HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 15

on appeal from: [2006] EWCH 3069

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

R (on the application of Animal Defenders International) (Appellants) v Secretary of State for Culture, media and Sport (Respondent)

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Carswell
Lord Neuberger of Abbotsbury

Counsel

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LORD BINGHAM OF CORNHILL

My Lords,

1. In these proceedings the appellant, Animal Defenders International, seeks a declaration under section 4 of the Human Rights Act 1998 that section 321(2) of the Communications Act 2003 is incompatible with article 10 of the European Convention on Human Rights as given effect in this country by the 1998 Act. The section is said to be incompatible as imposing an unjustified restraint on the right to freedom of political expression. The Queen's Bench Divisional Court (Auld LJ and Ouseley J) refused to make a declaration of incompatibility ([2006] EWHC 3069 (Admin), [2007] EMLR 158) but granted a leapfrog certificate under section 12(1) of the Administration of Justice Act 1969 and the House granted the appellant leave to appeal.

2. The appellant is a non-profit company whose aims include the suppression, by lawful means, of all forms of cruelty to animals, the alleviation of suffering and the conservation and protection of animals and their environment. It campaigns against the use of animals in commerce, science and leisure, seeking to achieve changes in law and public policy and to influence public and parliamentary opinion towards that end. Because of its campaigning objectives it is not eligible for registration as a charity.

3. In 2005 the appellant launched a campaign entitled "My Mate's a Primate" with the object of directing public attention towards the use of primates by humans and the threat presented by such use to the survival

of primates. The campaign was to include newspaper advertising, direct mailshots, and also an advertisement on television.

4. The appellant's advertising agents prepared an advertisement which they submitted to the Broadcast Advertising Clearance Centre ("BACC"), an informal body funded by commercial broadcasters to monitor proposed advertisements for compliance with the governing law and current codes of practice. On 5 April 2005 BACC declined to clear the advert on the ground that its transmission would breach the prohibition on political advertising in section 321(2) of the 2003 Act, the appellant being a body with mainly political objects as defined by the Act. This decision was confirmed by BACC on 6 May 2005. No objection has ever been raised to the content of the advertisement, which was entirely inoffensive but consistent with the aims of the appellant. The appellant issued its application for judicial review on 4 August 2005. It is accepted that the Secretary of State for Culture, Media and Sport, as the minister with overall responsibility for broadcasting, is the appropriate respondent.

Statutory control of broadcasting

5. Until enactment of the Television Act 1954, radio and television broadcasts in the United Kingdom were transmitted by the British Broadcasting Corporation, a body committed to a high ideal of public service broadcasting. Then, as now, the BBC broadcast no paid advertising. The 1954 Act opened the market to independent broadcasters dependent for their finance on advertising revenue. The Independent Television Authority was established to provide or arrange for the provision of programmes, and it was the duty of the Authority under section 3 to satisfy itself that, so far as possible, the programmes maintained a proper balance in their subject matter and a high general standard of quality, presented the news (in whatever form) with due accuracy and impartiality, preserved due impartiality on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy and, lastly, included no matter designed to serve the interests of any political party; but this last provision was subject to the qualification that it should not prevent the inclusion in programmes of relays of the whole (but not some only) of a series of BBC party political broadcasts, or the including in programmes of properly balanced discussions or debates where the persons taking part expressed opinions and put forward arguments of a political character. The Authority was obliged by section 4 to secure that the rules in the Second Schedule to the Act were

complied with in relation to any advertisements, and one of these rules was that

> "No advertisement shall be permitted which is inserted by or on behalf of any body the objects whereof are wholly or mainly of a religious or political nature, and no advertisement shall be permitted which is directed towards any religious or political end or has any relation to any industrial dispute."

6. It is unnecessary to refer to the series of statutes pertaining to wireless telegraphy and broadcasting enacted over the succeeding half century, save to observe that the principles summarised above were consistently preserved and given effect: see *R v Radio Authority, Ex p Bull* [1996] QB 169, [1998] QB 294. The 2003 Act is a very comprehensive measure, running to over 400 sections and 19 schedules. Chapter 4 of Part 3 contains regulatory provisions and sections 319-328 are directed to programme and fairness standards for television and radio. By section 319 the Office of Communications ("OFCOM"), a supervisory body established by section 1 of the Act, is required to set standards to achieve a number of objectives, among them that news is reported with due impartiality and accuracy and, in subsection (2)(g), that advertising which contravenes the prohibition on political advertising set out in section 321(2) is not included in television or radio services. Section 320 requires that programmes should, within a given programme or over a number of programmes taken as a whole or a series, preserve due impartiality in relation to matters of political or industrial controversy and matters relating to current public policy. Section 321(2) is central to this appeal. It provides:

> "(2) For the purposes of section 319(2)(g) an advertisement contravenes the prohibition on political advertising if it is—
>
> (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
>
> (b) an advertisement which is directed towards a political end; or
>
> (c) an advertisement which has a connection with an industrial dispute."

