Neutral Citation Number: [2006] EWHC 3069 (Admin)

Case No: CO/5636/2005

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4th December 2006

Before:

THE RIGHT HONOURABLE LORD JUSTICE AULD
-and-
THE HONOURABLE MR JUSTICE OUSELEY

- -

Between :

THE QUEEN ON THE APPLICATION OF ANIMAL DEFENDERS INTERNATIONAL	**Claimant**
- and -	
THE SECRETARY OF STATE FOR CULTURE MEDIA AND SPORT	**Defendant**

- -
- -

Mr Michael Fordham and Ms Shaheed Fatima (instructed by **Bindmans** the for the Claimant
Mr David Pannick QC & Mr Martin Chamberlain (instructed by Treasury Solicitor) for the **Defendant**

Hearing dates: 24th, 25th & 26th July 2006

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Approved Judgment

Lord Justice Auld:

Introduction

1. The issue in this case is whether a domestic statutory prohibition of political advertising on television and radio violates the human right of would-be political advertisers to freedom of expression through those media.

2. Animal Defenders International ("ADI") seeks a declaration of incompatibility under s. 4 of the Human Rights Act 1998 (the HRA") that the prohibition on political advertising on television and radio imposed by the Communications Act 2003 ("the 2003 Act") is incompatible with Article 10 of the European Convention on Human Rights ("ECHR"). ADI does not pursue its alternative claim for a declaration that the provisions containing the prohibition should be "read down" under s. 3 of the HRA, it being common ground that the wording is clear and that the claim of incompatibility is arguable.

3. The 2003 Act establishes two complementary principles governing the content of television and radio broadcasts touching on political and public affairs, neither of which has any counterpart in any of the other media. The first is a requirement of "impartiality", which is to be found in section 319(2)(c) and 320(2), in relation to "matters of political or industrial controversy" and "matters relating to current public policy",[1] and, in section 319(2)(k), as between advertisers. The second principle, which is intended to support and maintain that impartiality in the field of politics and public affairs, is to be found in sections 319(2)(g) and 321(2) and (3), in the form of an absolute prohibition on political advertising on television and radio services, except for controlled party political broadcasts mainly in election periods.

4. The Office of Communications ("OFCOM") is the body principally responsible, by virtue of sections 1 and 2 of the 2003 Act, for setting and enforcing standards as to the content of television and radio programmes. It does that by reference to "standards objectives" identified in section 319 of the Act. OFCOM has, pursuant to statutory powers,[2] contracted out its advertising standards codes function to two Committees of the advertising industry - its advertising standards codes function to the Broadcast Committee of Advertising Practice ("BCAP"), and the handling and resolution of complaints to the Advertising Standards Authority ("ASA").

5. OFCOM is directly charged, as part of its responsibility for securing the "standards objectives" in section 319, with the task, under section 319(2)(g) of preservation of the prohibition in section 321 of political advertising in radio and television services. The Broadcast Advertising Clearance Centre ("BACC"), which is funded by commercial broadcasters, acts as an informal clearing body for compliance of proposed television and radio advertisements with the law and OFCOM codes. However, the starting and finishing point for OFCOM in relation to political advertising is that, if, on a proper interpretation and application of the Act to the

[1] Save in the case of local radio services who have a lesser duty of no "undue prominence" to such matters; see 2003 Act, s. 320(1)(c).
[2] Contracting Out (Functions Relating to Broadcasting Advertising) and Specification of Relevant Functions Order 2004,

nature and/or source of any proposed advertisement, it constitutes political advertising, the Act gives it no discretion in the matter, it must enforce the prohibition.

6. ADI is a non-profit and non-charitable organisation, the objects of which, as its name indicates, are protection from and alleviation of suffering by animals. It campaigns with a view to effecting changes in law and public policy, against the use of animals in commerce, science or leisure. In early 2005, it began to prepare the launch of a campaign against the use of primates for the purpose of public entertainment, in particular in zoos and circuses, a campaign that it called *"My Mate's a Primate"*. It sought to support the campaign by newspaper and television advertising and direct mail. For the purpose of a television advertisement, it instructed a marketing company to prepare and submit to the BACC for informal pre-clearance a draft script and outline for a 20 second advertisement. The proposed advertisement was of video-film showing a young girl playing a primate in a cage with a voice-over about man's ill-treatment of primates, and inviting the public to find out more by sending £10 for an information pack. The BACC, by an e-mailed message of 5th April 2005, declined clearance, expressing the view that the proposed advertisement, whilst acceptable in content, would breach the prohibition of political advertising in section 321(2) of the 2003 Act, since ADI was a body with mainly political objects as reflected in its non-charitable status. This is how the BACC put it:

> "… 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 say that we suspect the intentions of this advertiser, but rather that it is a dangerous precedent to set. Likewise if any advertiser was to use income generated from a product advertised in a commercial for wholly or mainly political means it would be unacceptable under the code."

The BACC subsequently confirmed that decision.

7. The singling out in this way of political advertising in television and radio services for prohibition and control was based on Parliament's acceptance of the widely held perception that the power and pervasiveness of broadcast media over other media was such that it could give an unfair advantage to those who could afford to promote their political views over the air waves over those who could not, and, as a result, unfairly distort the democratic process. The prohibition and control, for that reason, had the general support of the Committee on Standards in Public Life ("the Neill

Committee"),[3] the Joint Committee of the Houses of Parliament on Human Rights on the Draft Communications Bill,[4] and the Electoral Commission, in its *Report and Recommendations on Party Political Broadcasting.*[5]

8. Given the regime of impartiality on matters of politics and matters of current public policy and the prohibition and control on broadcast political advertising, the latter, if it is to be effective, should be readily recognisable as such and kept quite separate from other parts of the programme service; see Article 10(1) of EC Directive 89/552/EEC.

The issue

9. The broad issue for the Court is whether the distinction between broadcast and non-broadcast political advertising, so as to prohibit the former but not the latter, is, in the words of Article 10(2) ECHR, "necessary in a democratic society … for the protection of the … rights of others", when put against one of the most fundamental of human rights for which the ECHR provides, that of freedom of expression. Presumably those "others" whose rights are candidates for protection are all those with an interest in the integrity of the democratic process, namely the community at large, not just those who may be politically disadvantaged for want of funds to advertise their cause. "Necessity" as a concept may be distinguishable from other public law notions such as reasonableness, proportionality, balance and non-discriminatory treatment, but can, depending on the context, be informed by one or more of them. Fairness and impartiality, for which sections 319 and 320 of the 2003 Act provide, extend to all those with an interest in the integrity of the democratic process, including non-political advertisers, whom section 319(2)(k) expressly shields from "undue discrimination". From those premises, it is a short step to considering, as part of the concept of Article 10(2) necessity for the prohibition of political advertising, whether it is fair or non-discriminatory in the cause of protecting the integrity of the democratic process.

10. The task for the Court on an issue of compatibility is often a crude one, that of pitting strong conflicting principles, one against the other, with a view to reaching a value judgement on whether Parliament has gone too far. It is not always practicable - certainly not with a complex statutory framework such as this – for the Court to attempt some "tailored" approach involving indicative severance or re-drafting, to say precisely how far too far. The Court is not well equipped, in the adversarial process to which it is confined, to assess the practicalities and efficacy of alternative legislative schemes with a different basis or reach. For example, as Mr David Pannick QC, for the Secretary of State pointed out, putative amendment or modification, whether by reference to the bodies or political or other public viewpoints to which the prohibition or restriction should apply, or to substitute restrictions of a different nature, such as financial caps or advertising time quotas, would throw up no end of issues of practicability and/or of potential for evasion. Such difficulties were recognised by the Joint Committee of the Houses of Parliament on Human Rights in paragraph 63 of its 2002 Report on the Communications Bill in their

[3] 5th Report (1998) Cap 13, paras 94-97
[4] 19th Report of Sessions 2001-02, HL Paper No 149 and HC Paper No 1102, para 301
[5] (January 2003) pp 17-19

finding that a compromise statutory solution of a more circumscribed ban would present a formidable challenge:

> "… We are … conscious that … - a more circumscribed ban applied more discriminatingly – presents a formidable challenge to put in statutory form. In particular, it is difficult to conceive of how to devise ways of allocating air time or capping expenditure in relation to 'a political viewpoint' as opposed to a political party, however that might be defined in statute. …"

11. However, in the absence of ready severance, such difficulties do not assist on an issue of compatibility if the prohibition as a whole goes further than is necessary for its purpose of securing fairness of political expression. As the Canadian Supreme Court have put it, the law should be carefully tailored so that rights are impaired no more than necessary; see per McLachlin J in the Supreme Court in *RJR McDonald v Canada* [1995] 127 DLR, 4th 1, at 342.

12. On the other hand, there may be a need for "bright-line" domestic distinctions in the realm of human rights, even though loyalty to them may involve some hardship in their application in some circumstances. A corollary of such approach, where necessary, is that the answer to a question of compatibility cannot be determined - as distinct from illustratively aided - by reference to the particular circumstances of any would-be political advertiser caught by the statutory prohibition, or, say, to the strength or weakness of those commercial or political interests on the other side of the argument.

The 2003 Act

13. I should now return in a little more detail to the two complementary principles in the 2003 Act governing the content of television and radio services in this country, namely impartiality and an absolute prohibition of political advertising, except, in the main, for controlled advertising of party-political broadcasting in election periods.

14. The scheme of the Act is that broadcasters, that is, those who provide television and radio services, must be impartial in the way they provide them. However, subject to control by the prohibition and, where appropriate, through the regulatory regime of the Act administered by OFCOM[6] for the control of party political and election broadcasts, there is no statutory restriction on the purchase of advertising time. In section 319, under the heading "Programme and fairness standards for television and radio", there are included among the various "standards objectives" as to content in "OFCOM's standards code", two objectives to that end:

> "(2) … (c) that news included in television and radio services is presented with due impartiality and that the impartiality requirements of section 320 are complied with; …
>
> (k) that there is no undue discrimination between advertisers who seek to have advertisements included in television; …"

[6] Section 333

Section 320, under the side-heading "Special impartiality requirements", requires impartiality on the part of the service provider on:

> "(2) … (a) matters of political or industrial controversy; and
>
> (b) matters relating to current public policy."

15. As to prohibition of political advertising, it is defined widely in section 321(2), and largely inclusively by reference to overlapping examples in section 321(3), according to the nature of the body responsible for, *or* the content of, the sought advertisement. Thus, the Act prohibits an advertisement by a body regardless of the content or end of the advertisement, if it is made by a political body as defined by the Act, *or* anybody's advertisement if it is directed towards a political end. This is how section 321(2) and (3) read:

> (2) "For the purposes of section 319(2)(g) an advertisement contravenes the prohibition on political advertising if it is –
>
> (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
>
> (b) an advertisement which is directed towards a political end; or
>
> (c) an advertisement which has a connection with an industrial dispute.
>
> (3) For the purposes of this section objects of a political nature and political ends include each of the following –
>
> (a) influencing the outcome of elections or referendums whether in the UK or elsewhere;
>
> (b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;
>
> (c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;
>
> (d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;
>
> (e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;

(f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;

(g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends."

