2 HRA domestic courts are obliged to take into account any decision of the European Court of Human Rights. Whatever position is taken on the question of whether or not there is a “human right to use a television channel”, it is submitted that any court considering the compatibility of s.321 would be bound to consider whether the ban is “*necessary* in a democratic society” rather than whether it is merely discriminatory, arbitrary or unreasonable.<sup>35</sup>

### Can s.3 save the ban from incompatibility?

How then should a court deal with the ban if it were to be found *prima facie* incompatible with Art.10 using the ordinary canons of construction? Would it be appropriate for a court to use s.3 HRA and adopt a strained interpretation of s.321 and thus render it compatible? Section 3(1) requires the court “[s]o 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. Exactly how far the court is entitled to go in effecting this “command”<sup>36</sup> or “strong adjuration”<sup>37</sup> has been a matter of some debate. The House of Lords has recently reconsidered the issue in *Ghaidan v Ghodin-Mendoza*. Their Lordships agreed that s.3 may require the court to depart from the intention of Parliament as expressed in unambiguous statutory wording.<sup>38</sup> However the court may not go so far as to adopt a meaning that is “inconsistent with a fundamental feature of the legislation ... the meaning imported must be compatible with the underlying thrust of the legislation”.<sup>39</sup> Extra words may be implied but only where they “go with the grain of the legislation”.<sup>40</sup>

Given this test, it is unlikely that the court could legitimately use s.3 to read down, or read extra words into, s.321(3) so as to achieve compatibility with Art.10. First, Parliament has provided an exhaustive definition of “objects of a political nature” and \**E.H.R.L.R. 297* “political ends”.<sup>41</sup> The “underlying thrust” of the section is to maintain an all-encompassing prohibition. Reading down or reading in extra words would very much go against “the grain”. Allied with this is the s.19(1)(b) statement itself. It would be problematic for a court to adopt a “linguistically ... strained”<sup>42</sup> interpretation of s.321 so as to achieve a Convention-compatible meaning when Parliament itself has passed it knowing that there are grave doubts as to its compatibility. The court should not simply ignore this fact. It is surely likely that a court would decide that the “fundamental feature” of the legislation was to prevent all forms of broadcast “political” advertising. Given these factors, to use s.3 to achieve a Convention-compliant result would be regarded as a case not of interpretation but of “judicial vandalism”.<sup>43</sup>

### A suitable case for deference?

There has been much judicial and academic consideration of judicial deference as a kind of domestic counterpart to the margin of appreciation afforded by the European Court of Human Rights to national

authorities.<sup>44</sup> Put simply the argument goes that the courts should *defer* to the legislature or the executive in certain cases due to their democratic credentials or greater institutional competence in the matters under consideration. In his speech in *Kebilene* Lord Hope commented that:

“[The margin of appreciation] is not available to national courts when they are considering Convention issues arising within their countries. But in the hands of national courts the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality ... in some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.”<sup>45</sup>

**\*E.H.R.L.R. 298** It might be argued that this would be an appropriate case in which the court should accord deference to Parliament and find there to be no incompatibility: that it is the considered decision of the democratically elected arm of government on the difficult and complex question of how exactly to restrict the exercise of a qualified right in the interests of guarding the integrity of the United Kingdom's democratic process.<sup>46</sup>

It is submitted, however, that deference should have no place in such a case for two reasons. First, if deference is, in some way, an equivalent of the Strasbourg margin of appreciation doctrine then, given the political character of the expression concerned and the importance of this in maintaining a democratic society, any deference afforded should be very limited.<sup>47</sup> The Government has recently cited *Murphy v Ireland*<sup>48</sup> in support of its contention that “there are strong policy and legal grounds for believing that the ban is compatible with Convention rights”.<sup>49</sup> As noted above, *Murphy* concerned the Irish ban on broadcast *religious* advertising. The European Court of Human Rights noted that a “wider margin of appreciation is generally available when regulating expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion”.<sup>50</sup> It was this margin that enabled the Court to distinguish *Murphy* from *VgT*<sup>51</sup> and find there to be no breach of Art.10. Since the UK ban concerns political expression, it is submitted that only a very narrow margin of appreciation would be accorded by the European Court of Human Rights. Concomitantly, a very limited level of deference should be accorded by the domestic court.