Thus an advertisement may fall foul of the prohibition in section 319(2)(g) either because of the character of the advertiser or because of the content and character of the advertisement. Section 321 continues in (3):

> "(3) For the purposes of this section objects of a political nature and political ends include each of the following—
>
> (a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;
>
> (b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;
>
> (c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;
>
> (d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;
>
> (e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;
>
> (f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;
>
> (g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends."

An exception is provided in subsection (7) for advertisements of a public service nature inserted by government departments and party political or referendum campaign broadcasts covered by later provisions of the Act.

7. In enacting the 2003 Act, Parliament paid close attention to the important decision of the European Court of Human Rights in *VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159, a decision given on 28 June 2001, to which it is now necessary to turn.

VgT

8. In *VgT* the court found a violation of article 10 of the European Convention, which so far as material to this case provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of the … rights of others …"

9. The facts in *VgT* were very similar to those in the present case. The applicant was an association dedicated to the protection of animals, with particular emphasis on animal experiments and industrial animal production. In reaction to television commercials broadcast by the meat industry it prepared a TV advertisement contrasting the behaviour of pigs in their natural environment with their treatment in the course of industrial production. The theme of the advert was "eat less meat, for the sake of your health, the animals, and the environment" and the content of the advert was not in any way objectionable. The Commercial Television Company, responsible for handling commercial advertising on behalf of the Swiss Radio and Television Company, declined to broadcast the advert because of its clear political character. The parties reached an impasse, the applicant's attempts to challenge the refusal internally failed and an administrative law appeal to the Federal Court was dismissed. The Federal Court noted the protection of freedom of expression in the Federal Constitution and the ban on political (and religious) advertising in section 18(5) of the Federal Radio and Television Act, and considered the impact of article 10 of the European Convention. It considered that the ban served various purposes: among them, preventing powerful groups from obtaining a competitive political advantage, protecting the formation of public opinion from undue commercial influence, bringing about a certain equality of opportunity among the different forces of society, contributing to the independence of broadcasters, and substantially

influencing the democratic process of formation of opinion. The court considered the ban to be the more necessary since television with its dissemination and immediacy would have a stronger effect on the public than other means of communication.

10. The European Court noted the Swiss domestic provisions already referred to, and also section 15 of the Radio and Television Ordinance, which reinforced the ban on political (and religious) broadcasting.

11. In giving judgment the European Court was obliged to consider and reject a number of arguments that were, with respect, obviously unsound. Thus the Swiss Government contended that the application was an abuse of process (rejected by the court in para 34 of its judgment) and that article 10 was inapplicable and the responsibility of the Swiss Government not engaged (rejected in para 47). The applicant contended that its advert was not political (rejected in paras 57-58) and that the ban had no legitimate aim (rejected in para 62). Thus it was not until para 63 of its judgment that the court was able to address the real issue in the case, which was whether the ban was necessary in a democratic society.

12. On this issue, the applicant submitted (para 63) that the measure was not proportionate since it had no other means to broadcast its advert. The Government relied (para 64) on the margin of appreciation which it enjoyed, and pointed to the alternative means of publicity open to the applicant (para 65). The court (para 66) reiterated the oft-expressed principle that freedom of expression is one of the fundamental foundations of a democratic society, extending not only to received but also to unorthodox and disturbing opinions, and giving particular protection to political as opposed to commercial speech. The test of necessity is one of pressing social need (para 67), and while member states have a certain margin of appreciation this is subject to European supervision. The question (para 68) is whether a measure is proportionate to the legitimate aim pursued, and whether the reasons for it are relevant and sufficient. The Swiss authorities had a certain margin of appreciation, particularly essential in commercial matters (para 69), but the advert in question (para 70) did not invite the public to buy a particular product and so fell outside the regular commercial context and there was in many European societies an ongoing general debate on the protection and rearing of animals. So in the *VgT* case (para 71) the margin of appreciation was reduced: what was at stake was not an individual's purely commercial interest but his participation in a debate affecting the general interest. In considering proportionality, (para 72)

the court had to balance the applicant's freedom of expression on the one hand with the reasons adduced by the Swiss authorities on the other, "namely to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity between the different forces of society; to ensure the independence of the broadcasters in editorial matters from powerful sponsors; and to support the press". The court acknowledged (para 73) that powerful financial groups could obtain competitive advantages in the areas of commercial advertising and noted the Federal Court's view (para 74) that television had a stronger effect on the public on account of its dissemination and immediacy, but was of opinion (*ibid*) that while the domestic authorities might have had valid reasons for this differential treatment, a prohibition of political advertising applicable only to certain media and not to others did not appear to be of a particularly pressing nature. The court summarised its thinking in para 75 of its judgment:

> "75 Moreover, it has not been argued that the applicant association itself constituted a powerful financial group which, with its proposed commercial, aimed at endangering the independence of the broadcaster; at unduly influencing public opinion; or at endangering the equality of opportunity between the different forces of society. Indeed, rather than abusing a competitive advantage, all the applicant association intended to do with its commercial was to participate in an ongoing general debate on animal protection and the rearing of animals. The Court cannot exclude that a prohibition of 'political advertising' may be compatible with the requirements of Article 10 of the Convention in certain situations. Nevertheless, the reasons must be 'relevant' and 'sufficient' in respect of the particular interference with the rights under Article 10. In the present case, the Federal Court in its judgment of 20 August 1997, discussed at length the reasons in general which justified a prohibition of 'political advertising'. In the Court's opinion, however, the domestic authorities have not demonstrated in a 'relevant and sufficient' manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of the applicant association's case."

The court pointed out (para 77) that the applicant had no means other than through the Swiss Radio and Television Company of reaching the entire Swiss public and was not concerned (para 78) with the mechanics of programming. It concluded (para 79) that the ban was not necessary in a democratic society and so violated article 10.

The 2003 Act

13. On the introduction of the Bill which became the 2003 Act, the Secretary of State felt unable to make a statement pursuant to section 19(1)(a) of the Human Rights Act 1998 that in her view the provisions of the Bill were compatible with the Convention rights scheduled to the 1998 Act. Instead she made a statement under section 19(1)(b) of that Act that although unable to make a statement under section 19(1)(a) the government nonetheless wished the House of Commons to proceed with the Bill. The government's position was that it believed and had been advised that the ban on political advertising in what became sections 319 and 321 was compatible with article 10, but because of the European Court's decision in *VgT* it could not be sure.

14. The Bill was considered by the Joint Committee on Human Rights, a body comprising members of both Houses of Parliament of differing opinions. In its Nineteenth Report of the Session 2001-2002 (19 July 2002, HL Paper No 149, HC 1102), the committee acknowledged (para 62) that the prohibition of political advertising could well be found to be incompatible with article 10, but urged caution in moving from the current position in the UK, referring (para 63) to the fear mentioned in *VgT* of the annexation of the democratic process by the rich and powerful. It recognised the difficulty of devising a more circumscribed ban, and concluded (para 64) that a total ban was likely to be held incompatible. It recommended (para 64) that the government should examine ways in which more limited but workable and Convention–compliant restrictions could be included in the Bill.

15. The Joint Committee on the Draft Communications Bill, similarly constituted, reported shortly afterwards (25 July 2002, HL Paper 169-1, HC 876-1). It supported (para 301) the principles underlying the proposed ban on political advertising and made a recommendation similar to that of the Joint Human Rights Committee.

16. On 10 October 2002 Sir Robin Biggam, chairman of the Independent Television Commission, the body then having overall responsibility for commercial television, wrote to the respondent. The ITC shared the government's principled objections to political advertising and hoped that the ban, which had been effective, would be maintained. Its assessment was that a scheme of control based around tests of due impartiality and undue prominence would quite quickly prove unworkable in practice. It drew attention to the risk of front organisations formed to campaign on single issues and was concerned that a compromise solution might be both incompatible and ineffectual. It urged the maintenance of a complete ban.

17. To a letter dated 10 December 2002 the respondent attached a departmental note, which in paras 7-8 explained:

> "**Alternative to the current ban**
>
> 7 Given the UK's commitment to human rights, officials were asked to examine how the ban might be substantially maintained, but in a manner compliant with the ECHR. In particular, consideration was given to an alternative regime based on specific prohibitions, such as banning all party political advertising and all political advertising around the time of elections or referendums; coupled with other rules to avoid the predominance of any particular point of view on one channel, to provide visual or audible identification of political advertisements, and to control the scale of political advertising in terms both of broadcasting time and the proportion of advertising revenue that a broadcaster is permitted to derive from political advertising.
>
> 8 The conclusion was reached, taking account of legal advice, that it would be very difficult to make such a scheme workable, and that in any event it would fall significantly short of the present outright ban, and allow a substantial degree of political advertising to be broadcast across a number of channels"

While the government recognised that it might have to change its position in the light of court decisions, it did not believe the bill to be incompatible. The *VgT* case was summarised, as were counsel's reasons

for advising that there was a very strong case for holding the ban to be compatible with the Convention.

18. The Joint Human Rights Committee returned to this subject in its First Report of the Session 2002-2003 (20 December 2002, HL Paper 24, HC 191). It reported (para 16) that it had written to the respondent asking for a fuller explanation of the government's reasons for concluding that it would be impossible to introduce transparent controls on political advertising which would be proportionate to the legitimate aim pursued and would secure a fair balance between competing rights and interests.