16. Thus, the scheme is to identify political advertising by reference either to the political nature of the promoter of the advertisement, namely "a body whose objects are wholly or mainly of a political nature" (section 321(2)), or to the content of the advertisement, namely one "directed towards a political end" (section 321(2)(b)) or, where applicable, in "connection with an industrial dispute" (section 321(2)(c)). "[O]bjects of a political nature" and/or "political ends" are inclusively defined in section 321(3) by reference to seven largely overlapping examples of political/public activity advocacy. Given the structure and range of that definition of a political body, by reference to a continuum of political activity and intensity from party political activity at election time to the pursuit by non-party political bodies at any time of particular interests of public concern, the prohibition on political advertising is capable of a very wide application.

17. ADI is clearly a body "wholly or mainly of a political nature" under section 321(2)(a), and its object is directed towards a "political end" within a number of the categories identified inclusively in section 321(3). ADI's proposed advertisement is, therefore, caught by the prohibition, so as to give rise to its Article 10 challenge to the compatibility of sections 319(2)(g) and 321(2).

Article 10

18. Article 10 provides -

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

19. The Secretary of State acknowledges that sections 319(2)(g) and 321(2), properly construed, constitute a prohibition on political advertising and that, in their application to ADI's proposed advertisement, engage Art 10(1). However, she

maintains that it is justified under Article 10(2), as "being prescribed by law" and arguably "necessary in a democratic society" for the protection of "rights of others". However, a decision of the ECHR in 2002, *VGT v Switzerland* (2002) 34 EHRR 321, to which I shall return, led the then Secretary of State, to state before the second reading of the Bill that became the 2003 Act, that, pursuant to section 19(1)(b) of the HRA, although he was unable to make a statement of compatibility, the Government nevertheless wished to proceed with the Bill.

20. ADI acknowledges two of those three elements of justification relevant to this case. The prohibition is clearly "prescribed by law" in the form of section 321, and it has as a legitimate aim "protection … of the … rights of others" by preventing undue influence over the public and broadcasters by powerful financial groups from distorting the political process. However, as I have indicated, ADI disputes that the prohibition is "necessary in a democratic society" for the achievement of that aim – hence this claim in judicial review.

21. Before considering the application of the heady concept, "necessary in a democratic society", to this prohibition and its application to the facts of this case, I should make four general points.

22. The first is that, although political expression is one of the most highly prized forms of expression and requires no justification, no-one has a *right* under Article 10 to broadcasting time on television or radio, save possibly where its denial is discriminatory, arbitrary or otherwise unreasonable (see the 2003 Act's reflection of the safeguard against "undue discrimination" in relation to broadcast advertisements generally, in section 319(2)(k); *R (ProLife Alliance) v BBC* [2004] 1 AC 185, per Lord Hoffmann, at para 64 and Lord Walker, at para 129, and *Haider v Austria* (1995) 83-A DR 66, where it might cause unfairness between political parties at election time).

23. The second point is that the rationale for the 2003 Act's singling out of broadcasting for special requirements as to political impartiality and for prohibition of political advertising is because it has traditionally been perceived as so much more powerful and pervasive in impact than other media forms; see, e.g. *ProLife*, per Lord Hoffmann at para 21, and *Murphy v Ireland* (2004) 38 EHRR 212, at para 69. Hence its particular attraction to those with political objects and the resources to resort to it. If political advertising on television and radio were permitted, it could, if that perception is correct, unfairly distort the democratic process in favour of the wealthy, as the *Neill Committee* recognised in paragraph 13.9 of its Report:

> "… if the ban did not exist, less well endowed parties or movement would have great difficulty in maintaining their point of view in the face of massive purchase of advertising time by their opponents."

24. In ECHR terms, as Professor E Barendt has pointed out,[7] it is probably a reflection of the high importance of political expression and the interests of fairness and equality that it may be subjected to tighter regulation on television or over the radio than other types of expression. However, it is questionable whether the latter will, for long,

[7] *Freedom of Speech*, Oxford; OUP, 161

remain so in a world in which technological developments, such as the world-wide web, electronic mail and other internet-based functions are swiftly developing rival, equally immediate, all-pervasive public platforms and commercially competitive alternatives.[8]

25. The third point is that Article 10(2) has engendered in this case, as it must in most cases where it is invoked, a forensic debate as to the fact or intensity, in the particular circumstances, of the harm to society in the proposed political advertisement said by a domestic Government to be the need, and thus justification, for interference with the fundamental right to freedom of expression under Article 10(1). That debate has focused on where, in the spectrum of political advertisement for which section 321(3) provides, ADI's purposes and proposed advertisement fall, and as to the availability and adequacy to it of alternative means of making its case to the public.

26. The fourth point is, in Strasbourg terms, the margin of appreciation, and in the domestic context, the ambit of discretion or judgement, to be allowed by the courts to Parliament in determining the need for a measure of the extent engendering a compatibility challenge. ADI's case is that, here, the margin or ambit is very narrow; the Secretary of State maintains that it is wide enough to enable the Court to exercise its own judgment by way of intensive review.

Three cases with particular bearing on the application: VGT, ProLife* and *Murphy

27. One of these cases, the Strasbourg authority of *VGT,* concerns the very issue raised by this case, the Article 10 status of a prohibition on broadcast political advertising, a case in which the Court held that the prohibition violated the freedom of expression conferred by the Article. ADI relies on this case, but the Secretary of State maintains that it is unreliable and, in any event, distinguishable, relying on obiter observations of Lord Hoffmann and Lord Walker of Gestingthorpe in the House of Lords in *ProLife* and on dicta of the Strasbourg Court in *Murphy.* ADI also seeks to rely on *ProLife* and *Murphy,* suggesting that the Strasbourg Court, in its judgment in *Murphy*, implicitly approved its reasoning in *VGT,* and that the obiter views of Lord Hoffmann and Lord Walker should be disregarded, since that case did not concern the Article 10 status of a prohibition on political advertising.

VGT

28. In *VGT* a Chamber of the Court held that the application by the Swiss Federal Court of a Federal law prohibiting television and radio, but not other media, advertising of a political nature to a television commercial by an animal welfare group directed against intensive pig-farming, though of a political nature, was not "necessary in a democratic society" and that, on that account, it violated Article 10. (The prohibition was not confined to such advertising during electoral processes, and the advertisement in question was sought outside any such process.) The Court: 1) seemingly accepted the importance of not allowing wealthy bodies a disproportionately loud voice in matters of public interest and debate; 2) acknowledged that the applicant was not such a wealthy body; 3) accepted that television and radio were particularly powerful means of advertising and that the Swiss authorities may have had valid reasons for

[8] See *Political Expression and the Broadcasting Ban on Advocacy Advertising*, Andrew Scott, (2003) MLR 224, at 238

differentiating in this respect between broadcast and other forms of media; but nevertheless 4) took the view that, as this was a restriction of political speech in the sense of matter affecting the general interest, the Swiss authorities had a narrow margin of appreciation whether to interfere with it and had exceeded that margin in doing so. This is how the Court reasoned its decision:

> "66. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. … As set forth in Article 10, this freedom is subject to exceptions. Such exceptions must, however, be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political rather than commercial.
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> …
>
> 71….in the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual's purely 'commercial interests', but his participation in a debate affecting the general interest.
>
> 72. The Court will consequently carefully examine whether the measures in issue were proportionate to the aim pursued. In that regard, it must balance the applicant association's freedom of expression, on the one hand, with the reasons adduced by the Swiss authorities for the prohibition of political advertising, on the other, namely to protect public opinion from pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity between different forces of society; to ensure the independence of the broadcasters in editorial matters from powerful sponsors; and to support the press.
>
> 73. It is true that powerful financial groups can obtain competitive advantages in the areas of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular, where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.
>
> 74. In the present case, the contested measure, namely the prohibition of political advertising …, was applied only to radio

and television broadcasts, and not to other media such as the press. The Federal Court explained in this respect … that television had a stronger effect on the public on account of its dissemination and immediacy. In the Court's opinion, however, while the domestic authorities may have had valid reasons for this differential treatment, a prohibition of political advertising which applies only to certain media, and not to others, does not appear to be of a particularly pressing nature.

75. Moreover, it has not been argued that the applicant association itself constituted a powerful financial group which, with its proposed commercial, aimed at endangering the independence of the broadcaster; at unduly influencing public opinion; or at endangering the equality of opportunity between the different forces of society. Indeed, rather than abusing a competitive advantage, all the applicant association intended to do with its commercial was to participate in an ongoing general debate on animal protection and the rearing of animals. The Court cannot exclude that a prohibition of 'political advertising' may be compatible with the requirements of Article 10 of the Convention in certain situations. Nevertheless, the reasons must be 'relevant' and 'sufficient' *in respect of the particular interference with the rights under Article 10*. In the present case, the Federal Court in its judgment …, discussed at length the reasons in general which justified a prohibition of 'political advertising'. In the Court's opinion, however, the domestic authorities have not demonstrated in a 'relevant and sufficient' manner why the grounds generally advanced in support of the prohibition of political advertising, also served to justify the interference *in the particular circumstances of the applicant association's case*. [my emphasis]

…

78. … The Court recalls that its judgment is essentially declaratory. *Its task is to determine whether the Contacting States have achieved the result called for by the Convention.* Various possibilities are conceivable as regards the organisation of broadcasting television commercials; the Swiss authorities have entrusted the responsibility in respect of national programmes to one sole private company. It is not the Court's task to indicate which means a State should utilities in order to perform its obligations to the Convention. [my emphasis]

79. In the light of the foregoing, the measure in issue cannot be considered as 'necessary in a democratic society'. …"

29. There is a problem with *VGT* for United Kingdom courts, limited as they are by sections 3 and 4 of the HRA, in the event of conflict of domestic primary legislation with the Convention, respectively to "reading down" the legislation under section 3 HRA or to a declaration of incompatibility under section 4 HRA. Their task is not, in the words of the Strasbourg Court in paragraph 75 of its judgment, whether the statutory interference with the freedom of expression in question "served to justify the interference in the particular circumstances of the appellant association's case", or, in paragraph 78, whether it has, in the circumstances, "achieved the result called for by the Convention". Their task is 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).

