HOUSE OF LORDS

SESSION 2002-03
[2003] UKHL 23
on appeal from: [2002] EWCA Civ 297

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina v. British Broadcasting Corporation (Appellants)

ex parte Prolife Alliance (Respondents)

JUDGMENT: 10 APRIL 2003

REASONS: 15 MAY 2003

The Appellate Committee comprised:

Lord Nicholls of Birkenhead

Lord Hoffmann

Lord Millett

Lord Scott of Foscote

Lord Walker of Gestingthorpe

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. Television broadcasters must ensure, so far as they can, that their programmes contain nothing likely to be offensive to public feeling. This 'offensive material restriction', as it may be called, is a statutory obligation placed on the independent broadcasters by section 6(1)(a) of the Broadcasting Act 1990. The BBC is subject to a comparable, non-statutory obligation under paragraph 5.1(d) of its agreement with the Secretary of State for National Heritage. This appeal concerns the operation of the offensive material restriction in the context of a party election broadcast. It is common ground that nothing in the present case turns on the fact that the obligation on independent television companies is statutory in form, whereas the obligation on the BBC is contained in an agreement.

2. The factual and regulatory background to the case is set out fully in the speeches of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe. I need not repeat it. Suffice for me to say, ProLife Alliance is a political party registered under the Political Parties, Elections and Referendums Act 2000. It campaigns for 'absolute respect for innocent human life from fertilisation until natural death.' Among its principal policies is the prohibition of abortion. In May 2001 ProLife Alliance fielded enough candidates for the June 2001 general election to entitle it to make one party election broadcast in Wales. The transmission was scheduled for a little under five minutes.

3. Early in May 2001 ProLife Alliance submitted a tape of its proposed broadcast to BBC, ITV, Channel 4 and Channel 5. The major part of the proposed programme was devoted to explaining the processes involved in different forms of abortion, with prolonged and graphic images of the product of suction abortion: aborted foetuses in a mangled and mutilated state, tiny limbs, a separated head, and the like. Unquestionably the pictures are deeply disturbing. Unquestionably many people would find them distressing, even harrowing. Representatives of each broadcaster refused to screen these pictures as part of the proposed broadcast. The broadcasters did not then, or at any stage, raise any objection regarding the proposed soundtrack. ProLife Alliance was not prevented from saying whatever it wished about abortion. The objection related solely to still and moving pictures of aborted foetuses.

4. On 22 May 2001 ProLife Alliance commenced judicial review proceedings against the BBC. At an expedited hearing, on 24 May Scott Baker J refused permission to proceed with the challenge. ProLife Alliance then submitted two further versions of the proposed broadcast to BBC, ITV and S4C. These are the broadcasters which split transmission of their services between the different parts of the United Kingdom. In the two revised versions the images of the foetuses were progressively more blurred. Neither was acceptable. On 2 June a fourth version was submitted and unanimously approved. This version replaced the offending pictures with a blank screen bearing the word 'censored'. The blank screen was accompanied by a sound track describing the images shown on the banned pictures. This version was broadcast in Wales on the evening of the same day. Five days later, on 7 June, the general election took place.

5. In January 2002 an appeal by ProLife Alliance was heard by the Court of Appeal, comprising Simon Brown, Laws and Jonathan Parker LJJ. The court granted permission to proceed with the judicial review challenge. The court treated the hearing in the Court of Appeal as the substantive hearing, and allowed the appeal: see [2002] 3 WLR 1080. The court made a declaration that the BBC's refusal to broadcast ProLife Alliance's party election broadcast was unlawful.

6. Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts. The courts, as independent and impartial bodies, are charged with a vital supervisory role. Under the Human Rights Act 1998 they must decide whether legislation, and the conduct of public authorities, are compatible with Convention rights and fundamental freedoms. Where there is incompatibility the courts must grant appropriate remedial relief.

7. In this country access to television by political parties remains very limited. Independent broadcasters are subject to a statutory prohibition against screening advertisements inserted by bodies whose objects are of a political nature. The BBC is prohibited from accepting payment in return for broadcasting. Party political broadcasts and party election broadcasts, transmitted free, are an exception. These 'party broadcasts' are the only occasions when political parties have access to television for programmes they themselves produce. In today's conditions, therefore, when television is such a powerful and intrusive medium of communication, party broadcasts are of considerable importance to political parties and to the democratic process.

8. The foundation of ProLife Alliance's case is article 10 of the European Convention on Human Rights. 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 grounds. Nor should access be granted subject to discriminatory, arbitrary or unreasonable conditions. A restriction on the content of a programme, produced by a political party to promote its stated aims, must be justified. Otherwise it will not be acceptable. This is especially so where, as here, the restriction operates by way of prior restraint. On its face prior restraint is seriously inimical to freedom of political communication.

9. That is the starting point in this case. In proceeding from there it is important to distinguish between two different questions. Once this distinction is kept in mind the outcome of this case is straightforward. The first question is whether the content of party broadcasts should be subject to the same restriction on offensive material as other programmes. The second question is whether, assuming they should, the broadcasters applied the right standard in the present case.

10. It is only the second of these two questions which is in issue before your Lordships. I express no view on whether, in the context of a party broadcast, a challenge to the lawfulness of the statutory offensive material restriction would succeed. For present purposes what matters is that before your Lordships' House

ProLife Alliance accepted, no doubt for good reasons, that the offensive material restriction is not in itself an infringement of Pro-Life Alliance's convention right under article 10. The appeal proceeded on this footing. The only issue before the House is the second, narrower question. The question is this: should the court, in the exercise of its supervisory role, interfere with the broadcasters' decisions that the offensive material restriction precluded them from transmitting the programme proposed by ProLife Alliance?

11. On this ProLife Alliance's claim can be summarised as follows. A central part of its campaign is that if people only knew what abortion actually involves, and could see the reality for themselves, they would think again about the desirability of abortion. The disturbing nature of the pictures of mangled foetuses is a fundamental part of ProLife Alliance's message. Conveying the message without the visual images significantly diminishes the impact of the message. A producer of a party broadcast can be expected to exercise self-control over offensiveness, lest the broadcast alienate viewers whose interest and support the party is seeking. Here, it was common ground that the pictures in the proposed programme were not fictitious or reconstructed or 'sensationalised'. Nor was the use of these images 'gratuitous', in the sense of being unnecessary. The pictures were of real cases. In deciding that, even so, the pictures should not be transmitted the broadcasters must have misdirected themselves. They must have attached insufficient importance to the context that this was a party election broadcast. Any risk of distress could have been safeguarded by transmitting the programme after 10 pm with a suitably explicit warning at the beginning of the programme.

12. In my view, even on the basis of the most searching scrutiny, ProLife Alliance has not made out a case for interfering with the broadcasters' decisions. Clearly the context in which material is transmitted can play a major part in deciding whether transmission will breach the offensive material restriction. From time to time harrowing scenes are screened as part of news programmes or documentaries or other suitable programmes. Doubtless party broadcasts fall on the side of the somewhat indistinct line where a point being made may be expected to be illustrated with appropriate pictures, unpleasant as well as pleasant. For instance, a broadcast on behalf of a party opposed to war may be expected to illustrate the horrors of war with a picture of a gruesome war scene. The same may be true of a programme produced by those opposed to capital punishment. That could be expected to include a picture of an execution. But, even in such broadcasts, the extent to which distressing scenes may be shown must be strictly limited, so long as the broadcasters remain subject to their existing obligation not to transmit offensive material. Parliament has imposed this restriction on broadcasters and has chosen to apply this restriction as much to party broadcasts as to other programmes. The broadcasters' duty is to do their best to comply with this restriction, loose and imprecise though it may be and involving though it does a significantly subjective element of assessment.

13. The present case concerns a broadcast on behalf of a party opposed to abortion. Such a programme can be expected to be illustrated, to a strictly limited extent, by disturbing pictures of an abortion. But the ProLife Alliance tapes went much further. In its decision letter dated 17 May 2001 the BBC noted that some images of aborted foetuses could be acceptable depending on the context: 'what is unacceptable is the cumulative effect of several minutes primarily devoted to such images'. None of the

broadcasters regarded the case as at the margin. Each regarded this as a 'clear case in which it would plainly be a breach of our obligations to transmit this broadcast.' In reaching their decisions the broadcasters stated they had 'taken into account the importance of the images to the political campaign of the ProLife Alliance.' In my view the broadcasters' application of the statutory criteria cannot be faulted. There is nothing, either in their reasoning or in their overall decisions, to suggest they applied an inappropriate standard when assessing whether transmission of the pictures in question would be likely to be offensive to public feeling.

14. I respectfully consider that in reaching the contrary conclusion the Court of Appeal fell into error in not observing the distinction between the two questions mentioned above, one of which was before the court and the other of which was not. Laws LJ said the 'real issue' the court had to decide was 'whether those considerations of taste and offensiveness, which moved the broadcasters, constituted a legal justification for the act of censorship involved in banning the claimant's proposed PEB'. The court's constitutional duty, he said, amounted to a duty 'to decide for itself whether this censorship was justified'. The letter of 17 May 2001 gave 'no recognition of the critical truth, the legal principle, that considerations of taste and decency cannot prevail over free speech by a political party at election time save wholly exceptionally': see [2002] 3 WLR 1080, 1090, 1097, 1099, paras 22, 37 and 44. Similarly, Simon Brown LJ said the critical issue was whether there was a pressing social need to ban this broadcast: p 1102, para 57.

15. The flaw in this broad approach is that it amounts to re-writing, in the context of party broadcasts, the content of the offensive material restriction imposed by Parliament on broadcasters. It means that an avowed challenge to the broadcasters' decisions became a challenge to the appropriateness of imposing the offensive material restriction on party broadcasts. As already stated, this was not an issue in these proceedings. Had it been, and had a declaration of incompatibility been sought, the appropriate government minister would need to have been given notice and, no doubt, joined as a party to the proceedings. Then the wide-ranging review of the authorities undertaken by the Court of Appeal would have been called for.

16. As it was, the Court of Appeal in effect carried out its own balancing exercise between the requirements of freedom of political speech and the protection of the public from being unduly distressed in their own homes. That was not a legitimate exercise for the courts in this case. Parliament has decided where the balance shall be held. The latter interest prevails over the former to the extent that the offensive material ban applies without distinction to all television programmes, including party broadcasts. In the absence of a successful claim that the offensive material restriction is not compatible with the Convention rights of ProLife Alliance, it is not for the courts to find that broadcasters acted unlawfully when they did no more than give effect to the statutory and other obligations binding on them. Even in such a case the effect of section 6(2) of the Human Rights Act 1998 would have to be considered. I would allow this appeal. The broadcasters' decisions to refuse to transmit the original version, and the first and second revised versions, of Prolife Alliance's proposed broadcasts were lawful.

