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Animal Defenders International v UK: sensible dialogue or a bad case of Strasbourg jitters?

In *Animal Defenders International v United Kingdom (ADI)* the Grand Chamber of the European Court of Human Rights (the Grand Chamber), having deliberated for over thirteen months, held that the United Kingdom's statutory ban on paid political advertisements in the broadcast media did not breach the free speech rights of an animal rights NGO that wished to broadcast an advertisement publicising the ill treatment of primates in captivity.¹ The Grand Chamber reached its decision by the slenderest of majorities, 9:8, and in so doing departed from its recent case law on broadcast political advertising. The case raises serious issues concerning the adjudication of freedom of expression cases, and of human rights cases more generally. Some of these concerns will be explored below, following a summary of the factual and legal background to the case.

LEGISLATIVE BACKGROUND

¹ *Animal Defenders International v United Kingdom* App no 48876/08, judgment of 22 April 2013. The hearing had been on the 7th March 2012. The Fourth Section the Court relinquished jurisdiction to the Grand Chamber under Article 30 European Convention on Human Rights on 29th November 2011.

The Communications Act 2003 prohibits the broadcasting of political advertisements on television and radio.² This follows previous statutory bans going back to the inception of commercial television in 1954.³ The purpose of the prohibition is to protect the equality of opportunity within the democratic process, preventing democratic debate being distorted by wealthy individuals and /or organisations buying up airtime and flooding the airwaves with their own political messages.⁴ The Secretary of State for Culture Media and Sport, Tessa Jowell MP, explained the rationale for the ban during the passage of the Communications Bill: ‘[b]y denying powerful interests the chance to skew political debate, the current ban safeguards the public and democratic debate, and protects the impartiality of broadcasters’.⁵ The example of the USA where restrictions on political advertising have been held to infringe the right to free speech under the First Amendment of the Constitution,⁶ and where money is a—perhaps *the*—key determinant of electoral success, is frequently held up as the (undesirable) likely consequence of removing the ban.⁷

² Communications Act 2003, s 319(2)(g). Section 333 retains the previous regime which applied to Party Political and Party Election Broadcasts, time for which is allocated, free of charge, to the biggest political parties.

³ See eg the Television Act 1954, sched 2; Broadcasting Act 1990, s 92. See *R v Radio Authority Ex parte Bull* [1998] QB 294 CA (Civ Div); J. Stevens and D. Feldman, ‘Broadcasting advertisements by bodies with political objectives, judicial review and the influence of charities law’ [1997] PL 615.

⁴ For an excellent review of this area of see J. Rowbottom, *Democracy Distorted: Wealth Influence and Democratic Politics* (Cambridge: Cambridge University Press, 2010).

⁵ HC Deb vol 395 col 788 3 December 2002. In 1998 the Neill Committee on Standards in Public Life had recommended that the ban be retained for these reasons, *Fifth Report, The Funding of Political Parties in the United Kingdom*, 1998, Cm 4057-1, 13.7. , 173-180.

⁶ *Citizens United v Federal Election Commission* 558 US (2010).

⁷ See eg the speech of Baroness Hale in *R (on the application of Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312 at [47-48].

The aims of protecting democracy from distortion by wealthy interests and preserving broadcaster's impartiality are promoted by section 321 of the Communications Act: an advertisement will contravene the prohibition if it is either 'by or on behalf of a body whose objects are wholly or mainly of a political nature'⁸ or is 'directed towards a political end'.⁹ However the Communications Act's reach is far greater than party political and electoral matters.¹⁰ Under section 321(3) the terms 'objects of a political nature' and 'political ends' are defined widely so as to include: 'influencing the outcome of elections and referendums';¹¹ 'bringing about changes in the law' and/or 'influencing the legislative process';¹² promoting the interests of political parties and groups;¹³ 'influencing the policies or decisions of governments';¹⁴ 'persons on whom public functions are conferred by law'¹⁵ or 'international agreements';¹⁶ and 'influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy'.¹⁷ The provision has been subjected to much academic criticism on account of its breadth, catching as it does not just political parties but social advocacy groups seeking to influence debate about matters of controversy.¹⁸

⁸ Communications Act 2003 s 321(2)(a).

⁹ *ibid* s 321(2)(b).

¹⁰ Lord Scott described the width of the prohibition as 'remarkable' in *Animal Defenders* n 9 above at [41].

¹¹ Communications Act 2003 s 321(3)(a). Covers the UK and elsewhere.

¹² *ibid* s 321 (3)(b).

¹³ *ibid* s 321(3)(g).

¹⁴ *ibid* s 321(3)(c). In the UK or elsewhere.

¹⁵ *ibid* s 321(3)(d). In the UK or elsewhere.

¹⁶ *ibid* s 321(3)(e). In the UK or elsewhere.

¹⁷ *ibid* s 321(3)(f).