30. The Strasbourg Court in *VGT*, in the passages from its judgment that I have set out, accorded the Swiss Court only a narrow margin of appreciation as to the consistency with Article 10 of the application of the prohibition in the circumstances of the particular case. An English court, in considering the 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". Given the Strasbourg Court's focus on the particular facts in *VGT*, including its disregard 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 Article 10.

31. If support were needed for that conclusion, it is to be found in the discussions of Lords Hoffmann and Walker in *ProLife* of the ratio of *VGT* and in the judgment of the Strasbourg Court in *Murphy*.

ProLife

32. In *ProLife* the House of Lords, by a majority, held that the BBC's refusal, on grounds of taste, decency and offensiveness to transmit a political party's public election video-film of an abortion was justifiable under Article 10(2) on those grounds. The issue for their Lordships and the courts below on *ProLife's* challenge by way of judicial review was as to the Article 10(2) legality of the BBC's and independent broadcasters' refusal to permit the broadcast within the framework respectively of an agreement between the BBC and the Secretary of State and then applicable legislation. The issue turned, as I have indicated, on the content of the proposed video-film; they did not have to consider the compatibility with Article 10 of the statutory or other framework under which the refusal to permit broadcasting of it was made - a point that Lord Nicholls of Birkenhead underlined in paragraph 9 of his speech in that case - or indeed, of any prohibition of political advertising. It was, within such judicial review limits as remain in the context of human rights, essentially a decision on the merits of the particular case, informed by Article 10 considerations and jurisprudence, as Lord Walker made plain in his important discussion of "[t]he long trek away from *Wednesbury* irrationality", starting at paragraph 131 of his speech, and in which he said, at paragraph 139:

> "... the court's task is, not to substitute its own view for that of the broadcasters, but to review their decision with an intensity appropriate to all the circumstances of the case. Here the relevant factors include the following. (1) There is no challenge to the statutory (or in the case of the BBC quasi-statutory) requirement for exclusion of what I have (as shorthand) called 'offensive material'. That requirement is expressed in imprecise terms which call for a value judgment to be made. The challenge is to the value judgment made by the broadcasters. (2) Their remit was limited (for reasons not inimical to free speech) to a single decision either to accept or reject the programme presented to them. In making that decision the broadcasters were bound (in accordance with their respective codes) to have regard to the special power and pervasiveness of television. …"

33. Lord Hoffmann, at paragraphs 63 and 64, whilst expressing reservations as to the Court's reasoning in *VGT* for finding the prohibition to be in breach of Article 10, saw in paragraph 75 of the judgment, a recourse to the discriminatory nature of the provision in the immediate circumstances of the case, but also the possibility of justification of the prohibition in other circumstances:

> "64…. As a matter of common sense, the association's complaint was not without merit. The Swiss government argued that no one had a right to television time and that the primary right under article 10 was not engaged. But the court took the view that for practical purposes it was. Prima facie, anyone was entitled to whatever television time for commercials he could afford to buy. Therefore a refusal to allow anyone a commercial on the grounds of the content of his broadcast was a discrimination which had to be justified. The court decided that was no sufficient justification for discriminating against political advertising 'in the particular circumstances of the applicant association's case' … This is a guarded, if somewhat opaque decision. The court expressly said that such a prohibition might be compatible with article 10 'in certain situations. … "

34. Lord Walker, at paragraphs 128 – 130, appears to have had similar doubts about the ratio in *VGT* and also the impression that it was based on the discriminatory nature of the provision in the particular circumstances of the case:

> "128. … the Court … found an infringement of article 10, mainly (it seems) because of the monopoly positions enjoyed in Switzerland by a single public advertising corporation and a single company controlling television commercials. The judgment does not, with respect, give full or clear reasons for what seems to be a far-reaching conclusion. It has already had one striking consequence, that is that the Communications Bill now before Parliament has not been certified as complying with

> the Convention because of a single clause relating to political advertising.
>
> 129. The true significance of the *VGT* case is therefore rather imponderable. But at least the general principle stated by the Commission the much earlier case of *X and the Association of Z v United Kingdom* [1971] 38 CD 86 still holds good, that although no private citizen or organisation has any unfettered right to access to broadcasting facilities 'the denial of broadcasting time to one or more specific groups or persons may, in particular circumstances, raise an issue under article 10 alone or in conjunction with article 14 of the Convention'. …
>
> 130. I do not think it is necessary, in order to dispose of this appeal, to try to go further into the general question of how article 10 is engaged in the field of broadcasts with a political content. But it is worth noting that the cases do reveal a degree of paradox. On the one hand, political discussion or debate is, of all forms of communication protected by article 10, accorded particular importance: see for instance *Bowman* … But on the other hand, there may be good democratic reasons for imposing special restrictions, especially to prevent those with deep pockets from exercising too much influence through the most powerful and intrusive means of communication."

35. The rationale for the Strasbourg Court's decision in *VGT* may indeed have been about discrimination, as Lords Hoffmann and Walker suggested. That consideration is undoubtedly relevant in Article 10 cases where access to public media of communication is the subject of prohibition or other restriction, as Lord Nicholls of Birkenhead observed in *ProLife*, at paragraph 8:

> "… Article 10 does not entitle ProLife Alliance or anyone else to make free television broadcasts. Article 10 confers no such right. But that by no means exhausts the application of Article 10 in this context. In this context the principle underlying Article 10 requires that access to an important public medium of communication should not be refused on discriminatory, arbitrary or unreasonable conditions. Nor should access be granted subject to discriminatory, arbitrary or unreasonable conditions. …"

Discrimination is particularly relevant where the rationale for the prohibition on political broadcasting is to prevent domination or distortion of the democratic process by those wealthy enough to secure access to powerful broadcasting media, even though the opposition may be driven by commercial rather than political motives.

36. However, as I have said, *ProLife* was not about the compatibility of a domestic statute with Article 10, or about a prohibition on political advertising, but about the legality in Article 10 terms of a particular executive decision made within an unchallenged statutory or quasi-statutory domestic framework banning the broadcasting of offensive material.

Murphy

37. Where, however, religious or moral sensitivities are in play, as in *Murphy,* decided a few months after *ProLife,* they and their potential for causing trouble if they are offended, rather than discrimination, may be the operative factor for a Contracting State in seeking to restrict access to the broadcasting media.

38. In *Murphy* the Strasbourg Court held to be Article 10 compliant a refusal by a national regulator in Ireland to permit a local radio station to permit a pastor of a Christian ministry in Dublin, to broadcast a video-tape about Christ, pursuant to an Irish domestic statutory prohibition on the broadcasting of any advertisement "directed towards any religious or political end". In doing so, the Court focused on the margin of appreciation available to Contracting States in determining, according to the nature of the prohibition and the circumstances to which it was sought to apply it, whether it was "necessary in a democratic society". It contrasted, at paragraphs 66 and 67 of its judgment, the limited margin of appreciation for restricting "political speech or on debate of questions of public interest" with a wider margin for "matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion":

> "66. … the Court has … consistently held that the Contracting States enjoy a certain but not unlimited margin of appreciation.
>
> 67. *In this latter respect, there is little scope under Art. 10(2) … for restrictions on political speech or on debate of questions of public interest*. However, a wider margin of interest is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal conviction within the sphere of morals or, especially, religion. …
>
> *The Court therefore observes that it is this margin of appreciation which distinguishes the present case from … VGT .. In the latter case, the Court considered that the advertisement prohibited concerned a matter of public interest to which a reduced margin of appreciation applied.*" [my emphases]

39. In addition, the Court rejected an argument on behalf of the applicant that the prohibition was too wide, and, therefore, not necessary to achieve the State's end of avoiding an unbalanced usage of broadcast advertising by religious groups with large resources and advertising (see paragraphs 69 and 74). In reaching that view, it acknowledged, at paragraph 68, the particular potency and pervasiveness of broadcast media, and rejected, at paragraphs 75 – 78, as wrong in principle, and unworkable, any partial relaxation of the prohibition in the case before it, given the particular religious sensitivities involved:

> "69. … the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference. The Court has acknowledged that account must be taken of the fact that the

> audio-visual media have a more immediate and powerful effect than the print media.
>
> …
>
> 74. … The prohibition concerned only the audio-visual media. The State was, in the Court's view, entitled to be particularly wary of the potential for offence in the broadcasting context, such media being accepted by this Court …as having a more immediate, invasive and powerful impact, including … on the passive recipient. He was consequently free to advertise the same matter in any of the print media (including local and national newspapers) and during public meetings and other assemblies. …
>
> 75. … the Court considers persuasive the Government's argument that a complete or partial relaxation of the impugned prohibition would sit uneasily with the nature and level of the religious sensitivities … and with the principle of neutrality in the broadcast media.
>
> 76. In the first place, the Court would accept that … a provision which allowed the 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. There is, in this context, some force in the Government's argument that the exclusion of all religious groupings from broadcasting advertisements generates less discomfort than any filtering of the amount and content of such expression by such groupings.
>
> …
>
> 78. Secondly, the Court considers it reasonable for the State to consider it likely that even a limited freedom to advertise would benefit a dominant religion more than those religions with significantly less adherents and resources. Such a result would jar with the objective of promoting neutrality in broadcasting and, in particular, of ensuring a 'level playing field' for all religions in the medium considered to have the most powerful impact."

40. Although *Murphy* was not about a prohibition of political advertising, whether by way of broadcasting or otherwise, but about prohibition of religious broadcasting, it has a fourfold relevance to the task of this Court in considering the compatibility with Article 10 of the prohibition of political advertising in this case. First, the Court recognised the margin of appreciation available to Contracting States in regulating the use of broadcast media, observing at paragraph 28, that, though it is subject to a minimum level of regulation throughout the European Union through the Frontiers Directive:

> "… The Directive recognises the importance which individual Member States attach to the regulation of broadcast advertising in that it provides that a Member State may impose stricter regulation on broadcasters operating under its jurisdiction than is provided for in the Directive."

Secondly, there is the Court's reference in paragraph 67 of its judgment (see paragraph 38 above) to the narrowness of that margin of appreciation in the context of restriction of freedom of expression of political views or of other matters of public interest. Thirdly, the Court accepted the justification for singling out broadcasting media for particular regulation or restriction because of the greater potency it perceived it to have over other media forms (see paragraph 39 above). And, fourthly, the European Court approached its task in the same way it had done in *VGT* (see paragraphs 29 and 30 above), by reference to the effect of the prohibition in the particular circumstances of the case:

> "72. … The question before the Court is therefore whether a prohibition of a certain type (advertising) of expression (religious) through a particular means (the broadcast media) can be justifiably prohibited in the particular circumstances of the case."

