

Political Advertising Bans and Freedom of Expression

Greek Public Law Journal, Vol. 26, p. 226

Ronan Ó Fathaigh*

Keywords: European Convention on Human Rights. Freedom of expression. Political advertising. Broadcasting. Political speech. Parliamentary deference.

In Animal Defenders International v UK, the 17-judge Grand Chamber of the European Court of Human Rights ruled that the UK's ban on political advertising on television, as applied to an animal rights organisation, did not violate freedom of expression. The Court divided nine votes to eight, with the majority opinion abandoning the Court's previous 'strict scrutiny' review, and laying down a new doctrine for reviewing political advertising bans. This article, first, examines the role the composition of the Grand Chamber played in the outcome of the case. Second, questions the basis of the new doctrine of review. And third, criticises the majority's treatment of precedent.

Introduction

For nearly three decades, the European Court of Human Rights has consistently held that there is 'little scope' for restrictions on 'political speech' under Article 10 of the European

* Institute for Information Law, University of Amsterdam.

Convention on Human Rights, which guarantees freedom of expression.¹ So in 2001, when the Court first considered a political advertising ban on television in Switzerland, it was no surprise that a unanimous Court ruled that such a ban, as applied to an animal rights group wishing to broadcast a political advertisement, violated freedom of expression.² The unanimous opinion in *VgT v Switzerland* was joined by both then-president of the Court, Luzius Wildhaber, and a future president of the Court, Christos Rozakis.

Seven years later, the Court was again faced with another political advertising ban on television, this time in Norway, and again, a unanimous Court ruled that the ban was an impermissible restriction on ‘political speech’.³ The second opinion in *TV Vest v Norway* was again joined by Christos Rozakis, who was now president of the Court, and Dean Spielmann, another future president of the Court. And one year later in 2009, Switzerland was back again before of the Court, having failed to allow the animal rights group broadcast an amended advertisement. This time the Court sat in a 17-judge Grand Chamber, and again found a violation of Article 10, and more forcefully reiterated the importance of ‘political speech’, coupled with the dangers of ‘prior restraint’.⁴ The opinion in *VgT v Switzerland (No. 2)*, was again joined by Christos Rozakis, and the new president Jean-Paul Costa.

But in 2013, when three former presidents of the Court, President Wildhaber, President Rozakis, and President Costa, had retired, the Court was called upon for a fourth time to

¹ *Wingrove v UK* (App no 17419/90) 25 November 1996, para 58, citing *Lingens v Austria* (App no 9815/82) 8 July 1986, para 42.

² *VgT Verein gegen Tierfabriken v Switzerland* (App no 24699/94) 28 June 2001.

³ *TV Vest AS v Norway* (App no 21132/05) 11 December 2008, para 66.

⁴ *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No. 2)* (App no 32772/02) 30 June 2009 (Grand Chamber), para 93.

consider a political advertising ban on television, this time in the United Kingdom. And something very peculiar happened. Despite both unanimous opinions in *VgT* and *TV Vest*, and despite the pedigree of these opinions, having been joined by three presidents of the Court, the Grand Chamber, in a nine-votes-to-eight majority opinion, with the president of the Court, Dean Spielmann dissenting, ruled in *Animal Defenders International v UK* that the UK's political advertising ban did not violate Article 10.⁵

Animal Defenders in the House of Lords

The case began in 2005, when the animal rights organisation Animal Defenders International (ADI), published its 52-page report on the abuse of chimps, monkeys and others primates in the research and entertainment industries. The report was part of ADI's 'My Mate's a Primate' campaign, and in order to draw public attention to this campaign, ADI made a 20-second television advertisement. The advertisement showed a young girl in a cage mimicking a monkey, with a voice-over describing the ill-treatment of primates. ADI submitted the advertisement to the Broadcast Advertising Clearance Centre, which pre-clears advertisements for broadcast, and it concluded that the advertisement breached the UK Communications Act's ban on advertisements which are 'directed towards a political end' i.e. political advertisements.⁶ ADI appealed the ruling to the UK courts, and in 2007 the case reached the House of Lords (now the UK Supreme Court). At that time, there was only one