¹⁸ See eg A. Scott, "'A Monstrous and Unjustifiable Infringement'?: Political Expression and the Broadcasting Ban on Advocacy Advertising (2003) 66 MLR 224; E. Barendt, *Freedom of Speech* (Oxford: OUP, 2006) 444-

ANIMAL DEFENDERS: THE CHALLENGE IN THE UNITED KINGDOM

It is against this statutory backdrop that Animal Defenders International (ADI), a non profit, non charitable animal rights NGO submitted a short film to be broadcast on commercial television networks as part of its 'My Mate's a Primate' campaign highlighting the abuse of primates by humans. The film juxtaposed a girl and a chimpanzee in a cage, accompanied by the text 'A chimp has the mental and emotional age of a 4 year old child', and concluding with a request for donations.¹⁹ Clearance for the advert was refused on the basis that it would fall foul of the Communications Act since ADI was a body whose objects were 'mainly of a political nature'.²⁰ Therefore ADI sought, by way of a judicial review, a declaration under section 4 of the Human Rights Act 1998 (HRA) that the statutory prohibition on broadcast political advertisements was incompatible with Article 10 of the European Convention on Human Rights (ECHR).²¹

445 and 484-486; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: OUP, 2006) 1015-1036; C. Munro, 'Time up for the Ban' (2007) 157 NLJ 886. The impact of the prohibition can be seen on the *Make Poverty History* campaign whose 'One Click' advert was banned, see Ofcom Bulletin issue 43, 12 September 2005, 4-14, available at <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/pcb52/issue43a.pdf> (last visited 24 June 2013).

¹⁹ The film can be seen here: http://www.youtube.com/watch?v=qON_IFQE4HY (last visited 24 June 2013).

²⁰ By the Broadcasting Advertising Clearance Centre, an informal body funded by commercial broadcasters to monitor proposed advertisements.

²¹ Article 10(1) of the ECHR provides that: '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.' Article 10(2) states: 'The exercise of these freedoms, since it

Both the Divisional Court²² and a unanimous House of Lords²³ held that the ban was not incompatible with Article 10. Their Lordships accepted the “anti-distortion” argument—that restrictions on political advertising were necessary to ensure that ‘the playing field of debate should as far as possible be level’.²⁴ The real question was not whether *some* limitations were necessary, but rather whether such an *all encompassing* prohibition was proportionate, especially given that ADI itself is clearly not one of those wealthy groups whose domination of the air-waves the legislation is intended to prevent. Alternative, more finely tuned regimes might be feasible, which would achieve the objectives of protecting democracy and yet still allow groups such as ADI to get their message across in the most effective medium, for example a system of rationing or capping. However, their Lordships held that the question of how to balance freedom of expression and the protection of democratic process was best resolved by elected MPs. Given the power and pervasiveness of TV, ‘great weight’ should be accorded to parliament’s view that it was necessary to impose a blanket ban on *all*

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.’

²² *R (on the application of Animal Defenders International) v Secretary of State for Culture Media & Sport* [2006] EWHC 3069 (Admin) (04 December 2006); (2007) HRLR 9. (Auld LJ and Ousely J)

²³ *R (On the Application of Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] UKHL 15 (12 March 2008); [2008] 1 AC 1312. Lord Bingham, Lord Scott and Baroness Hale gave fully reasoned speeches. Lords Carswell and Neuberger agreed with the reasons given by Lord Bingham. The appeal from the Divisional Court was ‘leapfrogged’. Hereinafter, for ease of reference, the House of Lords stage of the case will be referred to as ‘*Animal Defenders*’, and the European Court of Human Rights stage as ‘*ADI*’.

²⁴ *ibid* at [28] (Lord Bingham).

‘political’ advertisements in the broadcast media and that more nuanced systems taking account individual cases, or rationing or capping, were not workable since they would lead to uncertainty, unfairness and many legal challenges.²⁵ ‘Government had considered that no fair and workable compromise solution could be found which would address the problem—a judgment which Parliament accepted’ and which Lord Bingham saw ‘no reason to challenge’.²⁶

THE STRASBOURG POSITION ON BROADCASTING BANS ON POLITICAL ADVERTISING PRIOR TO *ADI*

When ADI applied for judicial review in the domestic courts it doubtless was confident that its prospects of securing a declaration of incompatibility were good, given that the protection afforded to political speech and speech bearing on matters of public concern by the European Court of Human Rights (ECtHR) has, famously, been very strong. The ECtHR has repeatedly said that ‘there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest’, and the margin of appreciation afforded to states in such cases has been narrow.²⁷ Freedom of political debate is said to be at the ‘very core of the concept of democratic society which prevails throughout the Convention’.²⁸ Furthermore, ADI would have drawn encouragement from the ECtHR’s specific case law concerning broadcasting bans on political advertisements. In *VgT Verein*

²⁵ *ibid* at [31-33] (Lord Bingham).

²⁶ *ibid* at [31].

²⁷ See eg *Lingens v Austria* (1986) 8 EHRR 103 at [42]; *Castells v Spain* (1992) 14 EHRR 445 at [43]; *Thorgeir Thorgeirson v Iceland* 14 EHRR 843 at [63]; *Éditions Plon v France* (2004) 42 EHRR 36.

²⁸ *ibid* n 23 *Lingens* at [42].

gegen Tierfabriken v Switzerland (VgT) a Swiss animal rights organisation, in response to commercials by the meat industry, wished to broadcast an advert highlighting the plight of factory farmed pigs and enjoining viewers to ‘eat less meat’.²⁹ Switzerland had a broadcasting ban on political advertisements which, like the United Kingdom’s ban, was designed to ‘prevent financially powerful groups from obtaining a competitive political advantage’ and ensure broadcasters’ independence’.³⁰ The ECtHR accepted that it was legitimate to impose limits on broadcast advertising in order to protect democracy in ‘certain situations’.³¹ However the blanket ban constituted a disproportionate interference since VgT was clearly not a wealthy group that was in a position to distort the political process in the way envisaged by the legislation; all it intended to do was to ‘participate in an on-going general debate on animal protection and the rearing of animals’.³² The reasons for the ban given by the Swiss authorities did not demonstrate ‘in a “relevant and sufficient” manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of [VgT]’s case’.³³ Furthermore because this was a restriction on political expression the margin of appreciation to be afforded to the state was necessarily narrowed.³⁴

²⁹ *VgT Verien gegen Tierfabriken v Switzerland* ((2002) 34 EHRR 4 (Chamber, Second Section).