As I have said in relation to the *VGT* decision, the task for this Court in determining whether a United Kingdom statute is incompatible with an ECHR obligation is broader and not so fact sensitive, otherwise the compatibility with the ECHR of our legislation would be vulnerable to constant challenge and re-challenge according to the individual circumstances of each case. In short, on a compatibility challenge, this Court has often to paint with a broader brush than the Strasbourg Court – another way of expressing "the bright-line" approach.

ADI's case

41. ADI's case went both to the focus of the prohibition on broadcast advertising and to the width of the prohibition as applied to that medium.

42. Mr Michael Fordham, on behalf of ADI maintained that there is no logical or Article 10 permissible basis for singling out the broadcasting media for a prohibition on advertising, given the other controls provided by the Act and the available media alternatives. In the first place, he questioned whether radio and television, by reason of their transient nature, are, in fact, more powerful than the print and other media, especially in relation to advertising. But, assuming for the purpose of ADI's case that the wide acceptance of its particular potency and pervasiveness still holds good, he pointed out that the rationale for reliance on it is capable of going both ways. The greater the power or pervasiveness of a medium of advertisement, the more significant to the would-be advertiser would be the loss of freedom to use it - to which loss the availability of alternative modes of communication is no answer. He maintained that Article 10 should protect the desired mode of communication, citing in particular, the following passage from the judgment of Mason J in *Australian Capital Television Pty Ltd v Commonwealth* 1992 177 CLR 106, at 146:

> "It is said that the restrictions leave unimpaired the access of potential participants … to other modes of communication with the electorate. The statement serves only to underscore the magnitude of the deprivation inflicted on those who are excluded from access to the electronic media. They must make do with other modes of communication which do not have the same striking impact …"

43. As to excessive width of the broadcasting prohibition, Mr Fordham submitted that it went beyond what was necessary to secure political impartiality and equality of treatment over the air-waves. He maintained that, while it may be necessary for the regulation of political parties and their conduct in the electoral process, it is not justified in respect of non-party political groups in the context of the wider political process exemplified in the categories of prohibition included in section 321(3) (b) to (f) (see paragraph 15 above).

44. Mr Fordham formulated for the Court four degrees or categories in a sliding scale of "politicality" to frame his submission that the inclusive definitions in section 321(2) and (3) of a body "whose objects are wholly or mainly of a political nature" or "an advertisement … directed towards a political end", are wider than necessary to protect the integrity of our democratic processes. These categories were: 1) "*party-politics*", relating to the activities of identifiable political parties, in particular in the form of promoting electoral success of a political party or its policies within[9] or without an election period or referendum, and 2) "*electoral-influence*", both covered by section 321(2)(a), section 321(3)(a) and, possibly section 321(2)(g); 3) "*law/policy change*", in the sense of promoting or opposing changes in law or governmental policy – covered as to status by section 321(2)(a) and as to conduct by section 321(3)(b) – (e); and 4) "*social advocacy*", such as influencing public opinion on some social cause or a matter of public interest or controversy – covered on status grounds by section 321(2)(a) and on content grounds by section 333(2) (b) and (f).

45. Focusing on freedom of expression of political content or views, Mr Fordham submitted that the further away the expression in question from the main electoral debate or outside the electoral period the stronger the Article 10(1) protection, or, correspondingly, the weaker the case for justification of any restriction of it under Article 10(2). Communications by single-issue groups, such as ADI, he maintained, would normally fall outside the particular sensitivities of party politics and the electoral process and within the category of "social-advocacy" that he identified in section 321(3) (b) and (f), as wrongly included in the prohibition on political advertising. In so submitting, he acknowledged that prohibition of social advocacy advertisements of this sort might comply with Article 10 in certain circumstances, such as during election periods or when identifiably related to an election issue or where, as in the *Murphy* case, some nationally highly sensitive issue is in play.

46. Mr Fordham submitted that the prohibition on political advertising contravenes Article 10 insofar as it goes beyond, or much beyond, the conduct of political parties in an electoral process and extends to that of other bodies in the wider political process. And, with particular reference to the circumstances of this case, he submitted

[9] In tandem with being subject to control, by virtue of section 333, by OFCOM of party political and party election broadcasts

that the right to freedom of expression calls for a high level of protection so as to require the Secretary of State to establish a pressing social need for its application so far outside party political context and/or the electoral process. He drew attention to the importance attached by the Strasbourg Court to the right - see e.g. *Jersild v Denmark* (1994) 19 EHRR 1, at para 30 - in particular in the context of political debate – and see *Lingens v Austria* (1986) 8 EHRR 407, in which the Court stated, at para 42, that:

> " … freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention."

47. The result, argued Mr Fordham, is a correspondingly lesser degree of latitude for a national authority in the application of its margin of appreciation, and thus little scope under Art. 10(2) for restrictions on political speech or on debate of questions of public interest, citing: *Murphy*, at paras 66 and 67 (see paragraph 38 above); and *Bowman v UK* (1998) 26 EHRR 1, at paras 41-46, in which the Strasbourg Court held that the right prevailed over a statutory measure imposing a severe restriction on the distribution of anti-abortion leaflets immediately before election time; the *McLibel* case, *Steel & Morris v United Kingdom*, App No 68416/01 (15 February 2005), in which the Court expressed, at paras 88-89, the high level of protection that should be given under Article 10 to the important role that single issue groups can have in influencing and mobilising public opinion in modern democracies; and *Attorney-General v Harper* [2004] SCC 33, at paras 84 and 112; and *Malisiewicz-Gaslor v Poland* App No 43797/98 (6 April 2006), at paras 56-60.

48. Whilst none of those authorities concerned the distinction between broadcast political advertising and other media means of doing so, Mr Fordham drew on them for the purpose of emphasising the high degree of protection given by the Court to the right of freedom of expression in a political context, an approach, he submitted, that was applicable regardless of the medium employed. Such strong public interest in enabling groups outside the mainstream to contribute to matters of public debate applies, he submitted, to broadcasting and to advertising. As to its application in principle to broadcasting, he cited *Groppera Radio v Switzerland* (1990) 12 EHRR 321, paras 64 and 71-73, and to political advertising, *VGT*, to the rationale of which, he submitted, the Court seemingly adhered in *Murphy*, in the following short passage at para 67, which, for convenience, I repeat:

> "… there is little scope under Art 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest."

49. Mr Fordham also relied on another, practical, consideration to which the Court in *Bowman*, at paragraphs 40 and 45, and in *Stambuk v Germany* Appl No 37928/97 (17 October 2002), at paras 47-49, gave attention, namely whether in the circumstances of a case the conduct prohibited would in fact cause any damage to the interests of society in a free and fair democratic process. He maintained that there were no such damaging circumstances here, where ADI was pitted against the commercial advertising might of opposing entertainment interests.

50. But most of all, Mr Fordham relied on the decisions of the Strasbourg Court in *VGT* and *Murphy*, As to *VGT*, he invited the Court to follow and apply it to the circumstances of this case. He drew attention to the closeness of the law, facts and issues to those here, including the fact that those on the other side of the debate, meat marketing enterprises, were able to secure ordinary commercial television advertising, so that *VGT's* proposal was simply to contribute to a current debate. He suggested that this Court should not be deterred from following *VGT* by Lord Hoffmann's description in *ProLife* of its reasoning as "opaque", suggesting that he was alone in that view and that, in any event, the House of Lords did not need to consider it directly and did not do so, since it was concerned with quite a different set of facts, a refusal to permit political advertising in an election period because of its content. As to *Murphy*, he said that, although it was concerned with the impact of a religious, not a political, advertising ban on broadcasts, it raised similar issues to those in *VGT*, which the Court in *Murphy* seemingly did not consider to have been wrongly decided.

51. Mr Fordham also suggested, by reference to academic writings on the subject and the lack of evidence of a comparable or comparably wide provisions in most other Contracting States and in leading Commonwealth countries,[10] that, to the extent that fairness of political debate needed to be covered by an restriction on political advertising, it should and could be limited to party politics and the electoral process (cf section 321(3)(a) of the 2003 Act (see paragraph 15 above)) and outside those limits by provision against offensive content and maintenance of the advertising distinguishability. He added that the EU requirement, by directive, of that distinguishability in statutory form, the applicability of the ASA's regulatory function over content requirements to television and radio political advertising, and the unrestricted availability of political advertising through the non-broadcasting media provide sufficient protection to the public against powerful distortion of the public debate on the matter.

52. In summary, Mr Fordham's argument was that this is not a case in which human rights law requires affirmation of a "bright-line" rule and the corollary of possible harshness of its application on the margins in the interests of certainty. Rather, he said, it is one for which human rights law insists upon a high level of protection for freedom of expression when confronting a draconian ban that cannot be justified in terms of proportionality, necessity or fairness.

The Secretary of State's case

53. Mr David Pannick QC, for the Secretary of State, drew attention to the widely accepted greater sensitivity of the democratic process to political broadcasts than to communications via the print and other media, and hence the need for singling out broadcast political advertisements for particular control at election time and otherwise for the general prohibition in sections 319(2)(g) and 321(2) and (3) of the 2003 Act. As to ADI's main case that, in any event, the prohibition on political advertising should be restricted to political parties or during elections, he submitted that it is based on erroneous distinctions between political parties and other groups pursuing political objectives and between advertising with a view to influencing the electoral

[10] A Sk Para 27: Australia – no counterpart to UK, tailored to election period; New Zealand – limited to election period; Canada – tailored prohibition to election period and spending cap (and see *Harper* para 79 for useful statement of case against third party advertising);

process and that which seeks to influence the wider political process. In both, he maintained, there is similar scope for distorting public debate and unfairness where one party or group has the money to advertise widely through the broadcast media and others have not. It is no more acceptable democratically, he submitted, for bodies, such as trade unionists, or employers' associations or special interest groups concerned, for example, with political matters such as abortion, climate change or immigration, to outspend their rivals on advertising, than for political parties, often concerned, albeit as part of a wider remit, with the same or similar issues and with the resources to fund a broadcasting campaign.

54. Thus, Mr Pannick maintained, the rationale for prohibiting paid advertising is the same in each case, whatever its categorisation in Mr Fordham's terms – "party politics", "electoral influence", "law/policy-change" or "social advocacy" - a broad rationale, as, he pointed out, that the Neill Committee recognised in paragraphs 13.7 and 13.9 of its Fifth (1998) Report. They all, he said, have the same objective, protection of freedom of speech in support of the public interest in a democratic society, whether for electoral purposes or through other means, citing, in particular, the following passage quoted with approval by the High Court of Australia in *Theopanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, at 124:

> "In principle … [political speech] should not be confined to communications which directly concern the conduct of government or which seek to influence electoral choices. That would be much too narrow. It would privilege speech on matters raised by political parties and candidates. The public is entitled to discuss a wide range of topics, irrespective of whether they are taken up by government and political parties. 'Political speech' refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about."