LORD HOFFMANN

My Lords,

The issue

17. The ProLife Alliance is a registered political party. Many people will know that it is opposed to abortion, euthanasia, embryo research and human cloning. Few will know anything else about it. It is a single-issue party.

18. In the 2001 general election the Alliance put up enough candidates in Wales to qualify for a party election broadcast. It submitted a tape to the broadcasting authorities. The Court of Appeal ([2002] 3 WLR 1080) said that it consisted mainly of "prolonged and deeply disturbing images" of aborted foetuses: "tiny limbs, bloodied and dismembered, a separated head, their human shape and form plainly recognisable" (Simon Brown LJ at p. 1103, Laws LJ at p. 1086). The broadcasting authorities unanimously refused to screen the broadcast on the ground that it contained material which would be offensive to public feeling. But the Court of Appeal has held in judicial review proceedings against one of the broadcasters, the BBC, that it acted unlawfully in rejecting it. The BBC appeals to your Lordships' House.

Programme standards

19. My Lords, the BBC rejected the tape on the ground that it infringed the standards of taste and decency with which all the programmes which it transmitted were required by law to comply. Before I explain the legal status of these standards, I must say something about their origins and rationale. The high standards of moral and religious rectitude enforced by Sir John Reith as first Director-General of the BBC (1922-1938) made external regulation unnecessary but after the BBC lost its monopoly of television broadcasting in 1955 the question of standards became more controversial. The *Committee on the Future of Broadcasting* (1974-1977), chaired by Lord Annan, (Cmnd. 6753) rejected the view that questions of taste and decency should be a matter of editorial discretion. It said (at para. 16.3): "Public opinion cannot be totally disregarded in the pursuit of liberty".

20. The main reason for singling out television and, to a lesser extent, radio for the imposition of standards of taste and decency is the intimate relationship which these media establish between the broadcaster and the viewer or listener in his home. Television in particular makes the viewer feel a participant in the events it depicts and acquainted with the people (real or fictitious) whom he regularly sees. The visual image brings home the reality which lies behind words.

21. The power of the medium is the reason why television and radio broadcasts have been required to conform to standards of taste and decency which, in the case of any other medium, would nowadays be thought to be an unwarranted restriction on freedom of expression. The enforcement of such standards is a familiar feature of the cultural life of this country. And this fact has given rise to public expectations. The Broadcasting Standards Commission puts the point with great clarity in paragraph 2 of its *Code on Standards*:

> "There is an implied contract between the viewer, the listener and the broadcaster about the terms of admission to the home. The most frequent reason for viewers or listeners finding a particular item offensive is that it flouts their expectation of that contract - expectations about what sort of material should be broadcast at a certain time of day, on a particular channel and within a certain type of programme, or indeed whether it should be broadcast at all."

22. A similar point about expectations was made by Stevens J. giving the opinion of the United States Supreme Court in *Federal Communications Commission v Pacifica Foundation* (1978) 438 US 726, 748 in a case about the use of obscene language on sound radio:

> "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder...Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offence by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."

The legislative framework.

23. All television broadcasters except the BBC operate under licences granted by the Independent Television Commission ("ITC"). When the Communications Bill now before Parliament comes into force, they will be licensed by the Office of Communications ("OFCOM"). The BBC operates under a Royal Charter and its regulation is therefore extra-statutory. But the standards of taste and decency applicable by the BBC and the other broadcasters are exactly the same and no one in these proceedings has suggested that the different regulatory systems make any difference.

(a) The independent broadcasters.

24. Section 6(1)(a) of the Broadcasting Act 1990 imposes upon the ITC a duty to do all it can to secure that every service which it licenses complies with a requirement that-

> "nothing is included in its programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling."

25. To give effect to this requirement, the ITC publishes a *Programme Code* (which is revised from time to time) and makes it a condition of every licence that the broadcaster must comply with the Code. Section 1 deals with, among other things, offence to good taste and decency.

(b) The BBC

26. The BBC's most recent Royal Charter, dated 1 May 1996, provides in clause 7(1)(b) that the Governors must satisfy themselves that all the activities of the Corporation are carried out in accordance with any agreement which may be made between the Corporation and the Secretary of State. The current agreement, dated 25 January 1996, provides in clause 5.1(d) that the Corporation shall do all it can to secure that all programmes which it broadcasts or transmits-

> "do not include anything which offends against good taste or decency or is likely to encourage or incite to crime or lead to disorder or to be offensive to public feeling."

27. To give effect to this requirement, the BBC publishes (and from time to time revises) *Producers' Guidelines* of which a section is entitled Taste and Decency.

(c) The Broadcasting Standards Commission

28. The Broadcasting Act 1996 set up the Broadcasting Standards Commission ("BSC"). It has a duty under section 108 to draw up a code giving guidance as to the portrayal of sex and violence and "standards of taste and decency for such programmes generally". The Code which it published in 1998 is still in force. It is the duty of each broadcasting or regulatory body (including the BBC), when drawing up any code relating to "standards and practice for programmes" to reflect the general effect of the BSC's code. The ITC *Programme Code* and the BBC *Producers' Guidelines* were revised to comply with this requirement.

29. The BSC also has a duty under section 110(2)(b) to consider and make findings on complaints of alleged failures on the part of any programme broadcast by the BBC or the independent companies) to "attain standards of taste and decency."

(d) The Communications Bill

30. The Communications Bill transfers to OFCOM the powers and duties of the BSC relating to programme standards. The proposed legislation on this subject goes into more detail than section 6(1)(a) of the 1990 Act. OFCOM is required by clause 309(1) to set such standards for the contents of programmes to be included in television and radio services as appears to them best calculated to secure "the standards objectives". These include

> "(2)(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;"

31. Clause 309(4) contains a list of matters to which OFCOM must have regard, so far as relevant, in setting standards. They are:

> "(a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description;

(b) the likely size and composition of the potential audience for programmes included in television and radio services generally, or in television and radio services of a particular description;
(c) the likely expectation of the audience as to the nature of a programme's content and the extent to which the nature of a programme's content can be brought to the attention of potential members of the audience;
(d) the likelihood of persons who are unaware of the nature of a programme's content being unintentionally exposed, by their own actions, to that content;
(e) the desirability of securing that the content of services identifies when there is a change affecting the nature of a service that is being watched or listened to and, in particular, a change that is relevant to the application of the standards set under this section; and
(f) the desirability of maintaining the independence of editorial control over programme content."

(e) Audience research

32. Clause 309(2)(f) of the Communications Bill makes explicit reference to "generally accepted standards". This is the way in which the notion of standards of taste and decency has always been interpreted. It is therefore necessary for both regulators and broadcasters to keep in touch with their audiences to discover what is likely to give offence. The BSC has power under section 122 of the 1996 Act to commission research into matters connected with, among other things, standards of taste and decency and from time to time publishes reports of surveys into public attitudes and expectations. These functions will be taken over by OFCOM. In addition, the broadcasters undertake their own surveys and researches and they are of course in the front line for complaints by members of the public.

Political and election broadcasts

33. The first party election broadcasts on sound radio took place during the general election campaign of 1924 and the first televised broadcasts in 1951. The initiative in arranging the broadcasts came from the BBC. Section 36 of the 1990 Act now provides that licences for certain descriptions of broadcasters must include "conditions requiring the licence holder to include party political broadcasts in the licensed service" and to observe "such rules with respect to party political broadcasts as the [ITC] may determine". In the case of the BBC there is at present no formal obligation to offer party political broadcasts ("PPBs") or party election broadcasts ("PEBs") but in practice the rules of allocation are agreed by all broadcasters. Section 11 of the Political Parties, Elections and Referendums Act 2000 has added a requirement that the ITC, before making any rules under section 36, and the BBC, in determining its policy with respect to party political broadcasts, shall have regard to any views expressed by the Electoral Commission.

34. Section 4 of the *Programme Code* contains the rules for PPBs and PEBs. PPBs are offered to the major parties in Great Britain (the Labour, Conservative and Liberal Democrat parties and, in Scotland and Wales respectively, the Scottish National Party and Plaid Cymru) at the time of key events in the political calendar such as the Queen's Speech, the Budget and the party conferences. PEBs are of course offered at the time of elections. In the 2001 general election, the major parties were each offered a separate series of PEBs in each of the four nations of the United Kingdom. A

smaller party could qualify for a PEB for transmission in the territory of any nation if it fielded candidates in at least one-sixth of its seats. This meant that a party could qualify if it put up 88 candidates in England, 12 in Scotland, 6 in Wales and 3 in Northern Ireland.

35. In a report published in 2003, the Electoral Commission considered whether there was a public interest in providing more opportunities for broadcasts by smaller parties. It concluded that there was not, and noted two concerns about the allocation of PEBs. First, it said in a Discussion Paper published in December 2001:

> "The effective raising of the threshold for smaller parties to qualify for PEBs, from 50 seats to one-sixth of contested seats, was made partly in order to deter organisations from fielding candidates so as to qualify for a PEB for their own publicity purposes rather than for genuine electoral purposes. It remains the case, however, that the estimated commercial value of the free airtime far exceeds the cost of lost candidate deposits in one sixth of seats. Should we be concerned by the possibility of this scenario? If so, what measures could be taken to provide additional disincentive?"

36. Secondly, in its Report and Recommendations, published in 2003, it said:

> "We are concerned that election broadcasts should inform electors' voting intentions. At the present time, and until such a time as transmission signals are far more fragmented and localised, most broadcasting media reach mass audiences. For independent candidates and for parties fielding candidates in a small number of constituencies, those constituencies would be only one very small part of the overall audience of a PPB. For the vast majority of viewers and listeners, therefore, there would be no opportunity to vote for that candidate or party and so the PPB would be irrelevant in terms of providing information to inform voting intentions."

Programme standards and PEBs

37. In requiring the application of standards of taste and decency, section 6(1)(a) of the 1990 Act makes no distinction between PEBs and other programmes. It applies to all programmes broadcast by a licensed service and section 202 defines "programme", in relation to any service, as including "any item included in that service". The agreement between the BBC and the Secretary of State similarly makes no distinction.

38. There is a provision in the Communications Bill (clause 311(7)(b)) which some have read as showing an intention to exclude PEBs from the standards of taste and decency. I do not propose to try to construe it; first, because it is not yet law and secondly because the Department of Culture, Media and Sport has written to the BBC to confirm that it is the government's intention that such standards should continue to apply to PPBs and PEBs and that the clause may be amended to make this clear.