³⁰ *ibid* at [63].

³¹ *VgT* at [73] and [75].

³² *ibid* at [75].

³³ *ibid*.

³⁴ *ibid* at [71]. (Albeit the background context of the expression was commercial advertising, an area in which the margin of afforded to states is usually widened.) It was the political nature of the expression in *VgT* that allowed the Court to distinguish it in the later case of *Murphy v Ireland* (2004) 38 EHRR 13 which concerned the Irish broadcasting ban on religious advertising. The Court in *Murphy* distinguished *VgT* on the basis that there a wider margin of appreciation should be afforded to states when regulating speech within ‘the sphere of

The *VgT* judgment posed problems for the United Kingdom government during the passage of the Communications Bill. Indeed the government took the highly unusual step of making a statement under section 19(1)(b) HRA to the effect that it was unable to make a statement that the Bill was compatible with Convention rights.³⁵ Moreover *VgT* posed problems for the House of Lords in *ADI*, bound as it was to ‘take it into account’ by virtue of section 2 HRA. However Lord Bingham held that the argument that it was necessary to maintain the ‘level playing field of debate’ had not been ‘deployed’ to its ‘full strength’ in the Swiss case which was in any event distinguishable as *VgT* had been seeking to respond to a meat industry campaign, which was not the case in *Animal Defenders*.³⁶ Lord Scott stressed the fact-sensitivity of Strasbourg judgments, saying that it was therefore ‘perilous to transpose the outcome of one case to another where the facts are different’.³⁷

Notwithstanding their Lordships doubts about the more general applicability of *VgT* the ECtHR appeared strongly to reaffirm its approach to broadcasting bans on political advertising in *TV Vest and Rogaland Pensjonistparti v Norway*, albeit in this case in respect of a minor political party which struggled to secure any coverage in mainstream programming due to the dominance of the major parties and whose only access to the airwaves was through paid advertising.³⁸

morals or, especially, religion’; and on the basis of the ‘nature and level of the religious sensitivities’ in Ireland at [67].

³⁵ See the Parliamentary Joint Committee on Human Rights Report on the Draft Communications Bill, Nineteenth Report of Session 2001-02, HL Paper 149, HC 1102, 19th July 2002, at [58 - 64].

³⁶ *ibid* at [28-29].

³⁷ *ibid* at [43]

³⁸ *TV Vest AS and Rogaland Pensionistparti v Norway* ((2009) 48 EHRR 51 (Chamber, First Section)). The UK government intervened in *TV Vest*, attaching a copy of the House of Lords judgment in *Animal Defenders* for the Court’s consideration [54 - 57], but to no avail. Furthermore, the Grand Chamber of the ECtHR found a

ANIMAL DEFENDERS AT STRASBOURG

The central question for the Grand Chamber in *ADI* was not whether *some* restriction on political advertising was legitimate to protect democratic processes from distortion: all sides agreed that it was.³⁹ Rather, it was whether a wide broadcasting ban that caught not just wealthy political actors but also social advocacy groups posing no threat to democracy, was a proportionate interference with ADI's Article 10 rights.

The majority held that it did—the ban did not violate Article 10.⁴⁰ The crucial step in the Grand Chamber's reasoning was its characterisation of the ban as a 'general measure'.⁴¹ Having regard to the case law the majority divined a trend: 'in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it.'⁴² Of particular importance, the majority held, was 'the quality of the parliamentary and judicial review of the necessity of the measure', and the 'risk of abuse if the general measure were to be relaxed', a question that was 'primarily for the state to assess'. Where a system of 'case by case examination' would 'give rise to a risk of significant uncertainty', then it was more likely that a general measure would be found to be a 'more feasible means of achieving the legitimate aim'.⁴³ Further, 'the more convincing the general

fresh breach of Article 10 in *VgT Veriein gegen Tierfabrieken v Switzerland (No 2)* app no 32772/02 (24 June 2009) after a failure by the Swiss authorities to lift the ban.

³⁹ *ADI* n 1 at [106] and [112]

⁴⁰ The majority comprised Judges Casadevall, Vajić, Steiner, Hirvelä, Nicolaaou, Poalelungi, Pardalos and Keller. Judge Bratza gave a separate concurring opinion.

⁴¹ *ADI* n 1 at [107]. Meaning a general measure whose impact is not tailored to the facts of individual cases.

⁴² *ibid* at [108]. See also the concurring opinion of Judge Bratza at [4] and [7].

⁴³ *ibid*.

justifications for the general measures are, the less importance the Court will attach to its impact in a particular case'.⁴⁴ Crucially, the majority stated:

'The central question as regards ... [general] measures is not, as the applicant suggested, whether less restrictive rules should have been adopted, or indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it'.⁴⁵

Moreover, on the question of the margin of appreciation, the Grand Chamber noted, since there 'is a wealth of historical, cultural and political differences [sic] within Europe ... it is for each State to mould its own democratic vision' and because of their close contact with the 'vital forces of their countries, their societies and their needs, the legislative and judicial authorities are in the best place to assess the particular difficulties of safeguarding the democratic order in their State'.⁴⁶

Having set up the question in this way it was a comparatively easy step for the majority to find that the interference with ADI's rights was proportionate. Crucially, they found that there had been 'exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition' coupled with the detailed debate and analysis by the domestic courts. The former, it was noted, possessed 'particular competence' in this area and 'considerable weight' was attached 'to [the] exacting and pertinent reviews' held by both parliament and the courts leading to their finding that 'general measures were necessary to

⁴⁴ *ibid* at [109].