Secondly, again, there is the s.19(1)(b) statement. The executive and the legislature have, in effect, *conceded* (probable) incompatibility at the outset. Why should the court summon up deference out of nowhere in order to find that legislation is compliant with rights standards when the very executive which initiated it and the legislative body which passed it do not consider, on the balance of probabilities, that such compliance exists? This would not be judicial deference but “judicial avoidance”.<sup>52</sup> It would be a mockery for a court to defer to a body on the basis of its democratic credentials and expertise when that very body cannot even be more certain than not that its actions are rights-compliant. The constitutionally correct thing to do would surely be for the court to accept the considered view of the executive and Parliament and make a declaration of incompatibility under s.4 HRA.

**\*E.H.R.L.R. 299** In his speech in *R. v A* Lord Hope said, *obiter*, that s.19 statements were merely expressions of opinion by the Minister. They were not binding on the court nor even did they have persuasive authority.<sup>53</sup> But, in the context of deference, it would surely be a dereliction of the court's constitutional duty to uphold rights if it were to ignore a statement of the executive to the effect that a provision is probably not compatible. Indeed under *Pepper v Hart*<sup>54</sup> this statement would be admissible evidence as to the intention of the proponent of the Bill. To allow deference to enter the equation would set a dangerous precedent. For it (the executive) would have stated that it cannot say, on the balance of probabilities, that the measure is compliant and thereby is able to take the credit for not having a cavalier attitude towards the protection of human rights. Yet at the same time it would be taking advantage of the court's willingness to defer to its (barely tenable) opinion that the provision might be compatible after all. In this context deference must be taken to be a single-edged sword which allows the court to find legislation to be compatible but only where the legislature and executive's considered view is that it is so.

### **Merely an opening gambit?**

During the passage of the Human Rights Bill the then Home Secretary, Jack Straw said that “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”.<sup>55</sup> Perhaps s.321 can be seen as the opening gambit in a conversation between the organs of governance about the essence of rights whose content is “essentially contestable”.<sup>56</sup> If this dialogue model is indeed apposite then the court should not half close its ears to what the other parties are saying. Section 19(1)(b) is part of the conversation. For this reason it should neither defer nor use extensive powers of interpretation under s.3 in order to find compatibility when it is likely that none is there. Rather it should, if indeed the provision is found to be incompatible, declare it so using s.4 HRA.

## Conclusion

The impact of the current regime might be illustrated by way of examples: fast food corporations may target television advertisements at children, yet an organisation campaigning against child obesity may not; clothes and sports shoe companies may advertise their wares on television, yet groups wishing to publicise the plight of workers in developing countries employed by such corporations may not; supermarket chains may advertise the freshness of their “out of season” cherry tomatoes and mange-tout peas, yet a group wishing to highlight the deleterious effects of the globalised economy which facilitates this consumption may not.

In *RJR McDonald McLachlin J.* stated that “the tailoring process seldom admits of perfection and the courts must accord some leeway to the legislature”.<sup>57</sup> But in s.321 of \*E.H.R.L.R. 300 the Communications Act it is fair to say that there has been no attempt to trim the cloth at all. Instead a blanket has been cast over the problem. For the reasons outlined above it is highly likely that this approach will be declared unacceptable either by the UK courts or, if not by them, the European Court of Human Rights.

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1. Political advertisements are to be contrasted with free Party Political Broadcasts (“PPBs”), time for which is allocated to registered political parties fielding a certain proportion of candidates at elections. The Communications Act 2003, s.333 retains the previous PPB regime. The Government has recently published a consultation paper soliciting comments on the future of PPBs: *Party Political Broadcasting: Public Consultation* (July 22, 2004), [www.culture.gov.uk](http://www.culture.gov.uk). This itself is a response to the Electoral Commission’s report, *Party Political Broadcasting--Report and Recommendations* (Jan 2003), [www.electoralcommission.org.uk](http://www.electoralcommission.org.uk). For recent judicial comment upon PPBs see *R. (on the application of ProLife Alliance) v BBC* [2003] UKHL 23; [2004] 1 A.C. 185.
2. [1998] Q.B. 294. See J. Stevens and D. Feldman, “Broadcasting advertisements by bodies with political objectives, judicial review, and the influence of charities law” [1997] P.L. 615.
3. s.321(3)(a)-(g). See A. Scott, “A Monstrous and Unjustifiable Infringement? Political Expression and the Broadcasting Ban on Advocacy Advertising” (2003) 66 M.L.R. 224; A. Geddis, “If Thy Right Eye Offend Thee, Pluck it Out”: *R v BBC, ex p ProLife Alliance*” (2003) 66 M.L.R. 885.
4. *Hansard*, HC Vol.395, col.788 (December 3, 2002).
5. *Lingens v Austria* (1986) 8 E.H.R.R. 407 at [42].
6. *Thorgeir Thorgeirson v Iceland* (1992) 14 E.H.R.R. 843 at [64].
7. See e.g. *Castells v Spain* (1992) 14 E.H.R.R. 445.
8. See e.g. *Markt intern Verlag GmbH and Klaus Beerman v Germany* (1989) 12 E.H.R.R. 161.
9. (2002) 34 E.H.R.R. 4.
10. *ibid.* at [59]-[62]. This finding itself is at least open to question--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] E.H.R.L.R. 182 at 184-185.