19. The respondent replied to the Joint Human Rights Committee in a letter dated 9 January 2003 and issued a Memorandum in Response to its Nineteenth Report of 19 July 2002. She explained:

> "With the Committee's observations in mind, the Government has followed the Committee's recommendation to examine ways in which workable and Convention-compatible restrictions could be included in the Bill. We have in particular considered an alternative regime based on specific prohibitions, such as banning all party political advertising, and all political advertising of any kind around the time of elections or referenda, coupled with other rules to avoid the predominance of any particular point of view, to provide visual or audible identification of political advertisements, and to control the scale of political advertising in terms both of broadcasting time and the proportion of advertising revenue that a broadcaster is permitted to derive from political advertising. We have concluded that it would be very difficult to make such a scheme workable, and that in any event it would fall significantly short of the present outright ban and allow a substantial degree of political advertising to be broadcast."

The government believed there to be a very strong case that the existing ban was compatible with the Convention, and made plain that the ban would apply to any advertisement inserted by or on behalf of a body whose objects were wholly or mainly of a political nature, any advertisement directed towards a political end and any advertisement having any connection with an industrial dispute.

20. Having considered these responses the Joint Human Rights Committee in its Fourth Report of the Session 2002-2003 (10 February 2003, HL Paper 50, HC 397, para 41) was satisfied that the course of action taken by the government in introducing the bill under section 19(1)(b) of the 1998 Act evinced no lack of respect for human rights and was legitimate in the circumstances.

21. In the course of the bill's passage through Parliament, no material amendment was made to the clauses which became sections 319 and 321.

The competing arguments

22. In his trenchant argument for the appellant, Mr Michael Fordham QC relied very strongly on the European Court's decision in *VgT* which was, he submitted, correctly decided, indistinguishable and all but conclusive in the appellant's favour. Thus he relied on the high importance of free expression under the Convention regime, the special protection accorded to political speech and the narrowed margin of appreciation enjoyed by member states in this area. He did not need to, and did not, challenge the control of broadcasts by political parties, whether or not at the time of an election, but strongly criticised the breadth of the ban as it applies to bodies, such as the appellant, which were not associated with any political party but were engaged in what he called social advocacy. (I shall henceforward use the expression "political advertising" to describe advertising of this character, falling within sections 319 and 321, but not so as to include advertising by political parties, which is not in issue here.) The excessive breadth of the statutory ban was, he argued, shown by the fact that it would apply, by virtue of sections 319(2)(g) and 321(2)(a), to a wholly non-political advert by any body whose objects were wholly or mainly of a political nature and, by virtue of sections 319(2)(g) and 321(3)(f), to any advert seeking to influence public opinion on any matter which, in the UK, was a matter of public controversy. That no such wide-ranging prohibition was necessary in a democratic society was, he said, shown by the practice of some other states in which there was no such prohibition, and he pointed to a large body of academic commentary supporting his submission.

23. Mr David Pannick QC, for the respondent, based his argument in part on some observations of the European Court in *Murphy v Ireland*

(2003) 38 EHRR 212 and more particularly on a series of propositions which found favour with Ouseley J in this case.

24. The applicant in *Murphy* was a pastor attached to an evangelical protestant centre based in Dublin. He wished to broadcast an advertisement for a video to be shown by the centre during the week before Easter 1995, but the broadcast was stopped by the Independent Radio and Television Commission because section 10(3) of the Radio and Television Act 1988 prohibited the broadcasting of any advertisement directed towards any religious or political end or having any relation to an industrial dispute. The applicant applied for judicial review against the Commission and the attorney general, but failed in the High Court and the Supreme Court. A bill was introduced in the Dáil to amend section 10(3) of the 1988 Act, but the amending bill never became law. The Minister for Arts, Heritage, Gaeltacht and the Islands opposed the amendment, noting the great power of the radio and television media, but resisting the proposal that Commission officials should distinguish between acceptable and unacceptable advertisements. He pointed to the difficulty of framing a selective ban and to the distinction between religious advertising and advertising for goods and services. When the Irish government introduced its own bill, section 10(3) was largely preserved but was extended to digital and other broadcasting services. In its judgment the European Court referred to the governing legislation and summarised the parties' respective arguments. It considered (para 67) that member states enjoyed a wider margin of appreciation in relation to matters of morals and religion as compared with restrictions on political speech or debate on matters of public interest, and on that ground distinguished *VgT*. The court considered (para 69) that the potential impact of the medium of expression in question was an important factor in assessing the proportionality of an interference, and acknowledged that the audio-visual media have a more immediate and powerful effect than the print media. The court paid attention to the peculiar characteristics and sensitivity of religious broadcasting (paras 70-73), but noted that the prohibition concerned only the audio-visual media (para 74): these, as the applicant, the government and the court all agreed, had a more immediate, invasive and powerful impact than other media, but the applicant was free to advertise the same matter in any of the print media, or at public meetings and other assemblies. Moreover the prohibition applied only to advertising. The applicant retained the same right as any other citizen to participate in programmes on religious matters, but advertising tended to be partial, and was not subject to the broadcaster's duty of impartiality, so that the purchase of advertising time would lean in favour of unbalanced usage by religious groups with larger resources. The court considered these (para 75) to be highly relevant reasons