55. At the lowest, Mr Pannick argued, Parliament and the Secretary of State were entitled to conclude that the focus of political debate should not be dominated by those with most money, the expenditure of which, within or outside mainstream political issues or election periods, could equally distort democratic debate to the unfair disadvantage of those without the same resources.

56. As to *VGT*, Mr Pannick submitted that it should not be regarded as determinative of the present case for a number of reasons.

57. First, he submitted that the Strasbourg Court's reasoning in *VGT* is unclear, unpersuasive and inapplicable to this case in a number of respects. He criticised the Court's failure to explain why the well recognised potency and pervasiveness of broadcasting media did not justify special restrictions, qualities recognised by the House of Lords in *ProLife* and by the Strasbourg Court itself shortly afterwards in *Murphy*. He criticised it for failing to take account of the significance of the availability of alternative media by which *VGT* could have pursued its political objectives, a factor considered relevant by the Court in *Murphy*, at para 74, to its finding that broadcasting restriction in that case was Article 10 compliant. Such availability of other media would, at least in part, have been an answer to the conundrum that the greater the potency of the broadcasting medium, the greater the

significance to the would-be advertiser of the loss of the freedom to use it. At the very least, he said, it should have been put in the balance, as the Court noted in *Murphy*. He also questioned the Court's seeming reliance on the fact that *VGT* was not a powerful financial group without considering whether to apply a "bright line" approach to its resolution of the issue before it. Such an approach, Mr Pannick submitted, if otherwise reasonable, may be permissible even though it may bear heavily on small groups or individuals in hard cases; otherwise legal certainty would always have to give way to discretion; see e.g. *R(Pretty) v DPP* [2002] 1 AC 800E-F.

58. Mr Pannick also criticised the Court in *VGT* for its seeming failure to have regard to the fact that that a number of Contracting States prohibit political advertising, a prohibition in some instances upheld by their domestic courts in a manner inconsistent with the decision in *VGT*. However, as he acknowledged, there is no over-all consistency of statutory regulation of, or judicial approach to, political broadcasting among the States to which he drew attention nor, indeed, by the Contracting States as a whole. Perhaps the most important reflection on this part of Mr Pannick's argument is that made by Lord Bingham in *Sheldrake v DPP* 2005] 1 AC 264, at Para 33:

> "… Some caution is in any event called for in considering different enactments decided under different constitutional arrangements. But, even more important, the United Kingdom courts must take their lead from Strasbourg. …"

59. In the result, as Mr Pannick acknowledged, there is no European domestic legislative consensus either way as to the need to single out broadcast, as distinct from non-broadcast, political advertising for special regulation, whether within or without an election period. It is not essential to the Secretary of State's defence of justification to establish any such consensus in support of her contention that the UK prohibition is Article 10 compliant. Indeed, the lack of consensus in this respect is a feature that Mr Pannick prayed in aid as to the breadth of the margin of appreciation that the Strasbourg Court would be likely to accord to the United Kingdom in a case such as this; citing as examples *X, Y & Z v United Kingdom* (1997) 24 EHRR 143, at para 52, and *Petrovic v Austria* (1993) 33 EHRR 307, at para 38.

60. Finally, on *VGT*, Mr Pannick submitted that it is, in any event, distinguishable in that there the applicant only sought, by advertisement, to respond to a general public debate engendered by the meat industry as a whole, and the Court can be seen as motivated by a concern to restore balance to a debate that had become unbalanced – not, he said, the case here. He also referred to Lord Walker's observation in *ProLife*, at paragraph 128 (see paragraph 34 above), that the Court seems to have decided as it did mainly because of "the monopoly positions enjoyed in Switzerland by a single public broadcasting corporation and a single company controlling television commercials".

61. Leaving *VGT*, and turning to the important consideration of the width of discretion or deference to be afforded by this court to Parliament on such an issue, Mr Pannick submitted that this Court should be slow to conclude that, in enacting the prohibition on political advertising in the form it did, it went outside its discretionary area of judgement. He underlined that submission by reference to the support for the prohibition of the Neill Committee, the Joint Committee for pre-legislative scrutiny of the Communications Bill, the Joint Committee on Human Rights and the Electoral

Commission, in its *Report and Recommendations on Party Political Broadcasting*, to all of which I have referred. Put another way, he said that Parliament is entitled to take the view that there are important differences between broadcasting and print journalism and that the former is more potent and in need of regulation outside, as well as inside, the electoral period. And, with Lord Walker's discussion in *ProLife*, at paragraphs 131- 144, in mind as to the appropriate test for a Court in a judicial review challenge, he acknowledged that the test is not a *Wednesbury* or reasonableness test, but one of "review … with an intensity appropriate to the circumstances of the case".

Conclusions

62. Article 10 does not provide absolute protection for political speech. Nor does it entitle any person or body to a right of political expression over the air waves. However, within a domestic statutory framework providing for access to broadcasting media, there may be recourse to Article 10 if its denial is potentially unlawfully discriminatory, arbitrary or otherwise unfair; see per Lord Nicholls in *ProLife*, at paragraph 8 (see paragraph 35 above). Where there is denial in the form of prohibition or by way of restrictions that engage Article 10 for any such or other reasons, a required constituent of any justification advanced under Article 10(2) is that it should be "necessary in a democratic society" for one or more of the interests specified therein, including "the protection of … rights of others". Such rights, as I have said (paragraph 8 above), include that of society to a fair democratic process. Put another familiar way, there should be a pressing social need for protection of such right to, or in the interest of, society in the integrity of the democratic process.

63. Just as discrimination may be a basis for engaging Article 10, so also it may be a basis for invoking Article 10(2) "necessity" for regulation of free speech in a public context, as the Strasbourg Court seemingly regarded it in *VGT*, (see paragraphs 28 and 30 above), and as Lords Hoffmann and Walker saw it in *ProLife* (see paragraphs 33 and 34 above). In that way rival imperatives against discrimination may be pitted or balanced against one another, albeit with the over-arching aim of ensuring the best use of free speech for society as a whole. In that respect, Mr. Fordham's submission seeking to remove the factor of discrimination from consideration of Article 10(2) necessity may, with respect, miss the point.[11] So, although the word "necessity" might be thought in normal usage to mean an absolute or near absolute constraint in order to establish an Article 10(2) justification, in such a conflict it is inevitably a relative concept. In judicial review it calls for consideration of the effect of a restriction on the particular facts of a case, that is, of the sort undertaken by the Strasbourg Court in *VGT* and *Murphy*, and by the House of Lords in *ProLife*, as to which of the two conflicting interests – one "a right" and the other a "necessity" – should prevail. Certainly, that is how the Canadian Supreme Court has approached a comparable exercise with regard to conflicts over the right to freedom of speech conferred by its Charter of Rights and Freedoms, see e.g. *Harper*.

64. The compatibility balance is necessarily on a different level of generality from that in judicial review. It is, as I have said, one of pitting strong conflicting principles, one against the other, with a view to making a value judgement on whether Parliament has gone too far. It is not the making of a value judgement as to the lawfulness in Article

[11] See also Tom Lewis, *Political Advertising and the Communications Act2003: Tailored Suit or Old Blanket?*, [2005] EHRLR 290

10 terms of their application to the particular facts of the case, although, as I have remarked, the consequences of such application may be illustrative either of a systemic flaw in the statutory scheme under examination, or that it is working as it should without more than necessary impairment of free speech.

65. In embarking on a compatibility assessment a court should, loyally to section 2(1)(a) HRA "take into account" Strasbourg jurisprudence in two particular respects. The first is the deference or discretion allowed to Contracting States, in particular their legislatures, and in particular when framing measures in support and protection of their own democratic processes. The second is as to any Strasbourg jurisprudence that might bear on the particular issue raised in that context, here the Article 10 legality of the 2003 Act's prohibition of political advertising in the broadcasting, but not non-broadcasting media, and as to the extent of prohibition in its wide definition of a political advertisement.

66. As to the Strasbourg Court's supervisory role, the Grand Chamber in *Hatton v United Kingdom* (2003) 37 EHRR 611 - an unsuccessful Article 8 challenge based on noise from permitted night-flying - stated the general rule, at paragraph 97 in the following terms:

> "… the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight."

The Court added, at paragraph 122, that, on policy issues that do not intrude into a particularly sensitive area of private life:

> "[t]he Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance."

67. Equally, the United Kingdom Government and Parliament, like comparable governmental bodies in other Contracting States, are accorded by their courts a discretionary area of judgement in deciding how best to regulate complex issues of social policy; see *Brown v Stott* [2003] 1 AC, 681, per Lord Bingham at 703B-C and Lord Steyn at 710H-711D. The permissible width of such discretionary judgement in relation to any particular provision is primarily or initially for our domestic courts to determine; see *ProLife*, per Lord Hoffmann, at paras 74 - 77, and Lord Walker, at paras 132 and 141-144.

68. The permissible width of the discretionary judgement allowed to Parliament in relation to its prohibition on political advertising is the central issue in this claim. Mr Fordham maintained that, given the fundamental Convention right in play, more particularly in its application to freedom of political expression, the scope for discretionary inroads on it are slim. He referred to the Strasbourg Court's application of a narrow margin of appreciation to the Swiss authorities' prohibition of broadcast

political advertising in *VGT* and to the Court's confirmation of that approach in its brief observation in *Murphy*, when distinguishing the religious sensibilities in play in that case from the restriction in *VGT,* that there was little scope under Article 10(2) for restrictions on political speech or on debate of questions of public interests. Mr Pannick did not accept the general applicability of the distinction mentioned in *Murphy*, and nor do I. Much depends on the whole scheme of a statutory prohibition or restriction of public expression of views and on the domestic context in which it is set. The *VGT* scheme lacked many of the ameliorating features of the scheme of control established by 2003 Act. And the domestic context in which that scheme was set lacked a number of the compensating features of the setting for the Act. And in *Murphy* the Court, in its brief comparison between the extreme sensitivities of religious feeling present in that case and political matters there or elsewhere, did not have to consider the precise nature of a prohibition on political advertising or its context.

69. The concern here is as to compatibility of the statutory prohibition, not as to a narrower question, namely whether, as in *VGT*, a statutory prohibition, or in *ProLife*, an executive decision made pursuant to a discretion given by a Convention compliant statute, is justifiable in the particular circumstances of the case. However, even though the exercise is on a broader plane, it is still necessary for the Court to consider the nature and effect of the statutory scheme of interference as a whole and in its general domestic setting. And it must still, in testing the "necessity" claimed by the Secretary of State for the prohibition conduct a balance of the competing imperatives. It can only sensibly do that, as the Canadian jurisprudence illustrates and as Lord Walker indicated in *ProLife*, by a review of the decision with an intensity appropriate to all the circumstances of the case, but to circumstances that do not necessarily include the wealth or motive of the individual applicant or the degree of political content, or its subject matter, of the sought advertisement in question.