11. *ibid.* at [67]-[68].
12. *ibid.* at [70]-[75].
13. *Hansard*, HC Vol.395, col.789 (Dec 3, 2002). See D. Feldman, "The Impact of Human Rights on the UK Legislative Process" (2004) 25(2) Stat.L.R. 91 at 98.
14. Department of Constitutional Affairs, *Human Rights Act 1998 Guidance for Ministers* (2nd ed.), para.36, [www.dca.gov/hract/guidance.htm#how](http://www.dca.gov/hract/guidance.htm#how), para.36.
15. *ibid.*
16. *Hansard*, HC Vol.325, col.780 (Feb 16, 1998) *per* Home Secretary; *Hansard*, HL Vol.575, col.1233 (November 3, 1997) *per* Lord Chancellor.
17. Nineteenth Report, 2001-02 (HL Paper 149, HC 1102), paras 58-64.
18. Fourth Report, 2002-03, *Scrutiny of Bills: Further Progress Report* (HL Paper 50, HC 397), para.40. Also influential was the fact that the Government's argument that the ban was not incompatible stood a "reasonable chance of success" and the difficulties of producing a "workable compromise solution".
19. See n.13 above. See also *Hansard*, HL Vol.646, cols 658-659 (Mar 25, 2003).
20. There is indeed an issue as to the exact way in which Art.10 relates to broadcasting--see following subsection.
21. [2001] UKHL 26; [2001] 2 A.C. 532 at [27].
22. It is by no means certain that stage (ii) would be satisfied, especially if the "rational connection" test is equated with the "relevant and sufficient" test in the Strasbourg jurisprudence.
23. Suggested by Professor Eric Barendt in evidence to the Joint Committee on Draft Communications Bill, Minutes of Evidence (June 17, 2002) Question [499].
24. *RJR McDonald v Canada* [1995] 127 D.L.R. 4th 1, *per* McLachlin J. at [165]-[166].
25. See n.1 above.
26. Electoral Commission Report, n.1 above, pp.16-17.
27. The European Commission on Human Rights has indicated that the denial of broadcasting time to one or more specific groups may, in particular circumstances, raise a problem under Art.10 either alone or in conjunction with Art.14. See *e.g. Haider v Austria* (App. No.25060/94), judgment of Oct 18, 1995 at 66. See also n.35 below.
28. [2003] UKHL 23; [2004] 1 A.C. 185 at [57]-[58]; see also Lord Nicholls at [8] and Lord Walker at [129].
29. See *e.g. Haider*, n.27 above, at 74.
30. (2002) 34 E.H.R.R. 4 at [48].
31. (2004) 38 E.H.R.R. 13 at [61]. For comment see Geddis, n.10 above.
32. (2002) 34 E.H.R.R. 4 at [68].
33. (2004) 38 E.H.R.R. 13 at [66].
34. For an explanation of the rationale for this position see the dissenting speech of Lord Scott in *ProLife*, [2003] UKHL 23; [2004] 1 A.C. 185 at [85]-[88]. Further support for this position may be gleaned from the Court's approach to the state licensing of broadcasting. Despite the

fact that this is expressly permitted by the last sentence of Art.10(1) the Court has still held that any such licensing must meet the requirements of Art.10(2): *Groperra Radio AG v Switzerland* (1990) 12 E.H.R.R. 321 at [61]; *Informationsverein Lentia v Austria* (1994) 17 E.H.R.R. 93 at [29]. If licensing by states (*i.e.* control of the setting up of broadcasting systems in the first place) must meet Art.10(2) requirements it is difficult to see why, in a situation where a broadcasting system already exists, denial of access should be subjected to less stringent controls.