39. Both the BBC and the independent broadcasters therefore accept that they remain responsible for compliance with standards of taste and decency by the PEBs which they transmit. Paragraph 4 of the BBC *Producers' Guidelines* says:

> "The content of party political broadcasts, party election broadcasts and Ministerial broadcasts (together with Opposition replies) is primarily a matter for the originating party or the government and therefore is not required to achieve impartiality. The BBC remains responsible for the broadcasts as publisher, however, and requires the parties to observe proper standards of legality, taste and decency."

40. Likewise, paragraph 4.2 of the *ITC Programme Code* says:

> "Editorial control of the contents of [PPBs and PEBs] normally rests with the originating political party. However, licensees are responsible to the ITC for ensuring that nothing transmitted breaches the *Programme Code*, notably the requirements on matters of offence to good taste and decency set out in Section 1...Licencees should issue parties with general guidelines on the acceptability of content...These guidelines, which are agreed between all relevant broadcasters, are designed to reconcile the editorial standards of the broadcaster, and audience expectations, with the freedom of political parties to convey their political messages."

41. The Guidelines issued by the broadcasters for the 2001 election said that PEBs had to comply with the ITC Programme Code and the BBC Producers' Guidelines relating to taste and decency and the codes concerning fairness and privacy "having regard to the political context of the broadcast". Accuracy, on the other hand, is entirely a matter for the political party making the broadcast.

The ProLife Alliance Broadcast

42. The 2001 general election was not the first time that the Alliance had produced a PEB which the broadcasters rejected. The same thing had happened in the 1997 election. On that occasion their application for leave to apply for judicial review was dismissed by Dyson J. By the time a renewed application was made to the Court of Appeal, the election was over and the Court of Appeal refused to entertain the application on the ground that it would serve no useful purpose. The Alliance then made a complaint to the European Court of Human Rights. I shall return to these proceedings later.

43. When it came to the 2001 election, therefore, both the Alliance and the BBC were aware that programme standards might be an issue. The Alliance submitted its tape on 1 May 2001. On 10 May the BBC's Chief Political Adviser, Mrs Anne Sloman, wrote to say that she had viewed the film together with representatives from ITV, Channel 4 and Channel 5 and that they all considered that the "shots of aborted foetuses and of mutilated foetuses" did not comply with the BBC Guidelines or the ITC Code.

44. The Alliance wrote on 13 May enclosing written submissions arguing its case. The BBC's decision was conveyed in a letter from the Litigation Department dated 17 May 2001, which included the following passages:

> "We can confirm that Anne Sloman's letter of 10 May represents the views of the BBC, ITV, Channel 4 and Channel 5. Having viewed the video, each

broadcaster individually came to the same conclusion that the broadcast would be offensive and so was not acceptable. We have met again to reconsider the matter in the light of your written submissions and we have again watched the video...

Some of the images are unacceptable in themselves because they are likely to be offensive to public feeling, in particular the images of aborted foetuses mostly in "a mangled and mutilated state"...

Some images of aborted foetuses could in principle be acceptable depending on the context in which they appear. What is unacceptable in your client's broadcast is the cumulative effect of several minutes primarily devoted to such images...

In reaching our conclusions, we have certainly taken into account the importance of the images to the political campaign of the ProLife Alliance. We have also proceeded on the basis that we should seek the minimum changes necessary to ensure compliance with the obligations of the BBC...

We have had regard to the guidelines on taste and decency, prevailing standards of taste and decency, broadcasters' criteria on the portrayal of violence, and public interest considerations, as well as all the other points made in your client's letter of 13 May and the accompanying written submissions. But none of these factors leads us to conclude other than that it would be wrong to broadcast these images which would be offensive to very large numbers of viewers. None of the broadcasters regarded this as a case at the margin. We all regard it is a clear case in which it would plainly be a breach of our obligations to transmit this broadcast.

We have considered whether (as you suggest in your written submissions) the images could be broadcast after 10 pm, with a warning for viewers. It is our judgment that the images are so offensive that it would not be appropriate to take that course in this case."

The application for judicial review

45. The Alliance applied for permission to apply for judicial review of the decision in the letter of 17 May. The application came before Scott Baker J. who dismissed it on 24 May. He considered whether the BBC had properly applied the standards of taste and decency which it was enjoined to apply by clause 5.1 of its agreement with the Secretary of State. What were generally accepted standards of taste and decency were matters on which untutored opinion could differ but the broadcasters were particularly experienced in making such decisions. They received feedback from the public about what they broadcast. He referred to the right of free speech in article 10.1 of the European Convention but said that it was qualified in article 10.2 by reference to the rights of others, which in his opinion included the right of viewers not to be confronted with offensive material in their own homes. He bore in mind that since the Human Rights Act 1998 the duty of the court is not necessarily confined to deciding whether an administrative decision is irrational. Interference with human rights can be justified only to the extent permitted by the Convention. In this case, however, the issue was whether the BBC had properly carried out its duty under the agreement to balance the rights of the Alliance against those of the viewers. The judge thought that "even with the most anxious scrutiny" it was impossible to conclude that the BBC's decision was near the margin, let alone irrational.

Subsequent developments

46. After the hearing before Scott Baker J, the Alliance submitted two more versions of their broadcast, both of which were rejected on similar grounds. This time Mrs Sloman consulted her colleagues at BBC Wales, including the Controller, Ms Menna Richards. Again there was unanimity in rejecting them. Finally the Alliance submitted a sound track without any images and this was broadcast on 2 June. Polling day was 7th June. The 6 Alliance candidates in Wales received a total of 1,609 votes, or 0.117% of the total votes cast in the principality: see Andrew Geddis, *What future for political advertising on the United Kingdom's television screens?* ("*Political advertising*") [2002] Public Law 615, 618.

The Court of Appeal

47. After the election, the Alliance appealed to the Court of Appeal (Simon Brown, Laws and Jonathan Parker LJJ). The appeal was allowed.

48. Laws LJ said that Scott Baker J. had been wrong to treat the case as falling within the "conventional jurisprudence" of judicial review. This was a "profoundly mistaken approach". The real question was whether the considerations of taste and offensiveness upon which the broadcasters acted were a "legal justification for the act of censorship" involved in banning the proposed PEB: see p. 1090. Given the importance of free political speech, was a refusal on grounds of offensiveness necessary and proportionate in a democratic society? Laws LJ rejected the suggestion that in deciding this question the court should show "deference" to the broadcasters. The weight to be given to their views was "modest at best": p. 1097. What mattered was "the court's constitutional responsibility to protect political speech." That meant that the court had to decide for itself whether censorship could be justified. Laws LJ thought that considerations of taste and decency would "very rarely" be an adequate ground for interfering with free political speech at an election time. Perhaps if there was "gratuitous sensationalism and dishonesty": p. 1099. But mere offensiveness of true images was not enough. Simon Brown LJ gave a judgment in similar terms and Jonathan Parker LJ agreed.

Two questions or one?

49. The effect of the Court of Appeal's judgment was that instead of starting by accepting, as the judge had done, that the regulatory framework required the BBC not to screen a PEB unless it complied with generally accepted standards of taste and decency and then going on to ask whether the BBC had properly applied those standards, the Court of Appeal elided the two stages by asking whether it was consistent with freedom of speech for the BBC to apply such standards at all.

50. Andrew Geddis, in his valuable article *Political Advertising*, from which I have already cited, expressed (at p. 621) his doubts about this reasoning:

> "In essence, the court found that the broadcasters acted unlawfully by allowing the shock and disgust that the Alliance's PEB might cause to the viewing public to outweigh that party's right to express its political message in its chosen form. Thus, the broadcasters' failure properly to carry out a full

> proportionality review - to ask if the social evil to be avoided justified the extent of the infringement on the Alliance's rights - meant, in the court's eyes, that the broadcasters had illegitimately exercised their judgment with regard to the taste and decency obligations.
>
> The problem with the court's analysis is that it is not clear how, in a legal sense, the *broadcasters* were really at fault. Simply put, they were not empowered by their legal instructions to conduct the kind of full proportionality inquiry that the Court of Appeal required of them. It is true that the very diffuseness of the broadcasters' taste and decency obligations allowed them a *degree* of leeway in the exercise of their judgment. And the broadcasters did (quite properly) consider the Alliance's right of political expression when carrying out this exercise. However, the broadcasters still had to abide by the overarching legal instructions laid down for them, either by Parliament (via the Broadcasting Act and the ITC) or by the Secretary of State...(via the BBC's agreement). These instructions were clear, if not always easy to apply: the broadcasters must decide if a programme meets their taste and decency obligations; and if it does not, then they must not screen it...
>
> The Court of Appeal's decision effectively rewrote the broadcasters' obligations to read something like "nothing is to be included in [a broadcaster's] programmes which offends against good taste or decency or...public feeling *except in the case of PEBs*". Therefore, while the broadcasters bear the brunt of the court's blame for not properly implementing their obligations as *rule appliers*, the real force of the court's judgment actually is directed at the *rule-makers'* failure to exempt PEBs from the broadcasters' taste and decency obligations."

51. I agree. In my opinion there are two questions to be asked. First, was Parliament entitled by section 6(1)(a) to impose on PEBs a need to comply with taste and decency standards which were meant to be taken seriously? Secondly, if it was, did the broadcasters properly apply those standards. I shall examine both of these questions.

Can taste and decency standards be applied to PEBs?

(a) Is this an issue?

52. The Alliance has never argued that section 6(1)(a) of the 1990 Act, in its application to PEBs, is inconsistent with its rights under article 10 of the Convention. But this is lip-service, because the thrust of its submissions, which found favour in the Court of Appeal, is that the statute should be disregarded or not taken seriously. The exceptional cases in which the Court of Appeal thought standards of taste and decency might be applicable, namely "gratuitous sensationalism and dishonesty", have nothing to do with taste and decency. Both would require the BBC to exercise an editorial control over the political content of the broadcast which it expressly disavows. It is for the political party to vouch for the accuracy of its programme and decide whether its material is necessary for its purpose and not "gratuitous". The BBC is neither entitled nor required to express a view on these matters. It assumes that the material included in the PEB is both necessary and true. It has to decide whether it should nevertheless not be broadcast on the ground that it offends against generally accepted standards of taste and decency.

53. I therefore propose to consider the relationship between provisions such as section 6(1)(a) and Article 10 of the Convention.

Freedom of political speech

54. I am fully conscious of the importance of free political speech. But I think that the Court of Appeal failed to make some important distinctions.

(a) The nature of the right under article 10

55. First, the primary right protected by article 10 is the right of every citizen not to be *prevented* from expressing his opinions. He has the right to "receive and impart information and ideas without *interference* by public authority".