justifying the Irish state's prohibition. The court did not consider that the government's aims could have been achieved by a more limited prohibition because (para 76) a complete or partial relaxation would sit uneasily with the nature and level of religious sensitivities already mentioned and with the principle of neutrality in the broadcast media: a provision which allowed the filtering of adverts by the state or a state organ on a case by case basis would be (para 77) difficult to apply fairly, objectively and coherently. Even a limited freedom to advertise would benefit a dominant religion (para 78) more than religions with fewer adherents and smaller resources, and jar with the object of promoting neutrality in broadcasting and of ensuring a level playing field for all religions in the medium considered to have the most powerful impact. The court noted (para 81) that there appeared to be no clear consensus among member states as to the manner in which religious broadcasting should be controlled. In the result, the court unanimously found that there had been no violation of article 10.

25. In his judgment in the Divisional Court Ouseley J accepted (para 85) that it was for the respondent to justify its interference with the appellant's right to advertise, that the aim of the legislation (para 86) was capable of providing justification and that (para 87) the test was one of necessity, not reasonableness: a high level of justification was required to justify interference with political expression, the state's margin of appreciation being relatively narrow. In considering justification, the judge thought it quite clear (paras 90-91) that the broadcast media were more pervasive and potent than other media, and that therefore (para 92) a proper distinction could be drawn between the broadcast and non-broadcast media. He accepted (para 94), as Mr Fordham had done, that political advertising at election times was properly controlled, to prevent wealthier parties or groups exerting undue influence on the course of political debate. But similar considerations applied outside election periods (para 96) and (para 98) no sensible distinction could be drawn between political parties and other groups with discernibly political ends. The judge gave examples (para 100) of causes strongly supported by single issue groups, among them opposition to UK membership of the euro, those supporting the ban on fox-hunting, those for or against abortion and civil partnerships or those protesting against the war in Iraq. Auld LJ (para 80) gave climate change and immigration as further examples. Ouseley J concluded (para 101) that no sensible distinction could be drawn in practice between one so-called political party or group and another so-called social advocacy group in this context. He considered (para 102) that the restriction reinforced the aim that there should be no political advertising by anyone through the back door. The distinctions possibly contemplated by the European court in *VgT* (paras 103-104) were not in

his opinion workable, or reconcilable (paras 105-106) with the broadcaster's important duty of impartiality. He concluded (para 108) that the justification for the legislation was clearly made out. But did it meet the exacting Convention standard (para 108)? He concluded that it did (para 109) because it supported democracy by denying an undesirable advantage to those best able to pay. No lesser restriction would suffice (para 110). There was not always (para 111) a clear distinction between religious and political issues, all media other than television and radio were open to the appellant (para 112), the legislature was entitled and obliged to balance competing interests (para 113) and Parliament had expressed a considered view, having grappled with the human rights implications of the ban (para 114). This was a field in which Parliament was best fitted to make a judgment (paras 115-116). *VgT* did not compel a contrary conclusion (paras 118-121), and the comparative material relied on was inconclusive (paras 123-124). He summarised his conclusion in para 125 of his judgment:

> "In summary, the necessity for restrictions on political/social advocacy broadcast advertising outside elections periods has been convincingly shown. It is necessary to protect the rights of others through preventing undue access to the broadcast media based on willingness and ability to pay. At root it supports the soundness of the framework for democratic public debate. The broadcast media remain pervasive and potent throughout the period between elections. The suggested distinction between political parties or groupings and social advocacy groups does not reflect the true political impact of all such advertising. The completeness of the prohibition avoids arbitrary and anomalous distinctions in practice. The European Court of Human Rights' decision in *Vgt* offers no useful guidance. Whether the decision of Parliament in enacting s. 321 of the Communications Act 2003 is seen as strong evidence for the necessity for the prohibition in an area of its primary experience and expertise or as a judgment in an area where a wider margin of discretion should be accorded to it, its decision should be respected by the courts. It is not incompatible with the ECHR."