⁴⁵ *ibid*. See also the concurring opinion of Judge Bratza at [17].

⁴⁶ *ibid* at [111].

prevent distortion of crucial public interest debates’ and the ‘undermining of the democratic process’.⁴⁷ Furthermore, the ban was ‘specifically circumscribed’, and minimally impaired freedom of expression because it only applied to paid advertising on TV and radio, leaving ADI free to participate in ordinary discussion programmes and to use other means of communication such as print, posters, public protest and the internet, or alternatively set up a non-political charitable arm which would be exempt from the ban.⁴⁸ In addition the Grand Chamber noted that the United Kingdom’s system of free party political broadcasts for political parties mitigated, in a general sense, the harshness of the ban, although (as the Grand Chamber admitted) this did not help ADI itself.⁴⁹

ADI had argued that an alternative, more finely tuned regime would be preferable, which would allow social advocacy groups to advertise outside of election periods, and adjudicated for example on a ‘case by case’ basis or a system of involving spending caps.⁵⁰ However the Grand Chamber held that this was primarily an issue for determination by domestic authorities and the United Kingdom bodies had reached the conclusion that such alternative schemes would not be feasible either due, respectively, to the risk of arbitrariness (with accompanying uncertainty, litigation, expense and delay) or abuse (for example political

⁴⁷ *ibid* at [114-116]. See also the concurring opinion of Judge Bratza at [12] and [13]. For a summary of the various stages of legislative examination and consultation process see [41-54]. The bodies consulted included the Joint Committee on Human Rights, the Independent Television Commission, and the Electoral Commission.

⁴⁸ *ibid* at [117] and [124]. See also the concurring opinion of Judge Bratza at [15].

⁴⁹ *ibid* at [121]. See also the concurring opinion of Judge Bratza at [15] and the dissent of Judge Tulkens et al at [14].

⁵⁰ Such nuanced systems exist in many European countries (eg Switzerland, Denmark, Norway, Sweden, Italy the Czech Republic and Belgium). The type and range of systems, from complete bans to systems with no restrictions at all, was surveyed by the European Platform of Regulatory Authorities, May 2006, summarised in *ADI* n 1 above at [65-69].

organisations setting up fronting social advocacy groups to circumvent any spending cap). Further, these alternative schemes might compromise the principle of broadcasting impartiality.⁵¹ On the question of restrictions placed on political advertising on TV and radio, the majority reiterated, there was no consensus among Contracting states and the margin of appreciation to be afforded should be ‘somewhat wider than ... than that normally afforded to restrictions on matters of public interest’.⁵² In conclusion the Grand Chamber found that the ‘reasons adduced by the authorities to justify the prohibition of [ADI’s] advertisement [were] relevant and sufficient ... [and] the prohibition [could not] therefore be considered to be a disproportionate interference with the applicant’s right to freedom of expression’.⁵³

COMMENT

This case raises several issues of concern, both with regard to the adjudication of freedom of expression cases specifically, and also in relation to the European Convention system for human rights protection more broadly.

General measure or blanket ban?

The first area of concern is in relation to the Grand Chamber’s identification of the case as one involving ‘general measures’. Essentially the majority seems to be saying, as a general proposition, that where a state interferes with human rights by way of a broad legal

⁵¹ *ibid* at [122].

⁵² *ibid* at [123]. The Court acknowledged in the area of political advertising broadcasting bans it was particularly difficult to assess the level of consensus between states and compare regimes due to the differing interpretations of the term ‘political’ in different legal regimes.

⁵³ *ibid* at [125].

prohibition that has a legitimate aim but which catches within its broad sweep or fine mesh those whose circumstances place them outside the scope of the legislation's aim then, as long as there has been a proper debate by the legislative organs that introduced it in the first place, it will likely be found to be proportionate. This approach is open to criticism for several reasons.

In its well-established Article 10 jurisprudence the European Court's method of establishing if a particular interference is 'necessary in a democratic society' is to determine whether it is in response to a 'pressing social need', whether it is 'proportionate to the legitimate aim pursued' and 'whether the reasons given to justify it by the national authorities are relevant and sufficient'.⁵⁴ Regard must also be had to the appropriate margin of appreciation to be afforded to the state at this stage.⁵⁵ However, as the dissenting judges pointed out, the majority judgment in *ADI* significantly waters down this approach in cases where a state's legislature has sought to achieve a particular aim by way of a 'general measure'.⁵⁶ In such circumstances, at least where a 'general measure' has been used because it is claimed that alternatives would lead to uncertainty or abuse then, following *ADI*, the emphasis is to be placed on the question of whether the reasons given for adopting the general measure are relevant and sufficient. This is indicated by the Grand Chamber's subtle re-definition of its own role in respect of the Article 10(2) 'necessary in a democratic society' test: to 'assess whether the reasons adduced to justify the prohibition were both "relevant" and "sufficient" and thus whether the interference corresponded to a "pressing social need"

⁵⁴ *Sunday Times v UK* (1979) 2 EHRR 245, at [62]. Admittedly this test is rather sporadically and inconsistently applied, see H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford: OUP, 2006), 93-106.

⁵⁵ *Handyside v UK* (1976) 1 EHRR 737 at [48-49].