70. As to the statutory scheme of the prohibition, it is plain that Parliament, in the 2003 Act has laid great store on the establishment of a regime of impartiality peculiar to television and radio services, in matters political because of the potency and pervasiveness of those media and corresponding vulnerability to abuse by powerful or well-placed interests to distort the democratic process unfairly to their advantage. There can be no valid criticism of such laudable objectives.

71. Parliament has also seen, as a necessary complement to those objectives, and for the same reasons, a widely defined prohibition of political advertising applicable at all times, but subject to relaxation with controls as to timing and content standards over party political broadcasts and, during election periods, party election broadcasts, all designed to secure fair public coverage over the air-waves of political view-points, which by their very nature, are rarely impartial. The singling out the broadcasting media for this special control of political advertising for those reasons, had and has, as I have said, wide and authoritative support in this country.[12]

72. The critical question, in my view, is not as to the principle of singling out the broadcasting media for special treatment. There is, as I have also said, ample reason and strongly arguable necessity for doing that in the interest of maintaining for society the integrity of the democratic process, a strong interest, also clearly acknowledged by

[12] See paragraph 6

the Strasbourg Court in *Murphy*, in paras 69 and 74. It is as to the width of the statutory definition, in section 321(3), of political advertising, with which ADI mainly takes issue, namely as to its extension outside the main party political debate and outside election periods to what Mr Fordham has called "law/policy" and "social/advocacy" matters. On that issue, neither *VGT* nor *Murphy* provides any assistance. Whilst the advertisement in *VGT* fell within one or both of those two categories, the Court's decision did not turn on any consideration as to its marginal political nature; indeed, it accepted without demur, at paragraphs 70 to 72 (see paragraph 28 above) its essentially political nature. The decision appears, as I have said, to have turned on a wholly different consideration, namely that the prohibition, on the facts of the particular case, discriminated unfairly against the applicant. As to *Murphy*, the Court had no occasion to touch on the question as to the nature of what might permissibly be prohibited in the way of "political" advertising. And, although *ProLife* was an Article 10 case, it was essentially one concerned with the content of a rejected advertisement, not the permissible width of the statutory framework under which the rejection had been made.

73. There is, therefore, nothing in those or any other Strasbourg cases to which the Court has been referred of which it can usefully take account on the essential issue before it. Equally, there is little to be gained from examination of a detailed or summary reference to the legislation or jurisprudence of other Contracting States or common law jurisdictions, other than that there is a lack of consensus on the matter of political advertising, a lack that militates against, rather than favours, a narrow margin of appreciation or of discretionary ambit of judgment of individual Contracting States' in their systems of control or lack of it in this area. I should add, with respect, that I have not found much assistance in the experts' reports put before the Court by either side; Mr Pannick in the end did not invite us to rely on those obtained on behalf of the Secretary of State, which he had apparently only produced as a matter of disclosure.

74. The Court is, therefore, thrown back on its own resources and the general guidance of Strasbourg and United Kingdom jurisprudence, in particular, *ProLife* and other material to which I have referred as to how it should approach its task.

75. There were for the United Kingdom Parliament, as starting points, two complementary imperatives of high principle, first the right to freedom of expression, particularly of political view-points, and, secondly, the preservation of the integrity of the democratic process. The fundamental importance of the former must be kept in mind when considering the margin of discretion/ambit of discretionary judgement on the part of Contracting States when interfering with it. However, the necessity for such interference may also be of a high order, particularly where, as here, its intended function is to bolster the value of freedom of speech to society as a whole in the preservation of the integrity of the democratic process. However, loyal the Court tries to be to the Article 10(2) principles expressed in it as one of "necessity" and by judicial gloss as "a pressing social need", the reality of its task, as I have said, is one of balancing of two relative - not absolute - imperatives that conflict in the manner of their application on a case by case basis, but, if Parliament has gone about it in a proportionate way, complement one another in the achievement of their respective objectives.

76. Moreover, in such matters of social and political judgement, the executive and legislative authorities - particularly the latter - of a Contracting State 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, under one name or another, 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. Such caution is an agent for broadening rather than narrowing the margin of appreciation/ambit of discretionary judgement of a Contracting State in this context, just as it may be in the context of other important and sensitive issues peculiar to a Contracting State's traditions, to which its authorities – like those of Ireland in *Murphy* – are peculiarly alive and well qualified to assess.

77. Here, the United Kingdom Parliament has chosen to introduce a prohibition on political advertising confined to the broadcast media because of its perceived greater power than that of other media and, consequently, greater potential for distortion by wealthy interests of the democratic process. It may be that it could have gone about it in a different way, but is the court to be the judge of that, faced as it is with wide and highly authoritative support for the Parliamentary scheme?

78. It may be, as Mr Fordham urged, that the argument in favour of the prohibition based on the power of the air waves has to be set against the importance of the loss to would-be political advertisers of such powerful means of communication. However, the Strasbourg Court in *Murphy*, while expressly acknowledging the particular power of the broadcasting media, was not deterred, for the reasons it gave, from depriving the applicant of access to it in that case. It is plain that such a prohibition - in this case, of political advertising - should not be considered on its own, but in the general scheme of control of broadcasting of which it is part and in the setting in which it is to be operated. First, given the absence of any corresponding restriction on non-broadcasting political advertising, there were and are a number of much used and politically effective alternatives available in the print media, in television and radio news and other discussion programmes and, increasingly, through the burgeoning use of internet and other modern technologies. Secondly, the advertising ban is complemented and relaxed by the provision of a controlled entitlement to access to the airwaves by political parties at election and other times through party election and political broadcasts. It may not meet all non-party political groups' aspirations with resources to promote them. But, as a matter of practicability, it is understandable that Parliament should consider that a limitless system of controlled access to all bodies or *individuals* (for the prohibition includes, in section 321(2)(b), political advertisements by an individual) along the same lines could not be justified.

79. As to Mr Fordham's second and main complaint, the extension of the prohibition beyond party political advertisements and outside election periods to what he described as "law/policy" and "social advocacy" matters, there are, it seems to me, two "knock-out" arguments. The first is that the boundary between party political matters and other matters of public importance and controversy cannot be clearly identified, as Parliament clearly recognised in compiling the overlapping series of examples in section 321(3) of the 2003 Act making up its inclusive definition of "a body whose objects are wholly or mainly of a political nature" and of "political ends". To have attempted to limit the prohibition by a more 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. Moreover, it 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.

80. But perhaps more importantly, it would not have been a principled or logical distinction to limit the prohibition to political parties over election periods. Whilst their input at such critical times for democracy is at its most intense and whilst the controlled use of the broadcasting media at such time may be more powerful and pervasive than other forms, uncontrolled and regular access to them at all other times for the purpose of political advertising is likely, in its cumulative effect, to have at least as powerful and enduring influence on the electorate on whatever broad or narrow political issues to which it is directed. If abused by wealthy proponents of certain issues, it would have as least as great a potential for distorting the democratic process as no control at all. As Mr Pannick pointed out, groups that are not political parties, but which have avowedly political aims may be capable of spending large sums of money on political advertising on television and radio outside, as well as within, electoral periods, on important questions, for example abortion, climate change, homosexual marriage, immigration, or EU membership or terms of membership.

81. Accordingly, I have come to the view that Parliament in the context of the over-all scheme of the 2003 Act for control of the content and nature of political broadcasting, acted within the ambit of the discretionary judgment available to it in introducing and maintaining the prohibition on political advertising in sections 319(2)(g) and 321(2) and (3), and that there is no basis for granting the declaration of incompatibility sought by ADI.

Mr Justice Ousley:
The framework for the decision

82. I gratefully adopt Auld LJ's account of the factual and legislative background.

83. The sole issue in this case is the compatibility of s321 Communications Act 2003 with Article 10 ECHR. There is no scope for the section to be interpreted so as to make it compatible, if the Claimant is right that it is otherwise incompatible. There are two reasons for this: first, the language of the Act is too clear and represents the deliberate policy choice made by Parliament to impose a ban on broadcast advertising in as wide and all-embracing terms as possible; second, the possible terms of any replacement provisions are themselves capable of being politically controversial and of giving rise to complex distinctions and regulatory issues. Their compatibility with the ECHR may also be debatable if the present regime is itself incompatible with the Convention. Is a restriction by reference to election periods alone legitimate, or does the ECHR permit restriction by reference to the nature of the body - whether political party or so-called social advocacy group - or by reference to the nature of the advertisement, whether political or merely concerning a matter of public controversy? What form of regulation of access to the broadcasting medium, if any, is it then permissible for a regulatory body to impose?

84. Although no advertiser has a right to access the media in order to broadcast its message, it is agreed that the restriction in s321 engages Article 10(1). It is an

interference with the Claimant's rights to freedom of expression because the Claimant and the broadcaster, we assume, would be content to agree terms for broadcasting the advertisements, but for the statutory restrictions. It is not necessary for the Claimant to show that the restrictions are arbitrary or discriminatory in order to show an interference under Article 10(1). That test was only relevant in *R (ProLife Alliance) v BBC* [2004] 1 AC 185, because there the Claimant could impose himself upon the broadcaster through his entitlement to an election broadcast, and could not to be thwarted by an arbitrary or discriminatory refusal of access on grounds that would not be applicable to other election advertisers.

85. It is for the Respondent to show that this interference is justified, as being necessary for the protection of the rights of others. Although the nominal respondent is the government department which sponsored the legislation, the action at issue concerns the act of Parliament in passing legislation in the terms which give rise to this claim. The Government takes up the cudgels on its behalf, but that should not obscure the fact that the proof of the justification for the interference is not confined to the specific evidence which the Government itself may put forward in this action. The experience, expertise and judgment of Parliament expressed in the legislation can demonstrate the necessary justification.

86. The protection of the rights of others is a concept sufficiently broad to cover the factors invoked here as justification for the ban: preventing disproportionate access to the broadcast media by those with the greatest ability and willingness to pay, thereby skewing the framework for political and other public debate, and damaging the actual or perceived impartiality of the broadcast media. At root, it is a restriction aimed at supporting the democratic process, through controlling the discriminatory advantage which groups, more able or willing to pay for broadcast advertisements, might enjoy in making their views seen, heard and influential. It is not a specific content or taste objection, nor does it relate to the possible intrusiveness or divisiveness of political advertising in the home during an otherwise uncontentious programme.