⁵ *Animal Defenders International v UK* (App no 48876/08) 22 April 2013 (Grand Chamber). See Jacob Rowbottom 'Animal Defenders International: Speech, Spending, and a Change of Direction in Strasbourg' (2013) 5 *Journal of Media Law* 1; and Tom Lewis, 'Animal Defenders International v. United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters' (2014) 77 *Modern Law Review* 460.

⁶ UK Communications Act 2003, s 321(2).

main authority from the European Court on political advertising that the House of Lords considered (*TV Vest* and *VgT (No 2)* having not yet been delivered):

The case was *VgT v. Switzerland*,⁷ and the facts were near identical to *Animal Defenders*. The applicant was the Swiss Association against Animal Factories (VgT), and in response to advertisements being broadcast by the meat industry on television, VgT made its own advertisement. It was a 55-second commercial, which showed a video clip of the life enjoyed by pigs in the wild, and contrasted this with a video of the miserable life pigs are subjected to in factory farms. However, the Swiss Federal Radio and Television Act bans ‘political advertising’,⁸ and having failed in the Swiss courts to have the advertisement broadcast, VgT asked the European Court to review whether there had been a violation of Article 10.

The European Court reviewed the rationales put forward by the Swiss government for maintaining a political advertising ban, namely (a) preventing financially powerful groups distorting public debate, i.e. the anti-distortion rationale; and (b) because the broadcast media is such an influential media, it may be subject to greater government regulation i.e. power of broadcasting rationale. However, the Court concluded that while these rationale were relevant, ‘general reasons’ were not sufficient to justify application of the ban to a small animal rights group, which posed no threat of distorting public debate.⁹ As mentioned above, the *VgT* judgment was unanimous, and joined by then-president Luzius Wildhaber, and future-president Christos Rozakis.

⁷ *VgT* (n 2).

⁸ Swiss Federal Radio and Television Act, s 18(5).

⁹ *VgT* (n 2), para 75.

However, instead of following *VgT*, the House of Lords chose to follow the European Court's 2003 *Murphy v Ireland* opinion, where the Court had held that an Irish ban on religious advertising on radio did not violate Article 10.¹⁰ This was despite the Court in *Murphy* having specifically distinguished *VgT* on the basis that there should be a wider 'margin of appreciation' when regulating speech within the 'sphere of morals' and 'religion',¹¹ and on the basis of the 'nature and level of religious sensitivities' in Ireland.¹² However, depending on how one read *Murphy*, some rationale rejected in *VgT* (the anti-distortion and power of broadcasting rationale) seemed to have been accepted in *Murphy*. Consequently, the House of Lords held the ban on political advertising did not violate Article 10, based mainly on the anti-distortion and power of broadcasting rationale, coupled with a deference to parliament.¹³

TV Vest and VgT (No 2)

Following the House of Lords' *Animal Defenders* opinion in 2007, the supposed question mark over the authority of *VgT* came to a head in 2008, when the European Court announced it was reviewing the application of a Norwegian ban on political advertising, as applied to a small pensioners political party. Ireland and the UK both submitted third-party comments in *TV Vest v Norway*,¹⁴ fearing their own continued bans on political advertising would be in doubt. They argued *Murphy* should be preferred to *VgT*. However, a unanimous Court held that the ban, as applied to the pensioners political party, and the fine imposed on a

¹⁰ *Murphy v Ireland* (App no 44179/98) 10 July 2003.

¹¹ *ibid*, para 67.

¹² *ibid*, para 76.