56. In the present case, that primary right was not engaged. There was nothing that the Alliance was prevented from doing. It enjoyed the same free speech as every other citizen. By virtue of its entitlement to a PEB it had more access to the homes of its fellow citizens than other single-issue groups which could not afford to register as a political party and put up six deposits.

57. There is no human right to use a television channel. Parliament has required the broadcasters to allow political parties to broadcast but has done so subject to conditions, both as to qualification for a PEB and as to its contents. No one disputes the necessity for qualifying conditions. It would obviously not be possible to give every grouping which registers as a political party a PPB or PEB. The issue in this case is about the condition as to contents, namely that it should not offend against standards of truth and decency.

58. The fact that no one has a right to broadcast on television does not mean that article 10 has no application to such broadcasts. But the nature of the right in such cases is different. Instead of being a right not to be prevented from expressing one's opinions, it becomes a right to fair consideration for being afforded the opportunity to do so; a right not to have one's access to public media denied on discriminatory, arbitrary or unreasonable grounds.

59. A recent example of the application of this principle is the decision of the Privy Council in *Benjamin v Minister of Information and Broadcasting* [2001] 1 WLR 1040. Mr Benjamin was host of a phone-in programme on government-controlled Anguilla Radio. The government suspended his programme because he had aired a politically controversial question (whether Anguilla should have a lottery) on which the government wished to stop discussion. Lord Slynn of Hadley (at p. 1048, paras 26, 27) accepted that Mr Benjamin had no primary right to broadcast. But he did have a right not to have his access to the medium denied on politically discriminatory grounds. Lord Slynn (at p 1052) described the government's action as "arbitrary or capricious". This is something which very much engages the freedom of political speech protected by article 10.

60. The same approach can be found in the jurisprudence of the European Court of Human Rights ("ECHR"). In *Haider v Austria* (1995) 83 DR 66 the Commission rejected the complaint of Mr Haider, the Austrian politician, that (among other things)

his opinions had not been given enough time on television, as manifestly unfounded. It said (at p. 74):

> "The Commission recalls that article 10 of the Convention cannot be taken to include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio or television in order to forward his opinion, save under exceptional circumstances, for instance if one political party is excluded from broadcasting facilities at election time while other parties are given broadcasting time."

61. The emphasis, therefore, is on the right not to be denied access on discriminatory grounds. In *Huggett v United Kingdom* (1995) 82A DR 98 the Commission considered a complaint about the criteria for allocating PEBs in the 1994 European Parliament elections. Mr Huggett was an independent candidate who did not qualify. The Commission also rejected the complaint as manifestly unfounded because there was no "arbitrariness or discrimination" in the application of the criteria.

62. In my opinion, therefore, the Court of Appeal asked itself the wrong question. It treated the case as if it concerned the primary right not to be prevented from expressing one's political views and concluded that questions of taste and decency were not an adequate ground for censorship. The real issue in the case is whether the requirements of taste and decency are a discriminatory, arbitrary or unreasonable condition for allowing a political party free access at election time to a particular public medium, namely television.

(b) Contents conditions

63. The problem about conditions relating to the content of the broadcast, as opposed to conditions depending on such matters as the number of candidates fielded or votes obtained in the last election, is that they run a much greater risk of being considered discriminatory. After all, the goverment in *Benjamin's* case may be said in effect to have imposed a condition for access to the radio which related to the contents of the broadcast: the broadcaster should not discuss matters to which the government objected. But this was discriminatory on objectionable grounds. So conditions which concern the contents of the programmes which will be accepted for broadcasting must be carefully examined to make sure that they are truly neutral between different points of view, or that any lack of neutrality can be objectively justified.

64. That was the question in the recent controversial ECHR case of *VgT Verein Gegen Tierfabriken v Switzerland* (2002) 34 EHRR 159, which concerned the prohibition of political advertising by section 18(5) of the Swiss Federal Radio and Television Act. An animal rights association complained that the television authority had rejected as "political" its advertisement depicting commercial pig rearing as cruel and urging people to eat less meat, when it had accepted commercials from the meat industry extolling the pleasures of pork and bacon. 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 there was no sufficient justification for discriminating against political advertising "in the particular circumstances of the applicant association's case": para. 75 at p. 177. 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." But the Secretary of State cautiously regarded the decision as a reason for being unable to certify that the proposed continuation of the UK ban on political advertising in clause 309 of the Communications Bill is compatible with the Convention.

(c) Are conditions as to taste and decency discriminatory?

65. A condition concerning standards of taste and decency is neutral in the sense that applies across the board to all political parties wishing to broadcast PPBs. Until the Alliance produced its proposed PEB in the 1997 election, it does not appear to have caused difficulty to any political party. But the Alliance says that it is discriminatory against a party which feels the need to breach the standards in order to get its message across. That is true.

66. The question then is whether it can be objectively justified. In deciding this question, it must first be borne in mind that the quality of the article 10 right is different from that which was in issue in the *VgT* case. This is not a case in which the Alliance was exercising a right to buy television time which was prima facie open to everyone in order to express its views on whatever subject it thought fit. The BBC and Parliament have decided that in the public interest free television time should be made available to political parties for PEBs because they consider that this would advance the democratic interest in encouraging an informed choice at the ballot box.

67. In deciding whether a condition as to the content of a PEB is unreasonable or discriminatory, it is therefore in my opinion relevant to consider whether it has any impact upon the particular democratic interest which offering the PEB was intended to advance. For example, if political parties are given PEBs in connection with a referendum on whether we should join the Euro, it would be unreasonable to attach much weight to an objection by the Alliance that standards of taste and decency prevented them from using their PEB to best effect in advocating the case against abortion. The subject is unrelated to the democratic interest in providing a PEB.

68. Although it may be said that all questions of social and economic policy are open to discussion in a general election, the Alliance PEB was quite unrelated to the specific policy of encouraging an informed choice at the ballot box. Their views were of electoral concern, at any rate theoretically, to the voters in only six of the Welsh constituencies. And the results, which were not wholly unpredictable, showed that they were of concern to very few of those voters. In any case, abortion is not in this country a party political issue. It has for many years been the practice to allow members of Parliament a free vote on such issues. So, despite the reference by the Court of Appeal (at p. 1097) to the "cockpit of a general election", the Alliance broadcast had virtually nothing to do with the fact that a general election was taking place. The election merely gave it an opportunity to publicise its views in a way which would have been no more or less effective at any other time.

69. My Lords, I think that it is necessary to bring some degree of practicality and common sense to this question. The Electoral Commission, in its 2003 report (at p. 36), expressed its concern about this aspect of the Court of Appeal's decision:

> "While we too would attach considerable weight to freedom of expression for political parties, especially during election campaigns, we are not convinced that this calls for PEBs to be exempted from the normal standards applied to all other broadcast material. It is not, in our view, realistic to conclude that the electorate necessarily stands to benefit from PPBs being outside the normal controls. In addition, we would be concerned if incentive was provided for organisations to register as political parties and field sufficient candidates in order to qualify for PPBs which would not only provide access to the media that would not otherwise be available but would enable material to be broadcast that would not otherwise be allowed."

70. Even assuming that the Alliance broadcast had been an ordinary PEB, relevant to the general election, I do not think it would have been unreasonable to require it to comply with standards of taste and decency. They are not particularly exacting and, as I have said, take into account the political context and the importance to the political party in getting its message across. But the rationale for having such standards applies to political as well as to any other broadcasts; the standards are part of the country's cultural life and have created expectations on the part of the viewers as to what they will and will not be shown on the screens in their homes.

71. Is there anything in European law which suggests that a taste and decency requirement would be regarded as unreasonable or discriminatory? In the *VgT* case the court made it clear that it was not considering a case in which the objection to an advertisement was that its content was offensive: see paragraph 76 at p. 177. And at this point it is also relevant to consider the response of the ECHR to the complaint of the Alliance about the rejection of its PEB in the 1997 election. On 26 June 2000 the Registrar of the ECHR wrote to the Alliance saying that "in accordance with the general instructions received from the Court" he drew their attention to "certain shortcomings" in the application. The indication given by the Registrar was that the court might consider that the taste and decency requirements were not an "arbitrary or unreasonable" interference with their access to television. Subsequently the court, after noting that the Alliance had been informed of "possible obstacles" to the admissibility of the application, rejected it as not disclosing "any appearance of a violation of the rights and freedoms set out in the Convention..."

72. The Court of Appeal treated this decision as an aberration to which no attention should be paid. But, like Scott Baker J., I think that it is very significant. The test applied in the letter from the Registrar, namely, whether the restriction on the content of the PEB was "arbitrary or unreasonable", seems to me precisely the test which ought to be applied. It is more in accordance with the jurisprudence of the ECHR and a proper analysis of the nature of the right in question than the fundamentalist approach of the Court of Appeal.

73. In my opinion therefore, there is no public interest in exempting PEBs from the taste and decency requirements on the ground that their message requires them to broadcast offensive material. The Alliance had no human right to be invited to the

party and it is not unreasonable for Parliament to provide that those invited should behave themselves.

(d) Deference

74. There is a good deal of discussion in the judgment of Laws LJ about whether "deference" should be paid to the decision-makers. As Andrew Geddis points out in the article from which I have quoted, Laws LJ treated the broadcasters as having decided to censor the Alliance broadcast and dismissed their argument that they were trying to apply statutory standards of taste and decency. But the question I am now addressing is whether Parliament was entitled to require PEBs to comply with standards of taste and decency and so the relevant decision-maker is Parliament.

75. My Lords, although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.

76. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in article 6 of the Convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.

77. In this particular case, the decision to make all broadcasts subject to taste and decency requirements represents Parliament's view that, as the Annan Committee put it (paragraph 16.3), "public opinion cannot be totally disregarded in the pursuit of liberty". That seems to me an entirely proper decision for Parliament as representative of the people to make. For the reasons I have given, it involves no arbitrary or unreasonable restriction on the right of free speech.

The decision by the broadcasters

78. If, as I think, Parliament was entitled to impose standards of taste and decency which were meant to be taken seriously, the next question is whether the broadcasters acted lawfully in deciding that the Alliance PEB did not comply. Mr Anderson has

not suggested that the decision letter of 17 May 2001 shows that the broadcasters misunderstood the guidelines or failed to take into account the political importance of the images to the Alliance. They made it plain that they did. He says that the rejection of the broadcast is sufficient in itself to show that they must have made some unspecified error of law.

79. In my view the only route by which one can arrive at such a conclusion is that of the Court of Appeal, which is to say that the broadcasters were not entitled to apply standards of truth and decency at all. But I have already explained why I do not think that this route is legitimate. Once one accepts that the broadcasters were entitled to apply generally accepted standards, I do not see how it is possible for a court to say that they were wrong.