The issue

26. There is much common ground between the parties to this appeal. Thus it is accepted that section 319 and 321 of the 2003 Act constitute

an interference with the appellant's exercise of its right to free expression, and article 10 of the Convention is engaged. It is accepted that this is a restriction prescribed by law and has the legitimate aim of protecting the rights of others, namely their democratic rights. The only issue is whether the restriction is necessary in a democratic society. And even here there is common ground. For a restriction to be necessary there must be a pressing social need for it, and it is for the member state which imposes the restriction to justify it. While the right to freedom of expression is not absolute, and no one has a right of access to the airwaves, the importance of free expression is such that the standard of justification required of member states is high and their margin of appreciation correspondingly small, particularly where political speech is in issue. The problem here is not one which can be resolved by exercise of the interpretative power given to the courts by section 3 of the 1998 Act. All this is agreed. Yet the importance of this case to the functioning of our democracy is in my view such as to call for the rehearsal of some very familiar but fundamental principles.

27. Freedom of thought and expression is an essential condition of an intellectually healthy society. The free communication of information, opinions and argument about the laws which a state should enact and the policies its government at all levels should pursue is an essential condition of truly democratic government. These are the values which article 10 exists to protect, and their importance gives it a central role in the Convention regime, protecting free speech in general and free political speech in particular.

28. The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated. It is the duty of broadcasters to achieve this object in an impartial way by presenting balanced programmes in which all lawful views may be ventilated. It is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than an auction. Nor is it achieved if well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or

injurious. The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them. The rights of others which a restriction on the exercise of the right to free expression may properly be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising.

29. I do not think the full strength of this argument was deployed in *VgT*. And in that case the applicant was seeking to respond, with a wholly inoffensive advertisement, to commercials broadcast by the meat industry. In the present case also the proposed advertisement is wholly inoffensive, and one may be sympathetic to the appellant's aims or some of them. But the issue must be tested with reference to objects with which one may not be sympathetic. Hypothetical examples spring readily to mind: adverts by well-endowed multi-national companies seeking to thwart or delay action on climate change; adverts by wealthy groups seeking to ban abortion; or, if not among member states of the Council of Europe, adverts by so-called patriotic groups supporting the right of the citizen to bear arms. Parliament was entitled to regard the risk of such adverts as a real danger, none the less so because legislation has up to now prevented its occurrence.

30. The question necessarily arises why there is a pressing social need for a blanket prohibition of political advertising on television and radio when no such prohibition applies to the press, the cinema and all other media of communication. The answer is found in the greater immediacy and impact of television and radio advertising. This was recognised by the European Court in *Jersild v Denmark* (1994) 19 EHRR 1, para 31, and again in *Murphy* in the passages referred to in para 24 above, although the court appeared to discount the point somewhat in para 74 of its judgment in *VgT*. Here, the chief executive of the appellant in her evidence has described television and radio as "the most influential advertising option" and stated that "Moving images are an enormously effective way of getting across evidence of social and environmental problems, and giving the public the chance to participate in change". Plainly, this application is made precisely because television and radio are judged to be the most effective advertising media. I share the view of Ouseley J in para 90 of his judgment "that it is not really a matter of serious debate but that the broadcast media is more pervasive and potent than any other form of media".

31. Since, in principle, no restriction may be wider than is necessary to promote the legitimate object which it exists to serve, it is necessary to ask whether any restriction on political advertising less absolute than that laid down in sections 319 and 321 would suffice to meet the mischief in question. The possibility suggests itself of regulating political advertising by time or frequency or expenditure or by the nature and quality of the adverts in question. It is, I think, unnecessary to explore this possibility in detail, for four main reasons. First, Mr Fordham for the appellant has not, clearly advisedly, advanced such an argument although, as I understand, he did so below. Secondly, it is difficult to see how any system of rationing or capping could be devised which could not be circumvented, as, for instance, by the formation of small and apparently independent groups pursuing very similar political objects. In its judgment in *Murphy*, para 77, the European Court recognised the difficulty of invigilating religious adverts fairly, objectively and coherently on a case by case basis and exactly the same difficulty would arise here, perhaps even more embarrassingly. It is hard to think that any such system would not accord excessive discretion to officials, and give rise to many legal challenges. Thirdly, the important duty of broadcasters to present a fair, balanced and reasonably comprehensive cross-section of public opinion on the issues of the day across the range of their programmes, hard as it is to discharge in any event, would be rendered even harder to discharge if account had to be taken of what might well be a considerable volume of political advertising. Fourthly, despite an express request by the Joint Human Rights Committee to consider compromise solutions, the government judged that no fair and workable compromise solution could be found which would address the problem, a judgment which Parliament accepted. I see no reason to challenge that judgment.

32. While television and radio are, as noted above, the preferred media for advertising, it is not irrelevant that all other media are open to the appellant: newspapers and magazines, direct mailshots, billboards, public meetings and marches. The appellant may also contribute to broadcast programmes and radio phone-ins. The European Court attached little weight to this consideration in *VgT*, paras 74, 77, but did so in *Murphy*, para 74. In my opinion, this is a factor of some weight. The case is quite unlike that in *Bowman v United Kingdom* (1998) 26 EHRR 1, para 47, where the legislative provision in question was held to operate, for all practical purposes, as a total barrier to Mrs Bowman's communication of her views.