⁵⁶ *ADI* n 1 above dissent of Judge Ziemele et al at [3-4].

and was proportionate to the legitimate aim pursued'.⁵⁷ Thus in 'general measures' cases the relevancy and sufficiency of the reasons provided becomes the crucial determinant of whether the 'social need' is 'pressing' and the interference proportionate, rather than merely the *final* element of the analysis.⁵⁸

The problem with this 'general measures' approach is that scrutiny of the impact of the legislation on the individual applicant will be significantly diminished. If a state introduces a general ban, but ensures that its legislative and executive bodies properly deliberate upon it, this will lead to a reduced intensity of examination by the Court, arguably to the point where it becomes merely a review of the quality of the debate at national level, rather than of the measure's impact in the 'particular case' before it.⁵⁹ The Grand Chamber stated that 'the application of the general measure to the facts of the case remains ... illustrative of its impact in practice and is thus material to its proportionality'.⁶⁰ But this, in effect, writes the individual applicant out of the equation. It is difficult to see, from the right holder's perspective, why the quality and quantity of debate should have a determinative impact on whether there has been a violation of their rights.⁶¹ Furthermore, as the dissenting judges commented, the approach of the majority disregards the well established principle that in order for a measure to be proportionate and necessary 'there must be no other means of

⁵⁷ *ADI* n 1 above at [105] (emphasis added).

⁵⁸ As Fenwick and Phillipson point out, n 56 above, at 94, 'the requirement that the "reasons" given be "relevant and sufficient" is largely meaningless [since] it is self-evident that they must be "relevant" [and] what counts as "sufficient" evidence will depend on how closely the Court is minded to scrutinize the factual matrix, which really depends upon how intensely it is applying the proportionality test'.

⁵⁹ *Murphy v Ireland* (2004) 38 EHRR 13 at [68]; *VgT* n3 above at [75]; *TV Vest* n3 above at [63] and [69].

⁶⁰ *ADI* n 1 above at [108]

⁶¹ This point was made forcefully by Judge Ziemele et al, dissenting, in *ADI* n 1 above, at [8-10].

achieving the same end that would interfere less seriously with the fundamental right concerned'.⁶²

In the United Kingdom's domestic human rights jurisprudence, since the passage of the HRA, a strong stance has been taken against a "formalist" approach which examines the adequacy of the decision making process behind a measure which interferes with Convention rights.⁶³ In particular the domestic courts have expressly rejected approaches which would allow consideration of the quality of debate in parliament as going to whether a measure is proportionate or not, holding that this would contravene Article 9 of the Bill of Rights 1689.⁶⁴ Thus in *Wilson v First County Trust Ltd* Lord Nicholls held: '[i]t is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis ... [it] is not to be judged by the quality of reasons advanced in support of it in the course of parliamentary debate'.⁶⁵

It stark contrast, recent Strasbourg jurisprudence has tended to place emphasis on the presence or absence, or quality of, parliamentary debate. Indeed in the prisoner voting ban

⁶² *ADI* n 1 above, dissent of Judge Tulkens et al at [16], and of Judge Ziemele et al at [14]. Judge Tulkens et al noted that in all of the debate by the domestic legislative bodies and courts, no convincing arguments were put for rejecting the *less restrictive* solutions that do operate in most other Contracting States.

⁶³ *R (on the application of Begum v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Limited (Northern Ireland)* [2007] UKHL 19, [2007] 1 WLR 1420,

⁶⁴ *Wilson and First County Trust* [2003] UKHL 40; [2004] 1 AC 816. Article 9 of the Bill of Rights 1689 states: 'That the Freedom of Speech and Debates or Proceedings in Parlyment ought not to be impeached or questioned in any Court or Place out of Parlyament'.

⁶⁵ *Wilson* n 61 at [67] (Lord Nicholls). Their Lordships all agreed, Lord Hope at [115 - 118], Lord Hobhouse at [140 - 145], Lord Scott at [173], Lord Rodger at [178]. See also *R v Secretary of State for Education and Employment, ex parte Williamson* [2005] UKHL 15; [2005] 2 AC 256 at [51] (Lord Nicholls)

case, *Hirst v United Kingdom (no 2)*, the *failure* to have such a debate counted against the United Kingdom and was one of the factors leading the Court to find of an absence of proportionality.⁶⁶ This line of reasoning leads to an uncomfortable inference: that states may impose broad restrictions on protected rights, and as long as they *do* tick the correct boxes in terms of debate, this will exempt them from the rigours of full proportionality review at any subsequent Strasbourg hearing. By the same token, states which may adopt *identical* measures, but whose legislatures do not conduct such full debates will be far more likely to be found in breach.⁶⁷ The question arises: if the law makers in Switzerland and Norway had conducted more extensive reviews when introducing their own broadcasting bans, might those states have escaped censure by the Strasbourg court in *VgT* and *TV Vest* respectively? The conclusion to be drawn from the majority judgment in *ADI* is that they would.

It might also be noted that it was only because of the *VgT* judgment that the ‘exceptional examination’ by the United Kingdom’s parliamentary and judicial bodies took place at all. Had it not been for *VgT* it is virtually certain that the pre-legislative and legislative scrutiny, (and judicial review), would have been far less searching.⁶⁸ The irony here is obvious—the *VgT* case itself provoked the discussion that accompanied the passage of the Communications

⁶⁶ *Hirst v United Kingdom (no 2)* (2006) 42 EHRR 41, [79]. See Judge Bratza’s concurring opinion in *ADI* n1 above at [12]. The question arises: what if there *had* been a full debate on prisoner voting prior to the passage of the Representation of the People Act 1983 (the impugned measure in *Hirst*)? See T Lewis “‘Difficult and Slippery Terrain’: Hansard, Human Rights and *Hirst v UK*” (2006) PL 209.