80. Public opinion in these matters is often diverse, sometimes unexpected and in constant flux. Generally accepted standards on these questions are not a matter of intuition on the part of elderly male judges. The researches into public opinion by the BSC and the broadcasters would be superfluous if this were the case. And I attach some importance to the fact that Mrs Sloman, who was the principal decision-maker for the BBC, and Mrs Richards, the Controller of BBC Wales, are women. In deciding which members of the public would be likely to find the images offensive, I would imagine that one constituency the broadcasters would have had in mind was the 200,000 women who, for one reason or another, according to the Alliance evidence, have abortions every year. Although people often speak of "abortion on demand", having an abortion is something which few women undertake lightly. It is often a traumatic emotional experience. I would therefore hesitate a good deal before saying that the broadcasters must have been wrong in saying, as they did, that the images would be offensive to very large numbers of viewers.

81. I would therefore allow the appeal and restore the judgment of Scott Baker J, whose judgment, if it were not for that of the Court of Appeal, I would have been content to adopt as my own. For the same reasons, I think it was lawful for the BBC to refuse to broadcast the second and third versions of the programme.

LORD MILLETT

My Lords,

82. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. Although for a long time of the contrary view, I am persuaded that for the reasons he gives the judgment of the Court of Appeal is unsustainable. I would therefore allow the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

83. I have had the advantage of reading in draft the opinions on this appeal of my noble and learned friends Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Walker of Gestingthorpe. I gratefully adopt their exposition of the facts and law

underlying this appeal but, to my regret, I find myself unable to join my noble and learned friends in the conclusion that they have reached.

84. The short issue in the case is whether the broadcasters, the BBC and the ITV companies, acted lawfully in declining to transmit the television programme submitted to them by the ProLife Alliance as the Alliance's desired party election broadcast for the purposes of the 2001 general election.

85. It is accepted that the broadcasters' refusal to transmit the ProLife Alliance's programme engages Article 10 of the European Convention on Human Rights. Article 10 guarantees "the right to freedom of expression" which includes "freedom … to … impart information and ideas without interference by public authority …" The licensing of broadcasting, whether by radio or television, is however expressly authorised and in this country unlicensed broadcasting is not permitted. So it is not open to the ProLife Alliance, or to anyone else, to make private arrangements for the broadcasting of the programmes of their choice.

86. It is this feature of television broadcasting that engages Article 10. The right to impart information and ideas does not necessarily entitle those who desire to do so to be supplied with the means or facilities necessary to enable the information to be conveyed to the desired audience. A person who has written a book or a play cannot insist on having it published by a publisher, or placed on someone else's bookstall, or, if a play, staged in someone else's theatre. But radio and television broadcasting are different. Licences are required. And licences are granted on conditions that impose restrictions as to the contents of programmes that can be broadcast. So Article 10 is engaged.

87. It follows that, in the present case, the ProLife Alliance is entitled to say that the criteria applied to its desired party election programme by the broadcasters in deciding whether or not to accept the programme should be no more severe than 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." (Article 10(2)).

88. I have set out in full the Article 10(2) heads under which restrictions on Article 10 rights can be justified notwithstanding the obvious inapplicability of most of the heads to the reasons why the Alliance's proposed programme was rejected. I have done so because it seems to me helpful to notice their comprehensive character. The application of restrictions allegedly in the public interest but not justifiable under any of these heads would, in my opinion, constitute a breach of Article 10 rights.

89. The licences under which the BBC and the ITV companies are permitted to broadcast impose conditions relating to the content of the programmes that can be broadcast. In the case of the BBC the conditions are contained in paragraph 5 of an Agreement dated 25 January 1996 between the BBC and the Secretary of State. The

paragraph requires the BBC to do all that it can to secure that all programmes it broadcasts—

> "do not include anything which offends against good taste or decency or is likely to encourage or incite to crime or lead to disorder or to be offensive to public feeling;" (para 5.1(d)).

Section 6(1) of the Broadcasting Act 1990 imposes a restriction to the same effect on the ITV companies. It provides that

> "The [Independent Television] Commission shall do all that they can to secure that every licensed service complies with the following requirements, namely—
> (a) that nothing is included in its programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling;"

90. It is these conditions on which the BBC and the ITV broadcasters respectively rely in justifying their refusal to broadcast the Alliance's desired party election programme. There is plainly nothing in the programme which could be said to be likely to encourage or incite to crime or to lead to disorder. The justification for the refusal is based, therefore, on the broadcasters' opinion that the programme "offends against good or decency or is likely … to be offensive to public feeling". In the debate before your Lordships reliance was placed by the broadcasters particularly on the requirement that nothing must be broadcast that is likely to be offensive to public feeling.

91. It was not contended by counsel for the Alliance that a restriction barring the televising of a programme likely to be offensive to public feeling was, per se, incompatible with Article 10. Nor should it have been. The reference in Article 10(2) to the "rights of others" need not be limited to strictly legal rights the breach of which might sound in damages and is well capable of extending to a recognition of the sense of outrage that might be felt by ordinary members of the public who in the privacy of their homes had switched on the television set and been confronted by gratuitously offensive material.

92. Nor, as my noble and learned friend Lord Nicholls of Birkenhead has pointed out, was it contended before your Lordships that the content of party election broadcasts should be subject to any textually different restrictions from those applicable to other programmes (see paras 9 and 10 of his opinion). The requirement that broadcasts should not offend good taste and decency or be offensive to public feeling is not necessarily an Article 10 breach in relation to party election broadcasts any more than it is in relation to programmes generally. The issue, therefore, on the present appeal is a narrow one. It is whether the rejection by the broadcasters of this particular programme, the purpose of which was to promote the cause of the Alliance at the forthcoming general election, was a lawful application by the broadcasters of the conditions by which they were bound. To put the point another way, was their rejection of the Alliance's desired programme necessary in a democratic society for the protection of the right of home-owners that offensive material should not be transmitted into their homes?

93. The issue is one that is fact-sensitive. The relevant facts seem to me to be these—

(1) The ProLife Alliance is against abortion.

(2) Its candidates at general elections stand on a single issue, namely, that the abortion law should be reformed so as either to bar abortions altogether or, at least, to impose much stricter controls than at present pertain. This is a lawful issue and one of public importance.

(3) The Alliance's desired programme was factually accurate. Laws LJ described what was shown in the programme thus—

> "The pictures are real footage of real cases. They are not a reconstruction, nor in any way fictitious. Nor are they in any way sensationalised."

There was no dissent from this description.

(4) Laws LJ went on to describe what was shown in the programme as "…. certainly disturbing to any person of ordinary sensibilities". This, too, was not disputed.

(5) It was accepted that, if the programme was to be transmitted, it would have to be transmitted in the late evening, and be preceded by an appropriate warning.

(6) Television is of major importance as a medium for political advertising. That this is so has throughout been recognised on all sides.

94. The decision to refuse to broadcast the programme was communicated to the Alliance by a letter of 17 May 2001 from the BBC. The letter said that the BBC, and the ITV broadcasters, had concluded that "it would be wrong to broadcast these images which would be offensive to very large numbers of viewers". Was this a conclusion to which a reasonable decision maker, paying due regard to the Alliance's right to impart information about abortions to the electorate subject only to what was necessary in a democratic society to protect the rights of others, could have come?

95. In my opinion, it was not. The restrictions on the broadcasting of material offending against good taste and decency and of material offensive to public feeling were drafted so as to be capable of application to all programmes, whether light entertainment, serious drama, historical or other documentaries, news reports, party political programmes, or whatever. But material that might be required to be rejected in one type of programme might be unexceptionable in another. The judgment of the decision maker would need to take into account the type of programme of which the material formed part as well as the audience at which the programme was directed. This was a party election broadcast directed at the electorate. He, or she, would need to apply the prescribed standard having regard to these factors and to the need that the application be compatible with the guarantees of freedom of expression contained in Article 10.

96. The conclusion to which the broadcasters came could not, in my opinion, have been reached without a significant and fatal undervaluing of two connected features of

the case: first, that the programme was to constitute a party election broadcast; second, that the only relevant criterion for a justifiable rejection on offensiveness grounds was that the rejection be necessary for the protection of the right of homeowners not to be subjected to offensive material in their own homes.

97. The importance of the general election context of the Alliance's proposed programme cannot be overstated. We are fortunate enough to live in what is often described as, and I believe to be, a mature democracy. In a mature democracy political parties are entitled, and expected, to place their policies before the public so that the public can express its opinion on them at the polls. The constitutional importance of this entitlement and expectation is enhanced at election time.

98. If, as here, a political party's desired election broadcast is factually accurate, not sensationalised, and is relevant to a lawful policy on which its candidates are standing for election, I find it difficult to understand on what possible basis it could properly be rejected as being "offensive to public feeling". Voters in a mature democracy may strongly disagree with a policy being promoted by a televised party political broadcast but ought not to be offended by the fact that the policy is being promoted nor, if the promotion is factually accurate and not sensationalised, by the content of the programme. Indeed, in my opinion, the public in a mature democracy are not entitled to be offended by the broadcasting of such a programme. A refusal to transmit such a programme based upon the belief that the programme would be "offensive to very large numbers of viewers" (the letter of 17 May 2001) would not, in my opinion, be capable of being described as "necessary in a democratic society …. for the protection of …. rights of others". Such a refusal would, on the contrary, be positively inimical to the values of a democratic society, to which values it must be assumed that the public adhere.

99. One of the disturbing features of our present democracy is so-called voter-apathy. The percentage of registered voters who vote at general elections is regrettably low. A broadcasters' mind-set that rejects a party election television programme, dealing with an issue of undeniable public importance such as abortion, on the ground that large numbers of the voting public would find the programme "offensive" denigrates the voting public, treats them like children who need to be protected from the unpleasant realities of life, seriously undervalues their political maturity and can only promote the voter-apathy to which I have referred.

100. For these reasons the decision of the BBC and the other broadcasters to refuse to transmit the Alliance's desired programme was, in my opinion, a decision to which no reasonable decision maker, applying the standards prescribed by paragraphs 5.1(d) of the BBC Agreement and section 6(1)(a) of the 1990 Act, and properly directing itself in accordance with Article 10, could have come. I find myself in full agreement with the Court of Appeal and would dismiss this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

101. The respondent to this appeal, the ProLife Alliance ('the Alliance') is an organisation which campaigns for 'absolute respect for innocent human life'. It is

opposed to abortion, euthanasia, destructive embryo research and human cloning. It is common ground that it is a respectable organisation working within the democratic process and it does not engage in or encourage violent protest.