87. It is insufficient for the proffered justification merely to be a view which Parliament could reasonably take. The interference to protect the rights of others has to be "necessary" in a democratic society. The ECtHR cases on Article 10 refer to the need to show a "high level" of justification for an interference with political expression, to a "pressing social need" and to a narrow margin of appreciation for the state when freedom of political expression is at issue. However, most of those cases relate to criminal libel, (*Lingens v Austria* (1986) 8 EHRR 407), conviction for broadcasting someone else's racist views, (*Jersild v Denmark* [1994] 19 EHRR 1), the prohibitive costs of defending libel actions, (*McLibel, Steel and Morris v UK* ECHR App. 68416/01 15 February 2005) and to a complete ban on a professional explaining in a news interview what new medical techniques might be available, on the grounds that the provision of such information constituted forbidden professional advertising (*Stambuk v Germany* App 37928/97 17th October 2002). Those cases therefore concern a ban or a kindred level of restriction on the public expression of the view in question or a penalty for expressing it, whatever the medium.

88. However such language can also be found in *VGT v Switzerland* (2002) 34 EHRR 321, which did not have so profound an effect, as it concerned only broadcast advertising. The applicability of that language here may depend on the basis of the decision, and whether it was laying down broadly expressed but rigid principles

within which national legislatures could act or whether it was reaching a fact sensitive, case specific decision only.

The justification for the ban

89. The rationale for the provision at issue is that the broadcast media are particularly pervasive and potent, and that were it permissible to use the broadcast media to advertise political views or views on issues of public controversy, wealthier groups or parties would use it to dominate the terms of public debate, or to skew the framework for influencing political decision-making, and would harm or destroy in the process the reputation of the broadcast media for policy impartiality. The Claimant takes issue with all of these points or says that they can be catered for in other ways. In particular, it contends that the political sensitivities associated with election campaigns can be catered for by using restrictions on expenditure, the election time frame, and the provision for election broadcasts to prevent any group having undue access to broadcast media at that especially sensitive time. Indeed, it points to such restrictions, e.g. in Canada, as showing that the concerns which underlie this legislation can be met to a significant extent without a ban as extensive as exists in s321. Although Animal Defenders International's case, with its two supporters Amnesty International and RSPCA, was related to its own area of concern i.e. social advocacy as it was called, much of its argument led to the conclusion that the only restriction compatible with the ECHR related to election campaigns.

90. On those issues, I take the view that it is not really a matter of serious debate but that the broadcast media is more pervasive and potent than any other form of media. That is why the Claimant and others wish to use it and are not content with the availability to them without restriction of the print media, billboards, leaflets, cinema and the internet (except where that is indirectly subject to the ban on advertising in the broadcast media). That is also why there is acceptance of the legitimacy of restrictions on broadcast advertisements by political parties at election time. It is easy to see what makes for the pervasiveness and potency: TV is the most readily available and used single media in homes in the UK, although broadcasts are also shown in public places; the choice of watching or listening is not affected by a preference for the editorial or journalistic line taken by the newspaper of choice; radio or TV advertisements cannot so readily be passed over or ignored during a programme. The impact of the moving image with accompanying text or music and the spoken word is only otherwise available in the cinema or internet. The authorities which we have been shown, whether *ProLife*, *Murphy v Ireland* (2004) 38 EHRR 212 or other Commonwealth cases, all recognise that same effect.

91. It is perfectly clear that the millions of pounds spent on broadcast commercial advertisements are spent for their reach and impact on the viewer and listener and not because there are equivalents in other media which lack the space to accommodate them. There is an unresolved debate about whether or not television advertising is more expensive than other media. It is sufficient to note that the tariff for an advertisement, in addition to production costs, will vary from channel to channel, depending on its reach, time of day, programme and so on. It does not seem to me to matter quite how expensive such advertisements are. They have an advantage which advertisers and broadcasters are aware of and will pay quite large sums of money for, sums which will be beyond the reach or regular reach of many groups who wish to participate in public debate.

92. There is therefore a proper distinction to be drawn between broadcast and non-broadcast media, and the ability of wealthier groups to exercise influence through other media constitutes no answer to the importance of that distinction to the justification for the total prohibition.

93. I am prepared to grant leave for the Claimant to adduce the evidence of its expert and, for the purposes of understanding what he says, the report of the Department of Culture, Media and Sport expert, noting that the DCMS does not rely on his report at all. However, there is nothing to suggest that the broadcast media are not the most pervasive, and the experts' analysis of potency is misplaced, relying on studies which compare the effect, principally on memory and recall, of the same message being provided in televisual and in print form. They do not analyse the effect of advertising on those to whom the television or radio is the only or main source of information. I found them of almost no assistance. In that respect I agree with the assessment by the DCMS of their value.

94. I turn from pervasiveness and potency to consider the purpose of a prohibition, on political/social advocacy advertising outside election periods. There is a general consensus among the various bodies which have examined the issue that there should be a ban on political advertising at election time; see for example the Neill Committee and the Electoral Commission. The reason is that wealthier parties, or wealthier groups which support a plank in a party's campaign, could purchase influence, through these most pervasive and potent media, over the terms of political debate and election results. Mr. Michael Fordham, for the Claimant, did not take issue with that. I do not see it as being an issue therefore but that there is a pressing need to protect the rights of others by avoiding undue dominance of the political debate by wealthier groups and that that justifies a ban on broadcast media advertising during election campaigns. What is significant about the need for such a ban during an election period is that the impact and influence of broadcast advertising on political and publicly controversial matters is acknowledged inevitably, albeit implicitly; broadcast advertising can create a financially based advantage for wealthier groups in the political process.

95. The Claimant's point that any ban should be confined to the period of an election campaign, is no more than one of limited degree and not one of principle. The period of the election campaign may represent a readily definable cut off point for any advertising which a lifting of the current ban might permit. There is an element of degree in the intensity of political discussion and in the immediacy of the electoral process.

96. However, the potential for that purchased influence to have a real impact on the terms of political and public debate and on the democratic process outside an election period is equally obvious. The power and pervasiveness of the broadcast media is always present and politics, policy making, the legislative process, and the way in which candidates are selected continue throughout the period between elections. Very contentious issues may arise; they are not left simply for a judgment at the next election. Purchased influence could be sought so as to affect the promotion of legislation in the first place, and its progress or priority. Such political or social advocacy advertising may affect policy decisions, including decisions on defence or foreign policy. Indeed, one or more bodies may have a very strong view as to what should or should not be done and may seek to promote it, in circumstances where no

other group has a directly opposite viewpoint. Such advertising outside an election period could also affect the outcome of elections, for one point which Professor Gunter, the Claimant's expert, recognises and it would be obvious to any politician or voter, is that what happens outside the election campaign, the perception built up over the years between elections, has a very powerful influence on the way in which votes are cast or left unused. It might even affect whether an election is called.

97. The next question is whether, as Mr. Fordham contended, even if part of the restrictions could be sustained by reference to political groups or parties outside election time, they could also be sustained for social advocacy advertising or groups such as ADI, AI or RSPCA. Should a line be drawn so as to permit advertising by such bodies? It is my view that the distinctions upon which Mr. Fordham seeks to rely are largely illusory, in this context. There is a real danger in sub-dividing the issues as Mr. Fordham was inclined to do, into discrete compartments which in reality do not exist so neatly.

98. There is no sensible distinction to be drawn between political parties and other groups which have discernibly political ends which may favour a party or none. It may be easier to identify registered parties but that would occasion splinter or supporter groups and much that was artificial. It would be artificial for such a group to be free from restriction while the beneficiary or target of their campaign was restricted. No sensible distinction can be drawn, for example, between a party which campaigns exclusively against membership of the Euro or for a referendum on the subject, and a support group which campaigns in other ways to the same end.

99. Distinctions which can be drawn between political parties and social advocacy groups are not readily defined; and the more blurred the line, the greater the artificiality of the inevitable distinctions and the greater the scope for perceived or actual unfairness and partiality of access. It is inherent in social advocacy groups' aims that they seek to change the law or policy or at least the way in which people behave on issues of public controversy.

100. I instance those who were strongly opposed to UK membership of the Euro; those who supported the ban on hunting with dogs with donations to one party; those who regard abortion or civil partnerships as necessary rights or as sins; those who take issue with counter-terror laws, as does Amnesty International, who meet no organised non-governmental counterpart; those who protest against the war in Iraq who likewise meet no counterpart but whose votes can redound for one party or a specific politician; interest groups who may seek to identify the religious affiliations or beliefs of politicians as a basis for their non-selection as candidates. I can see that those who support or reject the attitudes of one or other participant in the recent conflict between Israel and others could be well enough funded to pursue a campaign on television. Those who campaign for an end to what they see as abuses of animals, whether in research, circuses, sport or clothing and those who take a different view may promote their views as seeking legislative change or as alterations to public attitudes. They may argue that the MPs who support their legislative aim or policies should be returned at the next election or de-selected if they do not; they may simply invite public debate and commercial boycotts.

101. This is not to say that those are not legitimate political activities, but it shows that there is no sensible distinction in practice which can be drawn between one so-called political party or group and another so-called social advocacy group in this context.

102. I regard the restriction in relation to the body promoting the advertisement as simply a reflection of the legislative aim. It merely prevents refined argument about the true nature of the advertisement, when in reality it is difficult to imagine that a social advocacy group would have an advertisement which did not seek to promote its views directly, or indirectly through, for example, selling its products or raising awareness of its existence. Besides, that restriction scarcely raises an Article 10 issue unless its effect is a restriction on the expression of political opinion. The presence of that restriction simply reinforces the aim that there should be no political advertising by anyone through a back door or through debatable interpretations of a statutory provision.

103. The ECtHR decision in *VGT* could be seen as permitting a restriction based on the size, wealth or responsibility of the group, or its inability otherwise to reach all those whom it wished to reach. But it is difficult to see how that could permit sensible lines to be drawn. Any legislative structure would be open to abuse through splintering and multitudinous similar interest groups. It is also difficult to see what principle underlies an outcome permitting access only to those who have enough to advertise, but not so much as to be over wealthy. I cannot see why under Article 10 those who have money should be denied access to the media accessed by their opponents- poorer but not so poor as to be unable to afford access. Mr. Fordham submitted that ADI, AI and RSPCA were "responsible" bodies. No doubt they are, within the wide scope of that word; but that merely illustrates the problem of drawing a line on the basis of the attributes of an individual group short of, say, a proscribed terrorist organisation.

104. 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.

105. The legislative framework for broadcasting aims to ensure impartiality whether by the BBC or by commercial broadcasters. The legitimacy of that as an aim was not at issue. I consider that there would be a very different ethos with political and social advertising. Of course, there could readily be a differentiation between such advertising and programming, subject to issues of product placement. It might be possible to prohibit the re-broadcasting on a political or social advocacy advertisement of matter previously broadcast on a current affairs or news programme in order to reduce the potential for a misalliance in the minds of viewers. It might be possible to control the timing of such advertisements so that they did not immediately follow current affairs programmes. But the broadcaster would be faced with very difficult decisions as to how, through its obligation of impartiality, to deal with a body which was dominating its political advertising schedules and which was answering issues raised in current affairs programmes with advertisements of its own. It is inherent in many issues that those who seek to change the current situation have enthusiastic adherents who meet no counterparts organised to support the status quo, however much there may be arguments for doing so.