⁶⁷ In this regard it is notable that the Court in *VgT* in which the broadcasting ban was arguably *less* broad the UK’s (see the dissent of Judge Ziemele et al in *ADI* at [2] and Tulkens et al at [12]) held that the reasons given by the Swiss authorities were not relevant and sufficient at [75].

⁶⁸ The Neill Committee report, n 7 above, predated *VgT* and whilst supportive of the ban on political broadcast advertising, focussed on the issue as it related to political parties and did not address the allegation of overbreadth in relation to social advocacy groups.

Bill in the United Kingdom. The very fact that this debate had taken place contributed, in turn, to the quasi-overruling of *VgT* by the Grand Chamber in *ADI*. Indeed the crucial factor seems to have been the mere happenstance of the timing of legislative measures in relation to the Court's judgments: had the Communications Bill completed its passage *before* the *VgT* ruling the parliamentary deliberations would, without doubt, have been nowhere near as intensive.

Given the critical consequence of categorising a provision as a 'general measure' it would seem to be crucial to have a clear definition of this term. This is made all the more important by the fact that a 'general measure' appears to be strikingly similar to what, in other cases, the European Court has categorised as a 'blanket ban',⁶⁹ and/or as 'prior restraint'.⁷⁰ In these latter instances, however, the Court has insisted that such restrictions are subjected to careful scrutiny with the state afforded only a narrow margin of appreciation. In reality however it is difficult to a distinction difference these "bad" forms of restraint and the acceptable and justifiable 'general measure'.

It could be argued that the difference in *ADI* was the fact that *other* means of communication—eg newspapers, demonstrations, posters and the internet—were still available for social advocacy groups to get their message across.⁷¹ This is a weak argument. If the ban had covered these other media this would have constituted such a drastic interference with the freedom of political expression that it could never have withstood human rights challenge. The Communications Act ban *was* a blanket ban in the sense that it

⁶⁹ See eg *Hirst* n 65 at [76]

⁷⁰ *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153 [60]. In *ADI* n 1 above Judge Ziemele et al noted that this was 'almost a blanket restriction' (at [2]) which 'border[ed] on prior restraint' (at [10]).

⁷¹ *ADI* n 1 at [124]

denied access completely to broadcast advertising, arguably *the* most effective means of mass communication.⁷²

It is clear, then, that in future cases a great deal will turn on whether the Court classifies a restriction a ‘general measure’ or ‘blanket ban’. By way of illustration, consider the prisoner voting case, *Hirst*. The ban in that case arguably was not so very different to that in *ADI*. It applied *only* to those convicted of crimes serious enough to warrant a custodial sentence, and only during their period of incarceration. It did not apply to criminals subject to fines, suspended sentences or community service, or to those detained on remand or for contempt of court, fine default, or unconvicted detained mental patients.⁷³ But the Grand Chamber in *Hirst* did not hesitate to categorise that ban as a ‘blanket restriction’, and this was *the* key determinant in its finding of a breach of the right to vote under Article 3 of Protocol 1.⁷⁴

There is therefore a troubling lack of clarity about the crux question of what constitutes a ‘blanket ban’ what constitutes a ‘general measure’. If a ban is categorised as ‘blanket’ this will benefit the applicant—it will be an uphill struggle for the defendant state to justify it; but if it is a ‘general measure’ then all the state has to demonstrate is that its legislators have carried out a thorough ventilation of the issues before coming down on the side of restriction.

⁷² *ibid* Judge Tulkens et al at [12-13]; Judge Ziemele et al at [2]. There was some discussion in *ADI* over whether the internet has replaced television as the most influential medium. The majority stressed the ‘immediate and powerful effect of the broadcast media’, the fact that they were ‘familiar sources of entertainment in the intimacy of the home’ and their ‘synchronicity’ as compared to the internet. *ADI* had argued that to single out broadcasting was ‘illogical’ since the internet was equally if not more influential, but the majority held that there had been ‘no significant evidence of a sufficiently serious shift in the respective influences of the new and the broadcast media ... to undermine the need for the special measures for the latter’ at [117].

⁷³ *Hirst* n 65 at [51].

⁷⁴ *ibid* at [82].

The initial categorisation will in effect determine the outcome of the case. Will the adjudicative battleground, post *ADI*, become a struggle over categories?

Finally, as five of the dissenting judges explained, the ‘general measures’ doctrine is of distinctly dubious doctrinal provenance.⁷⁵ The Court has dealt on multiple occasions with cases involving general prohibitions and ‘bright line rules’.⁷⁶ But the Grand Chamber’s statement in *ADI* that ‘[i]t emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must *primarily* assess the legislative choices underlying it’⁷⁷ is loosely based on the single, limited and ageing authority of *James and others* a case concerning leasehold enfranchisement legislation involving Article 1 of Protocol 1.⁷⁸ Certainly the ‘general measures’ principle has not been deployed in the Court’s Article 10 case law hitherto. In particular, no mention was made of the doctrine by the Court

⁷⁵ *ADI* n 1 above, dissent of Judge Ziemele et al at [4-8].