102. The Alliance is also a political party registered under Part II of the Political Parties, Elections and Referendums Act 2000 ('the 2000 Act'). It participated on a small scale in the general election in 2001, as it had done in 1997. This appeal is concerned with the refusal of the British Broadcasting Corporation ('the BBC') and other terrestrial television broadcasters (Channel 3, Channel 4, and Channel 5) to transmit a party election broadcast on behalf of the Alliance in the form of the programme produced by the Alliance. The BBC is the sole appellant in your Lordships' House but it can be seen as acting on behalf of all the broadcasters.

103. The Alliance wished to show, by graphic images, what it described as the terrible truth about abortion. The broadcasters declined to transmit the programme, in three successive edited versions, on the grounds that it offended good taste, decency and public feeling. The Alliance complains that this decision infringed its right to freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). I will set out the familiar terms of article 10:

> "(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".

104. I must summarise the framework of regulation of television broadcasting, including party political broadcasts ('PPBs') and party election broadcasts ('PEBs'). The framework is partly statutory and partly non-statutory, since the BBC was established (in 1927) by Royal Charter rather than by Act of Parliament (although it derived its original monopoly position in radio from a licence under the Wireless Telegraphy Acts 1904 to 1926, and its original monopoly in television broadcasting from a licence granted in 1935; the television monopoly continued until the coming into force of the Television Act 1954). Whereas the independent terrestrial television broadcasters ('the independents') are regulated mainly by and under the Broadcasting Act 1990 ('the 1990 Act') as supplemented and amended by the Broadcasting Act 1996 ('the 1996 Act') the BBC is regulated mainly by its Royal Charter and by successive agreements (the latest dated 25 January 1996) between the Secretary of State for National Heritage and the BBC. The functions of the Independent Television Commission ('the ITC') are limited to the independents, whereas the Broadcasting Standards Commission ('the BSC') established by the 1996 Act has functions in

relation to the BBC as well as the independents. These include (under section 110(2)(b) of the 1996 Act) adjudicating on complaints about standards of taste and decency. But the powers of the BSC do not included imposing any prior restraint on what is to be broadcast.

105. By section 6(1) of the 1990 Act the ITC is required to do all that it can to secure that in every service licensed by it,

> "(a)…nothing is included in its programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling".

The following paragraphs of section 6(1) impose comparable requirements in respect of accuracy and impartiality in news programmes, impartiality in programmes dealing with political or industrial controversy, responsibility in religious programmes, and the prohibition of subliminal images. 'Programme' is widely defined in section 202. By section 7 the ITC is required to draw up a code giving guidance on standards and practice, especially in relation to the portrayal of violence. The ITC has produced a code known as the ITC Programme Code.

106. Very similar provisions are included in the agreement dated 25 January 1996 between the Secretary of State and the BBC. Para. 5.1 of the agreement is very similar to section 6(1) of the 1990 Act, and para. 5.1(d) (in relation to offensive material) is for all practical purposes identical with section 6(1)(a). The BBC Producers' Guidelines provide the counterpart of the ITC Programme Code. Mr Pannick QC (for the BBC) accepts for the purposes of this appeal that the BBC is a public authority, without making any wider concession as to its status in different contexts.

107. Party political broadcasts have been a feature of public life in the United Kingdom for about 80 years on radio, and for about 50 years on television. Their longevity recognises the peculiar power of radio and television to communicate with the electorate in their own homes (or wherever else they may be listening to the radio or watching television). Such broadcasts are in a special position and raise special problems, since the broadcasters' usual duties of fairness and balance cannot apply. A broadcast made by a political party must be expected to be partisan. However it is not in dispute that the prohibition on offending good taste, decency or public feeling applies to them.

108. By section 36 of the 1990 Act any licence granted by the ITC to any of the independents must contain conditions requiring the broadcaster to include party political broadcasts in its service, and to observe rules made by the ITC in respect to party political broadcasts. There is no special definition of PPBs or PEBs; the latter is simply a PPB made during the period before a general election. No PPB may be made except by a registered political party (a restriction which applies to the BBC as well as to the independents). By section 36(5) of the 1990 Act (as added by the 2000 Act) the ITC must have regard to the views of the Electoral Commission (a body established by the 2000 Act) before making rules under section 36(1)(b). A similar requirement is imposed in respect of the BBC by section 11(3) of the 2000 Act. The general effect is that the independents must provide PPBs and must do so within statutory guidelines;

the BBC need not provide PPBs (although it has always done so) but if it does it too must stay within statutory guidelines.

109. Before the 2001 general election the BBC and the independents agreed rules for the allocation of PEBs to political parties fielding candidates at the election. The details are not important for present purposes, but the general effect was that the Alliance would be entitled to one PEB (to be transmitted in the area in question) if candidates were standing in its interest in one-sixth of the seats in England, Wales, Scotland or Northern Ireland (as the case might be). The maximum duration of the broadcast would be four minutes forty seconds. It was for the Alliance (as for any other eligible party) to produce and edit the programme at its own expense, but transmission was provided free of charge by the broadcasters.

110. At the end of March 2001 the Alliance first contacted the BBC. What followed was to some extent traversing old ground which had already been covered in 1997. It is not necessary to recount what happened in 1997 in detail (it is set out more fully in the judgment of Laws LJ in the Court of Appeal, paras. 17 to 19) since the programme put forward in 1997 was in some respects different, and the Human Rights Act 1998 ('the Human Rights Act') was not then in force, or indeed anything more than a possible manifesto commitment. In brief, however, the Alliance's application for judicial review was refused by Dyson J on 24 March 1997, and a renewed application was refused by the Court of Appeal (presided over by Lord Woolf MR) on 20 October 1997. On 24 October 2000 the Alliance's complaint to the European Court of Human Rights was declared inadmissible (presumably on the ground of being manifestly ill-founded) by a Committee of four judges.

111. I return to the events of 2001. On 2 May the Alliance submitted to the BBC a video containing its proposed PEB. At that stage there was uncertainty as to how many candidates the Alliance would field in different parts of the United Kingdom (the last date for nominations was 22 May, with voting on 7 June; in the event the Alliance fielded the requisite number of candidates only in Wales). On 8 May there was a meeting to view and discuss the video, attended by Ms Anne Sloman of the BBC and representatives of the independents. Ms Sloman is the Chief Political Adviser of the BBC, a post she has held since 1996. She has had a distinguished career in the BBC since joining it as a producer in 1967, and her experience and professional skills are not in issue. On 10 May the Alliance was informed of the broadcasters' preliminary view that the proposed PEB would not comply with the BBC Producers' Guidelines or the ITC Programme Code in respect of taste and decency. The letter invited written submissions, and Mr Bruno Quintavalle (who is the Secretary of the Alliance, and a member of the English Bar) sent submissions on 13 May. On 16 May there was a further meeting of representatives of the broadcasters, including Ms Sloman. A BBC solicitor also attended this meeting. Ms Sloman's undisputed evidence is that the unanimous view of the meeting was that the proposed PEB was unacceptable, and that none of those present considered it to be a difficult or marginal decision.

112. On 17 May the BBC's Litigation Department sent a letter to the Alliance's solicitors communicating this decision. The stated reasons included the following:

"In reaching our conclusions, we have certainly taken into account the importance of the images to the political campaign of the ProLife Alliance. We have also proceeded on the basis that we should seek the minimum changes necessary to ensure compliance with the obligations of the BBC as set out in paragraph 5 (1)(d) of the Agreement, and the Producers' Guidelines, and the obligations of the other broadcasters under the ITC Code.

"We have had regard to the guidelines on taste and decency, prevailing standards of taste and decency, broadcasters' criteria on the portrayal of violence, and public interest considerations, as well as all the other points made in your client's letter of 13 May and the accompanying written submissions. But none of these factors leads us to conclude other than that it would be wrong to broadcast these images which would be offensive to very large numbers of viewers. None of the broadcasters regards this as a case at the margin. We all regard it as a clear case in which it would plainly be a breach of our obligations to transmit this broadcast.

"We have considered whether (as you suggest in your written submissions) the images could be broadcast after 10 pm, with a warning for viewers. It is our judgment that the images are so offensive that it would not be appropriate to take that course in this case. We should make it clear, however, that we are not saying that in principle an election broadcast could never be transmitted after 10 pm with a warning."

113. The Alliance promptly applied for judicial review of this decision. There was a hearing on 23 and 24 May, and the application was refused by Scott Baker J on 24 May. On 31 May and 1 June the Alliance submitted a second and a third revised version of the PEB, with progressively more blurred images. Neither of these was acceptable. On 2 June a fourth version was submitted. It was accepted and was transmitted in Wales on the same day. It contained no images other than a red background with the single word CENSORED.

114. The undisputed evidence on behalf of the Alliance included some factual material about abortion, as practised in the United Kingdom, which Laws LJ summarised in his judgment (para. 6):

"Each year approximately 200,000 abortions are carried out in the United Kingdom, some 70% of them funded by the taxpayer. The great majority are performed on the third of the five permitted grounds under the Abortion Act 1967 as amended: that is that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman. There is some evidence that many doctors maintain that the continuance of a pregnancy is always more dangerous to the physical welfare of a woman than having an abortion, a state of affairs which is said to allow a situation of de facto abortion on demand to prevail. The commonest form of abortion is suction abortion (vacuum aspiration), used on foetuses from 7 to 15 weeks gestation. Suction abortion always causes the foetus to be mutilated to a greater or lesser extent. Larger foetuses must be dismembered prior to extraction. A technique known as D and E (dilation and extraction) is used to effect this, either in conjunction with vacuum aspiration, or (after 13 weeks) on its own. In the second and third trimester, drugs (prostaglandins) can be used to induce premature labour.

> However before labour is induced there is a requirement, under Royal College of Obstetricians and Gynaecologists guidelines, to kill the foetus in the womb. This is usually done by the injection of potassium chloride into the foetal heart, or of saline solution into the amniotic fluid. The latter causes a slow death. It is said that the purpose is to avoid the possibility of a live birth which, if followed by death, could result in criminal charges."

115. I will also set out Laws LJ's account (with which I agree) of the first version of the programme (the subject-matter of the decision letter of 17 May 2001 and the judicial review proceedings). The summary is in para. 13 of Laws LJ's judgment.

> "It shows the products of a suction abortion: tiny limbs, bloodied and dismembered, a separated head, their human shape and form plainly recognisable. There are some pictures showing the results of the procedures undertaken to procure an abortion at later stages. There is no sound on the video. There is some introductory text. Then the words of articles 2, 3 and 14 of the Convention are cut into the visual images at various points. There is also some text briefly describing different abortion techniques. The pictures are real footage of real cases. They are not a reconstruction, nor in any way fictitious. Nor are they in any way sensationalised. They are, I think, certainly disturbing to any person of ordinary sensibilities."