33. The weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter. In the present context it

should in my opinion be given great weight, for three main reasons. First, it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so. Secondly, Parliament has resolved, uniquely since the 1998 Act came into force in October 2000, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has nonetheless resolved to proceed under section 19(1)(b) of the Act. It has done so, while properly recognising the interpretative supremacy of the European Court, because of the importance which it attaches to maintenance of this prohibition. The judgment of Parliament on such an issue should not be lightly overridden. Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules: *James v United Kingdom* (1986) 8 EHRR 123, para 68; *Mellacher v Austria* (1989) 12 EHRR 391, paras 52-53; *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800, para 29; *Wilson v First County Trust (No 2)* [2003] UKHL 40, [2004] 1 AC 816, paras 72-74; *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, paras 41, 91. A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.

34. If, as in *VgT*, a body with aims similar to those of the applicant in that case or the appellant in this had grounds for wishing to counter the effect of commercial advertising bearing on an issue of public controversy, it would have strong grounds for seeking an opportunity to put its case in the ordinary course of broadcast programmes. The broadcaster, discharging its duty of impartiality, could not ignore such a request. But that is not this case. A question of compatibility might arise if a body whose objects were wholly or mainly of a political nature sought to broadcast an advertisement unrelated to its objects, or if an advertisement were rejected as of a political nature or directed towards political ends when it did not fall within section 321(3)(a), (b), (c), (d), (e) or (g) but only within section 321(3)(f). But the present is not such a case. The appellant's proposed advertisement was, as one would expect, consistent with its objects and, as the appellant's chief executive makes plain in her evidence, its object is to persuade Parliament to legislate. If such a limited challenge were to arise, there might well be scope for resort to section 3 of the 1998 Act, agreed to be inappropriate in the present case.

35. In *Murphy*, para 81, the European Court observed that there appeared to be no clear consensus between member states as to the manner in which to legislate for the broadcasting of religious advertisements and that there appeared to be no uniform conception of the requirements of the protection of the rights of others in the context of the legislative regulation of the broadcasting of religious advertising. The same may be said of political advertising. While the laws of some states, notably the Scandinavian states and Ireland, appear to resemble those of the UK, those of some other states do not. The European Court has regarded such a lack of consensus as tending to widen the margin of appreciation enjoyed by member states: *Petrovic v Austria* (1998) 33 EHRR 307, para 38; *Stambuk v Germany* (2002) 37 EHRR 845, para 40. There is here no settled practice among European states, and it may be that each state is best fitted to judge the checks and balances necessary to safeguard, consistently with article 10, the integrity of its own democracy.

36. For these reasons, reflecting those of Ouseley J and, in the main, those of Auld LJ, I conclude that the ban on political advertising in sections 319 and 321 is necessary in a democratic society and so compatible with the Convention. I would accordingly dismiss this appeal. The respondent seeks no order for costs, and none will be made.

37. I cannot, with regret, concur in all that my noble and learned friend Lord Scott of Foscote says in paras [44] – [45] of his opinion. It is true, of course, that the 1998 Act gave domestic effect to the Convention rights defined in section 1 and that, under section 2, the obligation of the courts is to take into account any Strasbourg decision, not to follow it as a strictly binding precedent. But section 6(1) makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. The House has held that in the absence of special circumstances our courts should follow any clear and constant jurisprudence of the Strasbourg court, recognising that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court: *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20. As the law now stands, I see little scope for the competition between conflicting interpretations which my noble and learned friend appears to envisage.

LORD SCOTT OF FOSCOTE

My Lords,

38. I have had the great advantage of reading in advance the opinion of my noble and learned friend Lord Bingham of Cornhill on this appeal and am in respectful agreement that, for the reasons he gives, this appeal should be dismissed. There are, however, two aspects of the appeal on which I want to add a few words of my own.

39. The appellant, ADI, commenced the proceedings that have led to this appeal by making a claim for judicial review, prompted by the decision by the Broadcasts Advertising Clearance Centre that ADI's proposed advertisement, part of its "My Mate's a Primate" campaign, was a political advertisement for the purposes of sections 319 and 321 of the Communications Act 2003. It was a political advertisement because, first, ADI is a body "whose objects are wholly or mainly of a political nature" (s.321(2)(a)), second, the proposed advertisement was "… directed towards a political end" (s.321(2)(b)), and, third, "objects of a political nature and political ends" include, *inter alia*, "bringing about changes of the law …" (s.321(3)(b), "influencing public opinion on a matter … of public controversy" (s.321(3)(f) and "promoting the interests of a … group of persons organised … for political ends" (s.321(3)(g). ADI has accepted that these legislative provisions require its proposed advertisement to be treated as a political advertisement for the purposes of sections 319 and 321 of the 2003 Act and that the broadcasting of the advertisement in the television or radio media is accordingly prohibited. So the relief sought by ADI is now confined to a declaration under section 4 of the Human Rights Act 1998 that the statutory prohibition is incompatible with its right under article 10 of the Convention to freedom of expression.