⁷⁶ Principles concerning ‘general measures’ have mainly been discussed by the Court, though not using this term, in cases concerning intimate and sensitive issues of personal autonomy and dignity (eg *Pretty v UK* [2002] 35 EHRR 1 at [74]; *Evans v UK* ((2006) 43 EHRR 21 at 86] and [89]), cases involving economic and social policy (eg *James and others v UK* (1986) 8 EHRR 123 [at 36 and [68]; *Hatton & Others v UK* ((2003) 37 EHRR 28 at [128]), cases involving pensions and welfare (eg *Carson v UK* [2009] ECHR 1272, 2 Sept 2009; *Runkee v UK* [2007] ECHR 373 10 May 2007 at [39]) and cases involving electoral law (eg *Zdanoka v Latvia* (2007) 45 EHRR 17 at [112-114]; *Hirst v UK* (no 2) n 65 above). For a general review of this area see P. Sales and B. Hooper ‘Proportionality and the Form of Law’ (2003) 119 LQR 426. See Judge Ziemele et al, *ibid*.

⁷⁷ *ADI* at [108] (emphasis added).

⁷⁸ *James and others v United Kingdom* (1986) 8 EHRR 123 at [36], though this principle is not expressly stated in these terms in the Court’s judgment, its origins appearing to lie in the UK government’s argument before the Commission, see *James and others v UK* App no 8793/79, 28 Jan 1983 (HUDOC) at 47 and 57. See R. Ó Fathaigh ‘Ban on Political Advertising Does Not Violate Article 10: *Animal Defenders International v UK*’ *Strasbourg Observers* blog at <http://strasbourgobservers.com/2013/04/24/ban-on-political-advertising-does-not-violate-article-10/> 24 April 2013 (last visited 24 June 2013)

in its recent jurisprudence concerning bans on broadcast advertising, be it concerning political expression or religious expression. Furthermore, the Grand Chamber's key assertion that 'the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case' is stated to be based, with quite striking vagueness, on 'elements of its analysis' in *VgT*, *Murphy* and *TV Vest*, with a conspicuous absence of any specific paragraph references.⁷⁹ The case that would most support the Grand Chamber's argument is the religious advertising ban case of *Murphy* and no such 'general measures' methodology was used there. Rather that case was expressly distinguished from the political expression case, *VgT*, by virtue of the type of expression involved (religious, not political) and the particular sensitivities associated with religion, especially in Ireland, leading the Court to afford a wider margin of appreciation to the Irish state.⁸⁰

Previous authorities

Perhaps the other most striking feature of *ADI* is the Grand Chamber's apparent rejection of its approach in *VgT* and *TV Vest*.⁸¹ The Strasbourg court does not operate a system of binding precedent, the Convention being a 'living instrument which ... must be interpreted in the light of present day conditions'.⁸² Nevertheless the Court has previously held the position

⁷⁹ *ADI* at [109]. See R. Ó Fathaigh *ibid*.

⁸⁰ *Murphy v Ireland* [67]. *ADI* n 1 above, dissent of Judge Ziemele et al at [8]. See n 37 above. See further A. Geddis 'You Can't Say "God" on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media after *Murphy v Ireland*' (2004) EHRLR 181.

⁸¹ *ADI* n 1 above dissents of Judge Ziemele et al at [1] and of Judge Tulkens et al at [12].

⁸² *Tyrer v UK* (1978) 2 EHRR 1 at [31].

that ‘it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases’.⁸³

The Grand Chamber in *ADI* declined to follow its earlier approach notwithstanding the ‘essentially identical’ facts of the *VgT* case,⁸⁴ and the later reaffirmation of the *VgT* approach in *TV Vest*.⁸⁵ But it is not at all clear, from the majority judgment, what status these earlier authorities retain. They were not expressly overruled, and there are hints that the earlier cases might be distinguished: the group in *VgT* was *responding* to a particular advertising campaign, as compared to *ADI* which had been seeking to *initiate* a debate whilst *TV Vest* concerned a political party (as opposed to an NGO) and a different kind of regulatory regime.⁸⁶ But these points were never clearly spelled out by the Grand Chamber and as a result we are left in a state of uncertainty.

As the dissenting judges in *ADI* pointed out, there appears to be a ‘double standard’ operating within the Convention ‘whose minimum standards should be equally applicable to all the States parties to it’.⁸⁷ Why were the ‘essentially identical “general prohibitions”’ considered to be ‘not necessary in Swiss democratic society, but ... necessary in the ... United Kingdom’.⁸⁸ At the very least states like Switzerland, Norway and Denmark, all of which reformed their systems in order to comply with the *VgT* ruling, might feel aggrieved at the Grand Chamber’s apparent U turn.

⁸³ *Christine Goodwin v UK* (2002) 35 EHRR 18 at [74]; *Stafford v UK* (2002) 35 EHRR 32 at [68].

⁸⁴ *ADI* n 1 above dissent of Judge Ziemele et al at [1]. Lord Bingham described the facts of the cases as being very similar, *Animal Defenders* n 25 at [9].

⁸⁵ See n 41 above.

⁸⁶ *ADI* n 1 above, UK Government’s arguments at [98].

⁸⁷ *ADI* n 1 above dissent of Judge Ziemele et al at [1].

⁸⁸ *ibid.*

The irony here is inescapable. One of the main reasons why the Grand Chamber found for the United Kingdom was because the Communications Act ban avoided the uncertainty of more finely tailored regimes.⁸⁹ But its failure to deal clearly and explicitly with the earlier case law means that uncertainty still abounds. For example: would a group in the United Kingdom *responding* to a commercial advertising campaign on an issue of public controversy (as opposed to initiating a debate) be found to have its Article 10 rights breached by the ban?⁹⁰ If Switzerland, Norway or Denmark decided to reintroduce their own bans, and their legislative organs conducted searching debates on the issue, would they now, in the wake of *ADI*, be entitled to do so? We don't know.