116. The matter came before the Court of Appeal in January 2002. At the beginning of the hearing the Court granted permission to proceed with the application for judicial review, and treated the hearing as a substantive appeal from Scott Baker J. On 14 March 2002 the Court of Appeal (Simon Brown, Laws and Jonathan Parker LJJ) unanimously allowed the appeal and refused permission to appeal to your Lordships' House (but leave to appeal was granted by your Lordships on 17 July 2002).

117. In the Court of Appeal Laws LJ gave the leading judgment, using robust and vivid language to describe the high constitutional importance of freedom of speech. He cited from some well-known authorities both on freedom of speech and on the heightened protection which must under the Human Rights Act be accorded to human rights, with a correspondingly closer scrutiny of administrative decision-making when human rights are engaged. After referring to these authorities Laws LJ said at para. 37,

> "These considerations, with respect, give the lie to Mr Pannick's plea for deference to the decision-makers. If a producer were so insensitive as to authorise the inclusion of what is to be seen in the claimant's PEB video in an episode of a TV soap, the broadcasters would of course forbid its being shown and the courts would of course uphold them. That is at the extreme. There might be other more marginal situations, in which the courts would incline to defer to the broadcasters' judgment. Where the context is broadcast entertainment, I would accept without cavil that in the event of a legal challenge to a prohibition the courts should pay a very high degree of respect to the broadcasters' judgment, given the background of the 1990 Act, the 1996 Act, the BBC agreement, the codes of guidance and the BSC adjudications. Where the context is day-to-day news reporting the broadcasters' margin of discretion may be somewhat more constrained but will remain very

> considerable. But the milieu we are concerned with in this case, the cockpit of a general election, is inside the veins and arteries of the democratic process. The broadcasters' views are entitled to be respected, but their force and weight are modest at best. I emphasise this is in no sense a slur on their expertise: having looked through the evidence I am very conscious, if I may say so, of the experience and professionalism clearly possessed by Ms Sloman, and her colleagues were no doubt likewise qualified. But in this context the court's constitutional responsibility to protect political speech is overarching. It amounts to a duty which lies on the court's shoulders to decide for itself whether this censorship was justified."

Mr Pannick criticised the last sentence as one of what he described as the Court of Appeal's three basic errors.

118. Jonathan Parker LJ agreed with Laws LJ and also with Simon Brown LJ, who also gave a full judgment. After referring to authority in the European Court of Human Rights, including *Bowman v United Kingdom* (1998) 26 EHRR 1, Simon Brown LJ said (para. 57):

> "Against that broad background, let me now turn to the critical issue arising here. Was there a pressing social need to ban this broadcast? I have reached the clear conclusion that there was not. Disturbing, perhaps shocking, though the images on this video undoubtedly are, they represent the reality, the actuality, of what is involved in the abortion process. To campaign for the prohibition of abortion is a legitimate political programme. The pictures are in a real sense the message. Words alone cannot convey (particularly to the less verbally adept) the essentially human character of the foetus and the nature of its destruction by abortion. This video provides a truthful, factual and, it is right to say, unsensational account of the process. As the claimant's evidence explains:
> 'All the most challenging images from the 1997 PEB were removed, including a scene of an actual abortion procedure. All images of third trimester abortions were also removed, as were other distressing sequences, including graphic images of severed heads.'"

These observations (and comparable observations by Laws LJ at paras. 43 and 44) were said to be the second of the Court of Appeal's basic errors, that is insisting on the importance of the images and disregarding other means open to the Alliance of getting its message across. The third error on which Mr Pannick relied (and which he put in the forefront of his case) was that the Court of Appeal came close to disregarding the simple fact that PEBs are not immune from the obligation of avoiding offence to good taste, decency and public feeling.

119. My Lords, the House has had the benefit of clear and helpful written and oral submissions both from Mr Pannick and from Mr Anderson QC for the Alliance. But there was little or no discussion of the correct meaning to be placed on the words in section 6(1)(a) of the 1998 Act (reproduced almost word for word in the BBC's contractual obligation) prohibiting anything "which offends against good taste or decency or is likely . . . to be offensive to public feeling". There are obvious difficulties about such an imprecise sequence of words. In *Müller v Switzerland*

(1988) 13 EHRR 212 the European Court of Human Rights recognised the vagueness of the word 'obscene' in the Swiss Criminal Code, but held that it was nevertheless "prescribed by law" (and Mr Anderson did not pursue that point in his oral submissions). Nevertheless I think it is necessary to consider the meaning to be attached to the words quoted from section 6(1)(a) (for which I shall use the shorthand "offensive material").

120. 'Good taste' is an expression with a distinctly old-fashioned timbre. It seems very possible that in the days of Lord Reith (when newsreaders were males wearing dinner jackets and speaking the King's English) there really were no unseemly references in any broadcast to sexual activities or bodily functions, and no disrespectful jokes about living (or recently deceased) members of the Royal Family. Those times are long since past. They disappeared, perhaps forever, during the 1960's. It now needs an effort of memory or imagination to call to mind the strict statutory censorship of theatres which continued until its final abolition by the Theatres Act 1968.

121. Counsel agreed, to my mind correctly, that the various phrases describing offensive material are best taken as a single composite expression. That takes some of the pressure off 'good taste'. The composite expression must in my view be interpreted in accordance with contemporary standards. The broadcasters' two published codes show that in practice the obligation to avoid offensive material is interpreted as limited to what is needlessly (or gratuitously) shocking or offensive. Here the context is of crucial importance, and what could not possibly be justified as entertainment may be justified (in news or current affairs programmes) as educating the public about the grim realities of life. Your Lordships were referred to a number of adjudications by the BSC (some mentioned in paras. 61 and 62 of the judgment of Simon Brown LJ) which show that the BSC takes the same view of its statutory duty under section 110 (2)(b) of the 1996 Act. I do not regard the broadcasters or the BSC as having failed in their duties by not imposing the more stringent standards which might have been appropriate 50 or more years ago.

122. So when Mr Pannick rightly reminded your Lordships that PEBs are not immune from the obligation to avoid offensive material, that obligation must be understood as directed to matter which is likely to cause much more than mild discomfort. Even material which causes a significant degree of revulsion may be justified by the serious purpose of the context in which the material is broadcast. I would if necessary invoke section 3 (1) of the Human Rights Act to arrive at that conclusion, but I do not think it is necessary to do so. It can be arrived at by applying ordinary principles of statutory construction. It would be absurd to test offensiveness by the standards which prevailed in or before the middle of the last century.

123. Nevertheless the citizen has a right not to be shocked or affronted by inappropriate material transmitted into the privacy of his home. It is not necessary to consider whether that is a Convention right (Mr Pannick made a brief reference to article 8, but did not seek to develop the point). Whether or not it is classified as a Convention right, it is in my view to be regarded as an "indisputable imperative" in the language of the European Court of Human Rights in *Chassagnou v France* (1999) 29 EHRR 615, para 113. Neither the existence of the "watershed" nor any specific

warning broadcast before a programme can be relied on to provide protection, as the BBC and the independents recognise in their published codes.

124. In forming their judgments the broadcasters were required to (and as the letter of 17 May 2001 shows, did) take account of the character of the Alliance's programme as a PEB (although one concerned with a single issue which many would regard as an issue of ethics rather than party politics). The European Court of Human Rights has recognised the special importance of freedom of expression at the time of an election (*Bowman v United Kingdom* (1998) 26 EHRR 1, para 42). But even in that context the freedom is not absolute (see para 43 of the same judgment). The broadcasters also had to take into account the special power and intrusiveness of television. They are, by their training and experience, well qualified (so far as anybody, elected or unelected, could claim to be well qualified) to assess the Alliance's PEB as against other more or less shocking material which might have been included in news or current affairs programmes, and to form a view about its likely impact on viewers in Wales (the only country where the "CENSORED" version was eventually shown). In making those assessments the broadcasters were reviewing not programmes produced or commissioned by their own organisations, but programmes produced by or for political parties over which (except as regards offensive material) the broadcasters had no control. They could not themselves make editorial changes, but had to accept or reject the ready-made programme in its entirety.

125. Counsel's submissions were directed to two main questions. One is the manner in which article 10 is engaged on the facts of this case (Mr Pannick did not dispute that it is engaged in some way). The other (which is of crucial importance) is the nature of the review of the broadcasters' decision which the court had to undertake (or to put it another way, the degree of deference which the court should have shown towards the broadcasters as the primary decision-makers). The answer to the first question is likely to have an important bearing on how the second question should be answered.

126. Where a citizen complains that a national authority is infringing his right to freedom of expression, it is usually some form of coercion that he objects to: either prior restraint (that is, some form of censorship) or criminal sanctions (such as a prosecution for sedition, blasphemy or inciting racial hatred) after the event. In general the citizen has no right to require the state to furnish him with the means of expressing his views, whether by publishing a book, or presenting a theatrical production, or broadcasting a television programme.

127. The qualification in the last sentence of Article 10 (1) ("This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises") does not add much. It is concerned wholly or mainly with technical considerations (*Groppera Radio AG v Switzerland* (1990) 12 EHRR 321, paras 59-61). In particular, para 61 of the judgement of the European Court of Human Rights makes clear that any licensing measures may still have to be tested under Article 10 (2).

128. *VGT v Switzerland* (2002) 34 EHRR 159 was concerned with a prohibition, under Swiss federal law, on radio or television commercials of a political nature. VGT, an organisation campaigning for animal welfare, wanted to have broadcast a

television commercial concerned with the welfare of pigs but it was rejected as being political. The government of Switzerland defended the prohibition as necessary in a democratic society in order to prevent political debate being too much influenced by those with the greatest financial resources. It also pointed out that VGT had access to other channels of communication (while accepting that these were not so powerful and pervasive in character). Nevertheless the European Court of Human Rights unanimously found an infringement of Article 10, mainly (it seems) because of the monopoly positions enjoyed in Switzerland by a single public broadcasting 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 in 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".

The Commission expressed similar views in *Haider v Austria* (1995) 83 DR 66. The statement in *X and the Association of Z v United Kingdom* was cited by the Privy Council in an appeal from Anguilla which raised human rights issues, *Benjamin v Minister of Information & Broadcasting* [2001] 1 WLR 1040, 1049.

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 v United Kingdom* (1998) 26 EHRR 1, para. 42). But on the other hand, there may be good democratic reasons for imposing special restrictions, especially to prevent those with the deepest pockets from exercising too much influence through the most powerful and intrusive means of communication.