- [35.](#) See further T. Lewis, "Democracy, Free Speech and TV: the case of the BBC and the ProLife Alliance" [2004] 5 Web J.C.L.I. at sub-heading 7. It is arguable that the blanket ban may, in any event, fall foul of Lord Hoffmann's test. See Geddis, n.3 above, at 891-893. See also n.27 above and accompanying text.
- [36.](#) *Ghaidan v Ghodin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 *per* Lord Millett at [59].
- [37.](#) *R. v Director of Public Prosecutions Ex p. Kebilene* [2000] 2 A.C. 329 *per* Lord Cooke at 373.
- [38.](#) [2004] UKHL 30; [2004] 2 A.C. 557 *per* Lord Nicholls at [30]; Lord Steyn at [44]; Lord Millett at [67].
- [39.](#) *ibid.* , *per* Lord Nicholls at [33].
- [40.](#) *ibid.* , *per* Lord Rodger at [121].
- [41.](#) If the detailed elaboration in s.321(3)(a)-(g) had been omitted from the Act, the argument for the use of s.3 to interpret the term "political" as preceded by the implied word "party" would have been much stronger.
- [42.](#) *R. v A (Complainant's Sexual History)* [2001] UKHL 25; [2002] 1 A.C. 45 *per* Lord Steyn at [44].
- [43.](#) *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 A.C. 837 *per* Lord Bingham at [30].
- [44.](#) See *e.g.* *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2002] 3 W.L.R. 344 *per* Laws L.J. at 376-378; R. Singh, M. Hunt and M. Demetriou, "Is there a Role for the 'Margin of Appreciation' in National law after the Human Rights Act?" [1999] E.H.R.L.R. 15; P. Craig, "The Courts, The Human Rights Act and Judicial Review" (2001) 117 L.Q.R. 589; R. Edwards, "Judicial Deference under the Human Rights Act" (2002) 65 M.L.R. 859; D. Nicol, "Are Convention Rights a no-go Zone for Parliament?" [2002] P.L. 438-448. F. Klug, "Judicial Deference under the Human Rights Act 1998" [2003] E.H.R.L.R. 125; 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 *per* Lord Hoffmann at [74]-[77]; Lord Walker at [132]-[145].
- [45.](#) *R. v Director of Public Prosecutions Ex p. Kebilene* [2000] 2 A.C. 329 at 384.
- [46.](#) See Feldman, n.13 above, at 99-100. Such an approach was adopted in the prisoners' voting rights case *R. (on the application of Pearson and Martinez) v Secretary of State for the Home Department* [2001] EWHC Admin 239; [2001] H.R.L.R. 39, but was rejected in *Hirst v United Kingdom* (2004) 38 E.H.R.R. 40. The European Court noted the lack of evidence that the UK legislature had "ever sought to weigh competing interests or to assess the proportionality of the ban" on convicted prisoners voting.
- [47.](#) This was the approach adopted by a unanimous Court of Appeal in *ProLife* [2002] EWCA Civ 297; [2002] 3 W.L.R. 1080, but was rejected by a majority of the House of Lords who held that deference should be shown to broadcasters in interpretation of taste and decency guidelines even in the case of a party election broadcast, [2003] UKHL 23; [2004] 1 A.C. 185.
- [48.](#) (2004) 38 E.H.R.R. 13.
- [49.](#) Consultation paper, n.1 above, p.6, n.3.
- [50.](#) (2004) 38 E.H.R.R. 13 at [67].
- [51.](#) *ibid.* See Geddis, n.10 above.
- [52.](#) See Edwards, n.44 above, at 868.
- [53.](#) [2001] UKHL 25; [2002] 1 A.C. 45 at [69].
- [54.](#) [1993] A.C. 593.

55. *Hansard*, HC Vol.314, col.1141 (June 24, 1998). See Klug, Nicol and Clayton, n. 44 above.

56. Nicol, 44 above.

57. See n.24 above at [160].

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