CONCLUSION

The eight dissentient judges in *ADI* summed up the Communications Act prohibition thus:

‘this is a ban which concerns the most protected form of expression (discussion on matters of public interest) by one of the most important categories of actors in the democratic process (an NGO) and a form of media which remains influential (radio and/or television), without the least exception’.⁹¹

⁸⁹ *ADI* n 1 above at [122]

⁹⁰ This possibility was suggested, obiter, in the House of Lords hearing of *ADI* by Lord Bingham at [34] and Lord Scott at [41]. The latter gave examples: adverts for burgers might offend those groups who disagree with the way beef cattle are reared and slaughtered; adverts for Christmas turkeys might offend those who oppose factory farming of poultry.

⁹¹ *ADI* n 1 above dissent of Judge Tulkens et al at [13]. Almost identical words were used by Judge Ziemele et al at [2].

To illustrate by way of example, under the current state of affairs a car manufacturer may advertise its SUVs on television without limit (finances permitting), but an NGO wishing to publicise the impact of such vehicles on the environment is prohibited by law from doing so.⁹² Perhaps unsurprisingly, therefore, the judgment was greeted with dismay by those who feel that social advocacy groups are hard done by under the current regime.⁹³

Nevertheless, many were relieved by the decision, closing the door, as it does, firstly on any slide towards ‘US-style political advertising’ and, secondly, on the provision of a commercial broadcasting platform for those with far more controversial views than ADI.⁹⁴ Setting to one side the free speech arguments, however, one cannot help feeling that the majority of the Grand Chamber were desperate to reach the conclusion they did, casting to

⁹² Judge Tulkens et al commented that whilst ADI is prohibited from airing its views via broadcast advertisements, ‘a commercial firm ... would have full freedom, limited only by its financial resources, to screen advertisements using animals to promote its products, an approach directly contrary to the views of [ADI]’ at [19].

⁹³ R. English, ‘Strasbourg ties itself in knots over advertising ban’ *UK Human Rights Blog* 22 April 2013 at <http://ukhumanrightsblog.com/2013/04/23/strasbourg-ties-itself-in-knots-over-advertising-ban> (last visited 24 June 2013) O. Bowcott ‘Animal rights group fails to overturn ban on political advertising’ *The Guardian* 22 April 2013; J. Creamer ‘Comment: Political Advertising should be allowed on UK television’ *politics.co.uk* 24 April 2013, at <http://www.politics.co.uk/comment-analysis/2013/04/24/comment-political-advertising-should-be-allowed-on-uk-tv> (last visited 24 June 2013).

⁹⁴ J. Rozenberg, ‘Government will be mightily relieved at decision to uphold political ads ban’ *The Guardian* 22 April 2013; J. Rowbottom, ‘A surprise ruling? Strasbourg upholds the ban on paid political ads on TV and Radio’ *UK Constitutional Law Blog* 22nd April 2013 at <http://ukconstitutionallaw.org/2013/04/22/jacob-rowbottom-a-surprise-ruling-strasbourg-upholds-the-ban-on-paid-political-ads-on-tv-and-radio/>. Judge Bratza in his concurring opinion in *ADI* at [7] provided examples of more ‘controversial’ areas: ‘abortion, immigration, gay marriage and climate change’.

the wind established case law and essentially creating from scratch a whole new ‘general measures’ doctrine.

Much has been written recently of the possibility of dialogue between national institutions and the Strasbourg court.⁹⁵ Perhaps *ADI* is a perfect example of just such a dialogue. A more cynical conclusion would be that, against the backdrop of the famously hostile reaction amongst the British political classes and media to the Court’s judgment in *Hirst*, the Grand Chamber had reason to think twice before interfering again with the mechanisms of British democracy.⁹⁶ Perhaps *ADI* is an example of sensible dialogue. Perhaps, less charitably, is it a case of Strasbourg losing its nerve.

⁹⁵ M. Amos ‘The Dialogue Between United Kingdom Courts and the European Court of Human Rights’ (2012) ICLQ 557; J.P. Costa ‘The relationship between the European Court of Human Rights and the national courts’ (2013) EHRLR 264.

⁹⁶ David Cameron famously declared that it would make him ‘physically ill even to contemplate having to give the vote to anyone who is in prison’ HC Deb vol 517 col 921 3 Nov 2010; P. Wintour and A. Sparrow ‘I won’t give prisoners the vote, says David Cameron’ *The Guardian* 24 October 2012. After a debate on 10 February 2011 the House of Commons voted by 234 to 22 in favour of retaining the blanket ban on prisoner voting, HC Deb vol 523 col 493 - 585 10 February 2011. The draft Voting Eligibility (Voting) Bill proposes three options one of which is to retain the status quo in defiance of the ruling in *Hirst* at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-voting-eligibility-prisoners-bill/> (last visited 24 June 2013); J. Chapman and J. Groves ‘MPs begin historic debate over whether to take a stand against Europe and overturn ruling that prisoners must have the vote’ *Mail Online* 18 February 2011 at <http://www.dailymail.co.uk/news/article-1355376/Prisoners-vote-MPs-stand-UK-rights-overturn-EU-ruling.html> (last visited 24 June 2013); Craig Woodhouse ‘Prison paedos “will get vote”: Euro judges demand ballot for lags’ *The Sun* 23 December 2012 at <http://www.thesun.co.uk/sol/homepage/news/politics/4711067/Prison-paedos-will-get-vote.html> (last visited 24 June 2013).