106. For my part, I see a real problem in terms of impartiality, even if the timing of broadcasts of political advertisement is controlled in relation to current affairs

programmes, and product placement is controlled. There is a statutory obligation not to discriminate unduly between those wishing to advertise. That might enable someone who wished to reply to advertising by advertising to do so, and might prevent commercial or other threats influencing access to the media for political or social advocacy advertising. But it is far from easy to see that that or any other provision could readily cope with access for different bodies all urging the same course of action; Middle East politics is an obvious area for many such different bodies to exist. And there might be only a handful of bodies who took the opposite view but who were not limited in funds. There might well be other policy areas in which there was no organised body other than the Government contending for the retention of that which others wished to change.

107. I see this nonetheless as a lesser consequential issue; it is rather an aspect of the other issues which reinforces the arguments for the level playing field which the ban in question ensures in the broadcast media.

108. The justification for the view embodied in the legislation is clearly made out. Does it however demonstrate a pressing social need, to a high level, for this legislation?

109. I take the view that it does. As I have said, at root the prohibition in s321 is aimed at supporting the democratic process in a wide sense, supporting a fair framework for political and public debate and avoiding an undesirable advantage being obtained by those able and willing to pay for advertisements in the most potent and pervasive media. The prohibition thus achieves a very important aim for a democracy.

110. No lesser degree of restriction adequately achieves that aim, by time or group. The democratic process is not confined to election time but extends to all those decisions which Government or the legislature may have to make between times. The existence of parties and groups which would have sought to influence debate through their economic power and willingness to spend money on broadcast advertising is quite clear. The potentially malign effect of over-mighty groups spending in a way which alters the terms of public debate, or of policies, or which alters the votes of legislators and influences electoral outcomes to the disadvantage of those less well-endowed or well-organised is obvious, and at work not only at election times. The power of the broadcast media, pervasive and potent, in that respect is not readily deniable.

111. For the reasons which I have already given, no sound or practicable distinction can be drawn between political parties or groups and social advocacy groups, or between groups by reference to their individual wealth or worth. An illustration of the difficulties is afforded by the decision in *Murphy*. Religious advertising was banned in Ireland and the ban was upheld because of religious sensitivities in Ireland. This related at least in part to the position in Northern Ireland. (A wider margin of appreciation was thought necessary in relation to controls on freedom of religious expression. This contrasts with the narrow margin in *VGT*, though it is not obvious that such a distinction is appropriate.) The impact of religion on politics or vice versa is part of what might be thought to make it so very sensitive. Many issues of controversy in the UK, from abortion to civil partnerships, some involving ethnic minorities, draw on hotly contested religious views and their impact on politics, here or abroad where co-religionists live. For some the distinction between religious and political thought is itself illusory. Freedom of expression about religious matters can itself be a matter of hot political controversy. This would be an exceptionally sensitive

area to define and control, and it is an area in which a wider margin of appreciation or area of discretion is to be accorded to Parliament. A complete ban properly avoids some very arbitrary decisions.

112. The limited nature of the restrictions themselves makes it easier to accord priority to the other rights which are to be protected. There is no restriction on the use of other media, including cinema and parts of the internet, the print media and posters, to convey the groups' messages. There is no restriction at all on the use of broadcast media to promote the charitable interests which some groups have through separate but related bodies. There is no restriction on the participation of the groups in current affairs programmes and their activities are often devised so as to be broadcast news items. The restriction concerns one section of the media, rather than as is the case with so many other restrictions which have been before the ECtHR, a total or practically very substantial restriction on any expression of a viewpoint.

113. There are competing interests at stake here which a legislature is entitled and obliged to balance, taking account of the way in which it can anticipate that groups and parties would use the greater access to the broadcast media which the Claimant seeks for itself and others. Part of that also reflects the impartiality obligations and inevitably limited, though increasing, range of channels licensed to broadcast.

114. In this regard, it is clear that Parliament has expressed a considered view, having grappled with the human rights implications of s321. I give great weight to its view thus expressed as evidencing the need for this restriction. This is not an executive act, not secondary legislation but primary legislation which was passed without member dissent by Parliament. It was aware of the opposition on human rights grounds of Professor Barendt, and of the reservations, based on *VGT*, expressed by the Joint Committee on Human Rights and the Electoral Commission.

115. 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 MPs 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.

116. I see these factors as giving substantial evidential weight to the view of a democratically elected body in deciding what restriction was shown to be necessary in the public interest. In substance, another way of putting that is to say that the subject matter warrants a considerable discretionary area of judgment being accorded to Parliament.

117. 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 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.

The decision in *VGT*

118. Mr. Fordham naturally relies on the decision in *VGT*. But I do not see how he can do so. The fundamental criticism which I have of *VGT* is that it is not possible to discern the basis of the decision. Mr. Fordham relies on it as holding that a total ban on social advocacy and political advertising is of itself incompatible with Article 10 and that the limited restriction which it envisages obliquely is, implicitly, related to election periods alone; see para.74. He may be right in reading it that way, and the particular circumstances of the thwarted advertiser are no more than illustrative of the wider proposition. Lord Hoffmann, however in *ProLife* (para.64) appears to have thought that the crucial reasoning concerned the particular circumstances of the would-be advertiser. Lord Walker in para.128 thought that it concerned the particular monopolies enjoyed by the single public and single commercial television corporations in Switzerland. These latter two views meant that the refusal of permission to advertise in either the particular case of the advertiser or the particular country was a breach of Article 10 rights; no more general principle was at issue. Those are three very different approaches. Although Mr. Fordham may be right as to what the Court meant, he cannot rely on it in the way he has to, in the light of what the two members of the House of Lords who expressed a view thought *VGT* meant. It simply is not a case which can be applied to other cases. The narrow margin of appreciation accorded in *VGT* befits more a fact specific decision than a case laying down broadly expressed but quite rigid principles. It is more difficult to see that narrow margin as appropriate for the difficult issue of how to frame legislation of general application, as *Murphy* appears to recognize.

119. If the reasoning is as broad as Mr. Fordham suggests, there is force in the criticisms made by Mr. David Pannick QC, for the DCMS, that it refers to the arguments on pervasiveness of television and to its potency, a feature recognised in *Jersild*, without ever explaining what significance that has for its reasoning; it ignores the significance of the availability of other media for the advertiser to make its point, acknowledged as relevant in *Murphy*; it ignores the absence of consensus among states as to how advertising of this sort between elections should be dealt with. Indeed, there is a complete lack of consideration of the position in other countries. This could suggest that it was concerned only with the particular position in Switzerland. I also take the view that it ignores the ability of the legislature on an issue of this sort to weigh the issues, even with a limited margin of appreciation. If it intended to state so broad and important a general proposition as that for which Mr. Fordham contends, it is surprising that the reasoning is not so much sparse as missing. The arguments are stated and followed simply by a conclusion.

120. If the reasoning is, as so often with the ECtHR, fact sensitive, then no general conclusion helpful to Mr. Fordham can seriously be drawn. All the criticisms above apply. But additionally the Court has not dealt with a fundamental difficulty in its approach. If it intends to say that Article 10 is breached by a restriction depending on the nature of the advertiser, its small scale and lack of resources or other individual factors but not for others lacking those special features, it is neither principled nor practical. It accepts that there can be a ban for political and social advertising for the

reasons which have persuaded me. But it creates exceptions for which no obvious measures are available or workable. That issue is simply not addressed.

121. Yet for a legislature, contemplating what restrictions are necessary, how they might be framed so as to avoid arbitrary distinctions and decisions in practice, or decisions turning on the individual group, case or advertisement, consistent, rational, practicable rules are necessary. If *VGT* decided that legislation could only provide for each case to be dealt with on "merit" e.g. lack of wealth, reach or other opportunities, legitimate controls would be reduced to chaos. The very difficulty of drawing sensible lines supports the judgment that s321 Communications Act represents the least discriminatory and a very practicable approach to the broadcasting of political/social advocacy advertisements.

122. I find no assistance in *Murphy* in resolving what this case decided. The problems within its reasoning are ignored, and no explanation of what it decided is provided. If it adopted the decision, it is unclear what basis for the decision it adopted. *Murphy* accepts the relevance of alternative media. It acknowledges the need to regulate an advertising system on a clear and consistent basis, rather than on an individual basis. *VGT* ignored those two factors. It is one of those ECtHR decisions which suffers from unclear or unsound reasoning which the UK Courts should not follow; *Jones v Saudi Arabia*, [2006] UKHL 26, [2006] 2 WLR 1424, para. 18. It is a wholly inadequate basis for a declaration of incompatibility.

Other countries

123. We were provided with a certain amount of material about how some other Council of Europe states deal with advertising of the sort at issue here. It was not comprehensive in terms of the countries covered or the evidence as to what those countries which were covered actually did. We had some Commonwealth material too. I did not find this of any great use save that it was clear that there was a general consensus that election periods justified advertising bans, and that there was no clear consensus that a ban of the sort at issue here was necessary outside that period. I also note that at least in Denmark's case, the legislation has been affected by its view of the effect of *VGT*, which with some misgivings it has concluded meant that a general ban could not be sustained. Other legislatures varied their restrictions from time to time.

124. It is my view that various states have decided what restrictions they think are necessary for the political sensitivities which they face and the broadcasting systems which they have. Their different broadcasting traditions can be very relevant. The absence of consensus may reflect those differing country conditions which can properly be part of an individual legislature's judgment as to whether or not this degree of ban is necessary in its democratic society.

Conclusion

125. In summary, the necessity for restrictions on political/social advocacy broadcast advertising outside elections periods has been convincingly shown. It is necessary to protect the rights of others through preventing undue access to the broadcast media based on willingness and ability to pay. At root it supports the soundness of the framework for democratic public debate. The broadcast media remain pervasive and potent throughout the period between elections. The suggested distinction between

political parties or groupings and social advocacy groups does not reflect the true political impact of all such advertising. The completeness of the prohibition avoids arbitrary and anomalous distinctions in practice. The ECtHR decision in *VGT* offers no useful guidance. Whether the decision of Parliament in enacting s321 of the Communications Act 2003 is seen as strong evidence for the necessity for the prohibition in an area of its primary experience and expertise or as a judgment in an area where a wider margin of discretion should be accorded to it, its decision should be respected by the Courts. It is not incompatible with the ECHR.

126. I too would dismiss the claim.