¹³ *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

¹⁴ *TV Vest* (n 3).

broadcaster for broadcasting a political advertisement, violated Article 10. Crucially, the Court approved and followed *VgT*, applying a ‘strict scrutiny’ standard of review,¹⁵ distinguishing *Murphy* on the basis that ‘it was [religious] sensitivities that led the Court to’ apply a lower standard of scrutiny, and accept the argument that a relaxed ban would be difficult to apply to religious advertising.¹⁶

The weight and authority of *VgT* was further bolstered in in 2009, when the 17-judge Grand Chamber of the Court in *VgT v Switzerland (No 2)*,¹⁷ was asked to step in after Swiss authorities had refused to broadcast an amended version of *VgT*’s original advertisement. The Grand Chamber ruled that Switzerland had failed in its positive obligations under Article 10 to ‘allow the television commercial in issue to be broadcast’.¹⁸ The Court reiterated its political speech doctrine, and crucially, suggested that the continued refusal to broadcast the commercial was a ‘prior restraint’, which raised ‘such dangers’ that the ‘most careful scrutiny’ must be applied.¹⁹ While the Court divided 11 votes to six on ‘jurisdiction’ to reopen a decided case, the four most senior judges of the Court, including the president Jean-Paul Costa, former president Rozakis, and two vice presidents, were in the majority. And none of the dissenting opinions questioned the soundness of the first *VgT* opinion.

¹⁵ *ibid*, para 64.

¹⁶ *ibid*, para 75.

¹⁷ *VgT (No 2)* (n 4).

¹⁸ *ibid*, para 91.

¹⁹ *ibid*, para 94.

Animal Defenders in Strasbourg

Thus, when Animal Defenders submitted its application to the European Court, it seemed probable that a violation of Article 10 was forthcoming, given the holdings in *VgT*, *TV Vest* and *VgT (No 2)*, and the House of Lords' seemingly misplaced preference for *Murphy* over *VgT*. However, in 2013, with Luzuis Wildhaber, Christos Rozakis, and Jean-Paul Costa, having retired, the *Animal Defenders* opinion was handed down, resulting in a somewhat surprising 9-8 vote for no violation of Article 10.

The majority opinion begins not with a discussion of *VgT*, *Murphy*, or *TV Vest*, but instead begins with the Court setting down a new controlling doctrine for analysing the ban: it categorised the ban at issue as a 'general measure'. According to the Court, 'general measures' are rules 'which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases'.²⁰ The Court then laid down a three-step test to determine the proportionality of a 'general measure', where the Court must assess (a) the 'quality' of the parliamentary and judicial review of the necessity of the measure; (b) the 'legislative choices' underlying the general measure, and (c) any 'risk of abuse' if a general measure is relaxed.²¹

Framing the question for analysis as one involving 'general measures' allowed the Court to reject ADI's submission that the central question was whether less restrictive rules could have been adopted, but rather the 'core issue' was whether in adopting the general measure

²⁰ *Animal Defenders* (n 5), para 106.

²¹ *ibid*, para 108.

and striking the balance it did, the legislature ‘acted within its margin of appreciation’.²²

Thus, in one fell swoop, the *Animal Defenders* majority brought a widened margin of appreciation right into the mix, which had been absent in both *VgT* and *TV Vest*.

The Court then examined the proportionality of the ban, applying its new three-step test for assessing ‘general measures’. First, with regard to the quality of parliamentary and judicial review, the Court attached ‘considerable weight’ to the ‘extensive pre-legislative consultation’, referencing a number of parliamentary bodies which had examined the ban, and praised the UK courts for ‘carefully applying’ the jurisprudence.²³

Second, examining the underlying rationale for the ban, the Court accepted the anti-distortion rationale, holding that there was a ‘risk of distortion’ of public debate by wealthy groups having unequal access to advertising.²⁴ Moreover, the Court rejected the argument that the ban was illogical because it did not apply to the internet, holding that the broadcast media still had an ‘immediate and powerful effect’, with the internet not having the same ‘synchronicity or impact’.²⁵ Third, as regards the risks from relaxing a general measure, the Court held it was ‘reasonable’ for the government to fear a relaxed ban was not feasible, given the ‘risk of abuse’ in the form of wealthy bodies ‘with agendas’ being fronted by social advocacy groups, leading to uncertainty and litigation.²⁶ The Court concluded that the

²² *ibid*, para 110.