131. I now come on to what I see as the crucial issue. The long trek away from *Wednesbury* irrationality (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223) as the only appropriate test, where human rights are involved, began many years before the coming into force of the Human Rights Act. The need for 'anxious scrutiny' by the Court, where human life or liberty is at risk, was memorably stated by Lord Bridge of Harwich in *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] AC 514, 531. The principle of proportionality (having received a passing mention by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410) was discussed but not adopted in *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 (especially at 749, 750, 762, 766-7), a case in which the

House was asked (but declined) to apply Article 10 at a time when it did not form part of national law. The *Wednesbury* test was quite strongly reaffirmed, on a human rights issue (homosexuals in the armed forces) in *R v Ministry of Defence ex parte Smith* [1996] QB 517 in which Sir Thomas Bingham MR said at p556,

> "The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations".

However, the European Court of Human Rights later ruled against the United Kingdom in that matter: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

132. Some of these cases speak of the national court, on judicial review, according to administrative decision-makers a margin of appreciation. But since the coming into force of the Human Rights Act it has become clear that that expression is confusing and therefore inapposite. The correct principle is that the court should in appropriate cases show some deference to the national legislature or to official decision-makers: see the observations of Lord Hope of Craighead in *R v DPP ex parte Kebilene* [2000] 2 AC 326, 380-1 and those of Lord Steyn in *Brown v Stott* [2001] 2 WLR 817, 842. Lord Hope (at p.381) favoured the expression "discretionary area of judgment" put forward by Lord Lester of Herne Hill QC and Mr Pannick in Human Rights Law and Practice (1999) p.74. This lead was followed by the Court of Appeal in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840; Laws LJ referred (at p.855) to the need for a "principled distance" between the decision-maker's decision on the merits and the court's adjudication.

133. The clearest and most authoritative guidance has been given by your Lordships' House in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. That case was concerned with official policy as to the searching of prison cells, and the impact of the policy on prisoners' rights to confidential communication with their lawyers. The passage in the speech of Lord Steyn (at pp 547-8) is very well known but it bears repetition:

> "The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an Act, rule or decision) is arbitrary or excessive the court should ask itself: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective." Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases?"

134. Lord Steyn then referred to some valuable academic work and observed,

> "The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various Convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence ex parte Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights".

135. Lord Steyn then referred to the outcome of the *Smith* case in the European Court of Human Rights and continued,

> "In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
> The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood,* at p 847, para 18 "that the intensity of review in a public law case will depend on the subject matter in hand." That is so even in cases involving Convention rights. In law context is everything".

Lord Bingham of Cornhill agreed with Lord Steyn and Lord Cooke of Thorndon. Lord Cooke, in a short speech, went further and suggested that the day would come when it would be more widely recognised that *Wednesbury* was an unfortunately retrogressive decision in English administrative law. Lord Hutton agreed with Lord Bingham and Lord Steyn. Lord Scott of Foscote agreed with Lord Bingham and Lord Cooke.

136. The valuable academic work referred to by Lord Steyn in *Daly* has also been discussed in detail by Lord Hope in *R v Shayler* [2003] 1 AC 247-284-7 (paras 72-79). Finally (as to the authorities bearing on this part of the case) I would refer to the dissenting judgment of Laws LJ in *International Transport Roth Gmbh v Secretary of State for the Home Department* [2002] 3 WLR 344, 376-8 (which he must have written at much the same time as he was writing his judgment in the case now under appeal). The whole passage is of great interest but I will highlight four principles

which Laws LJ put forward (with the citation of appropriate authority) for the deference which the judicial arm of government should show to the other arms of government:

(1) (at p 376) "greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure";

(2) (at p 377) "there is more scope for deference 'where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified' (per Lord Hope in *ex parte Kebilene*)";

(3) (at p 377) "greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts";

(4) (at p 378) "greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts".

137. The second of these principles is certainly applicable in the present case and is of the greatest importance. Striking a fair balance between individual rights and the general interest of the community is inherent in the whole of the Convention: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69. The other three points made by Laws LJ are thought-provoking but I do not find them particularly helpful in determining this appeal, for several reasons. In this case (as in many cases raising human rights issues) responsibility for the alleged infringement of human rights cannot be laid entirely at the door of Parliament or at the door of an executive decision-maker. Responsibility for the alleged infringement is as it were spread between the two (this is a point made by Mr Andrew Geddis in an article at [2002] PL 615, 620-3). Moreover the court's (or the common law's) role as the constitutional guardian of free speech is a proposition with which many newspaper publishers might quarrel (see the observations of Lord Steyn in *Reynolds v Times Newspapers Limited* [2001] 2 AC 127, 210-1, although in recent years your Lordships' House has fully recognised the central constitutional importance of free speech). A third difficulty is that the principles stated by Laws LJ do not allow, at any rate expressly, for the manner (which may be direct and central, or indirect and peripheral) in which Convention rights are engaged in the case before the court.

138. My Lords, this is an area in which our jurisprudence is still developing, and we have the advantage of a great deal of published work to assist us in finding the right way forward. I have obtained particular assistance from Understanding Human Rights Principles, edited by Mr Jeffrey Jowell QC and Mr Jonathan Cooper (2001) and from the very full citations in the third (2001) edition of Judicial Review Handbook by Mr Michael Fordham. Fordham's survey in para. 58.2 appears to me to give a useful summary of where we seem to be going. Under the heading "Latitude and Intensity of Review" he writes:

> "Hand in hand with proportionality principles is a concept of 'latitude' which recognises that the Court does not become the primary decision-maker on matters of policy, judgment and discretion, so that public authorities should be

> left with room to make legitimate choices. The width of the latitude (and the intensity of review which it dictates) can change, depending on the context and circumstances. In other words, proportionality is a 'flexi-principle'. The latitude connotes the appropriate degree of deference by court to public body. In the Strasbourg (ECHR) jurisprudence the concept of latitude (called 'the margin of appreciation') comes with a health warning: it has a second super-added deference (international court to domestic body) inapt to domestic judicial review (domestic court to domestic body). This means that Human Rights Act review needs its own distinct concept of latitude (the 'discretionary area of judgment'). The need for deference should not be overstated. It remains the role and responsibility of the Court to decide whether, in its judgment, the requirement of proportionality is satisfied".

There is also an interesting recent article by Mr Richard Edwards which I shall return to.

139. So 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 to reject the programme as 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.

(3) Although your Lordships do not know the identities of all those involved in the decision, Ms Sloman is undoubtedly a broadcaster of great experience and high reputation. There is no reason to think that she and the others involved failed to approach their task responsibly and with a predisposition towards free speech. No doubt is cast on the good faith of any of them.

(4) Free speech is particularly important in the political arena, especially at the time of a general election. That is why specific arrangements are made for PEBs, but the fact that PEBs are not immune from the general requirement to avoid offensive material is only a limited restriction on free speech, and it applies equally to all political parties. There was no arbitrary discrimination against the Alliance.

(5) The effect of the decision was to deprive the Alliance of the opportunity of making a broadcast using disturbing images of the consequences of abortion. The Alliance still had (and used) the opportunity to broadcast its chosen text, and it was still at liberty to use a variety of other means of communicating its message. In that respect article 10, although engaged, was not engaged as fully as if there had been some total ban.

140. Most of these points call for no further elaboration but I should say a little more about the last two. Part of the Alliance's complaint (and one which carried considerable weight with the Court of Appeal) was that the Alliance was uniquely disadvantaged by the prohibition on offensive material, because it (alone of all the makers of PEBs) wanted to shock viewers with the realities of abortion. The Alliance could say, no doubt correctly, that it alone was being prevented from putting across its message in its chosen way. It is however possible to imagine that some other party campaigning on a single issue might be in a similar position: as was said in *Becker v Federal Communications Commission* (1996) 95 F 3d75, 87,

> "the political uses of television for shock effect is not limited to abortion . . . ('Other subjects that could easily lead to shocking and graphic visual treatment include the death penalty, gun control, rape, euthanasia and animal rights.')"

But I would not regard this as making the restriction on offensive material arbitrary or discriminatory in any relevant sense. Images such as those in the Alliance's video, transmitted into hundreds of thousands of homes, would indeed have extraordinary power to stir emotions and to influence opinions. But that is the justification for imposing on the broadcasters responsibility for excluding offensive material. It cannot be a free-standing reason for disregarding the prohibition as discriminatory against those who (for whatever well-intentioned reasons) wish to shock television viewers.

141. I do therefore see force in Mr Pannick's submission that the Court of Appeal came close to overlooking the fact that PEBs are not immune from the requirement for offensive material to be excluded. I also see some force in his criticism that the Court of Appeal attached too much importance to the disturbing images which the Alliance wished to transmit for their shock effect. Most important of all, I think (with very great respect to the Court of Appeal) that although not avowedly engaged in a merits review, they did in fact engage in something close to that. Although my opinion has fluctuated, in the end I do not think that it has been shown that the broadcasters' decision, even if reviewed with some intensity, was wrong. I would therefore allow the appeal.

142. After making some progress in the preparation of this speech I have had the great advantage of reading the speech of my noble and learned friend Lord Hoffmann, and his insights have assisted me to the conclusion which I have eventually reached as to the outcome of the appeal.

143. I add a footnote in relation to the article by Mr Edwards, Judicial Deference under the Human Rights Act (2002) 65 MLR 859. This draws extensively on Canadian human rights jurisprudence and discusses the notion of human rights legislation as formalising a constitutional dialogue between different branches of government, with each branch being in a sense accountable to the other (see Iacobucci J in *Vriend v Alberta* [1998] 1 SCR 495, paras 138-9). The article is critical of the British judiciary for being over-deferential and insufficiently principled in its approach to proportionality under the Human Rights Act.

144. As to deference, I would respectfully agree with Lord Hoffmann that (simply as a matter of the English language) it may not be the best word to use, if only because it is liable to be misunderstood. However the elements which Mr Edwards

puts forward as his basis for a principled approach (at pp 873-80, largely drawing on Canadian jurisprudence: legislative context; the importance of the Convention right in a democracy; mediation between different groups in society; respect for legislation based on considered balancing of interests; recognition of "holistic" policy areas which are not readily justiciable; and respect for legislation representing the democratic will on moral and ethical questions) appear to me by no means dissimilar from the principles which do emerge from *Daly* and other recent decisions of your Lordships' House. The *Wednesbury* test, for all its defects, had the advantage of simplicity, and it might be thought unsatisfactory that it must now be replaced (when human rights are in play) by a much more complex and contextually sensitive approach. But the scope and reach of the Human Rights Act is so extensive that there is no alternative. It might be a mistake, at this stage in the bedding-down of the Human Rights Act, for your Lordships' House to go too far in attempting any comprehensive statement of principle. But it is clear that any simple "one size fits all" formulation of the test would be impossible.

145. For these reasons I would allow this appeal.