²³ *ibid*, paras 115-116.

²⁴ *ibid*, para 117.

²⁵ *ibid*, para 119.

²⁶ *ibid*, para 122.

reasons for the ban were ‘relevant and sufficient’, and there was therefore no violation of Article 10.²⁷

Analysis

The first objection that may be levelled at the majority’s opinion is the standard of scrutiny applied. The two highest standards of scrutiny which the Court has historically applied to restrictions on political speech have been the ‘strict scrutiny’ and the ‘most careful scrutiny’ tests. Nowhere does the majority apply these standards of review, and instead mentions twice how the government’s fears were ‘reasonable’.²⁸ This type of review is difficult to square with the seminal, and three-decade-old, *Sunday Times v UK* opinion (decided by a 20-judge plenary Court), which roundly rejected the proposition that Article 10 ‘supervision was limited to ascertaining’ whether a restriction was ‘reasonabl[e]’.²⁹

Second, it is clear the majority’s categorisation of the political advertising ban as a ‘general measure’ allowed the Court to apply a more deferential standard of review. The majority argued that its general measures doctrine ‘draws on elements of its analysis’³⁰ from *VgT*, *Murphy* and *TV Vest*. Curiously, however, the majority omitted any individual paragraph references to these cases as authority for this proposition. And there is no hint in these cases to a general measures-type analysis, coupled with a lack of reference to any of the general measures case law the *Animal Defenders* majority discusses. Further, the case the majority routinely cites is the 1986 *James v UK* opinion,³¹ which the government had argued

²⁷ *ibid*, para 125.

²⁸ *ibid*, para 122.

²⁹ *The Sunday Times v UK* (App no 6538/74) 26 April 1979, para 59.

³⁰ *VgT (No 2)* (n 4), para 109.

³¹ *James v UK* (App no 8793/79) 21 February 1986.

was authority for the proposition that legislative ‘bright lines’ may be permissible i.e. general measures. Notably, *James* had involved legislation that allowed tenants to purchase their landlord’s interest in a property after a certain period, and had nothing to do with political advertising.

The third point is how easily the majority was able to distinguish the only earlier Grand Chamber authority on political advertising, namely *VgT (No 2)*. In *VgT (No 2)* the Court had approved *VgT* and mentioned that ‘prior restraint’ called for the ‘most careful scrutiny’. The majority in *Animal Defenders* curiously said that *VgT (No 2)* was ‘not relevant’, as it concerned ‘positive obligations on the State to execute a judgment of this Court’.³² And yet this same majority thought that an opinion delivered 27 years earlier concerning the right to property (*James*), delivered before any of the Court’s political advertising cases, was relevant, but a Grand Chamber opinion issued only four years earlier, which discussed *VgT* in positive terms, was irrelevant.

Finally, *Animal Defenders* has arguably left the Court’s doctrine of precedent in tatters. The doctrine was formally established by the Grand Chamber in *Chapman v UK*, which held that ‘precedents laid down in previous cases’ should not be departed from ‘without good reason’.³³ The majority arguably failed to offer any reasons for departing from *VgT* and *TV Vest*, and leaves the impression that the outcome in *Animal Defenders* depended on the composition of the Court. Had *Animal Defenders* been decided a mere two years earlier, when Christos Rozakis and Jean-Paul Costa were still on the Court, it may have been a different story.

³² *Animal Defenders* (n 5), para 109.

³³ *Chapman v UK* (App no 27238/95) 18 January 2001 (Grand Chamber), para 70.