40. The Divisional Court refused to make the declaration and I, in agreement with all your Lordships, would do so too. It is not in dispute that the statutory prohibition of political advertising does constitute a restriction on ADI's "freedom of expression" and that article 10 of the Convention is therefore engaged. It is common ground, also, that the critical issue is whether the Secretary of State has shown that the restriction is "necessary in a democratic society … for the protection of the rights of others …". For the reasons given by Lord Bingham, on which I cannot and shall not attempt to improve, restrictions on the ability of organisations like ADI, whose *raison d'être* is to bring about

changes in the law, to promote their objects by means of television or radio advertisements are necessary in order to try to ensure a level playing field for the promotion or defence of political ideas and policies and thereby to protect the rights of the public to a fair functioning of an important part of the democratic process. A restriction that prohibits the broadcasting of ADI's desired advertisement seems to me well within the margin of appreciation that must be accorded to Parliament.

41. I do not think, however, that your Lordships in dismissing this appeal, should be taken to be franking sections 319 and 321 against any possible attack made on article 10 grounds. The width of the statutory prohibition is remarkable. It would appear, for example, to withhold from ADI, or from any organisation whose objects were wholly or mainly to bring about changes in the law, the ability to place for broadcasting an advertisement with no political content whatever, eg. to attend a car boot sale, or an advertisement with an entirely neutral political content, eg. to encourage voters to vote at an election. Moreover, a good deal of commercial advertising is likely to be objectionable to the principles of some section of the viewing public. For example, the broadcasting of an advertisement encouraging people to patronise some particular zoo or circus would be likely to offend ADI and its supporters; the broadcasting of an advertisement encouraging people to eat burgers of various sorts would be likely to offend organisations that disagree with the manner in which beef cattle are reared or slaughtered or both; the broadcasting of advertisements encouraging people to buy a turkey for Christmas dinner would be likely to offend organisations who want the intensive rearing of poultry banned; and so on. Why should these organisations not counter the broadcasting of advertisements that offend their principles with the broadcasting of their own advertisements promoting their principles? It was not suggested that the purpose of ADI's "My Mate's a Primate" campaign was to counter the broadcasting of advertisements promoting any zoo or zoos in which primates are kept in cages but if that had been the case the arguments justifying the statutory prohibition might have been difficult.

42. I conclude, therefore, that there *may* be respects in which sections 319 and 321 are incompatible with article 10. But the power to make a declaration of incompatibility under section 4 of the 1998 Act is a discretionary power. And as a general rule the discretion ought not, in my opinion, to be exercised unless the circumstances of the case in which the question of making the declaration arises show that the legislative provision in question has affected a Convention right of the applicant for the declaration in a manner that is incompatible with that

right. Hypothetical examples of ways in which the legislative provision might be incompatible with a Convention right should not, in my opinion, suffice. Your Lordships' conclusion on this appeal is that the effect of sections 319 and 321 in prohibiting the broadcasting of ADI's desired advertisement is not incompatible with ADI's article 10 rights.

43. The other matter on which I want to comment concerns the *VGT* case (2002) 34 EHRR 159, fully reviewed by Lord Bingham in paragraphs 8 to 12 of his opinion. Heavy reliance on the *VGT* case was placed by Mr Fordham QC, counsel for ADI. The European Court's decision was, he submitted, indistinguishable from the present case. The applicant, VGT, was, like ADI, an association whose aim was the protection of animals. VGT desired to have broadcast an advertisement about the manner in which piglets were reared. The advertisement was rejected by the Swiss authorities on the ground of its political character. The European Court concluded that the Swiss government had not demonstrated in a "relevant and sufficient" manner why the prohibition was necessary (para.75). The European Court considered the *VGT* case in *Murphy v Ireland* (2003) 38 EHRR 212 and, although concluding in *Murphy* that the ban on religious advertising with which the case was concerned did not interfere with the applicant's article 10 rights, did not distinguish or qualify its reasoning in the *VGT* case. The *VGT* case went back before the European Court on a subsequent application, consequential upon the Swiss Federal Court's refusal to revise its domestic judgment that had prompted the original application to the European Court, and in a judgment delivered on 4 October 2007 the European Court held that there had been a new and further violation of the applicant's article 10 rights. However, as Mr Pannick QC, counsel for the Secretary of State, has pointed out (para.32 of his printed Case), judgments of the European Court are closely focused on the facts of particular cases that "makes it perilous to transpose the outcome of one case to another where the facts are different" (per Lord Bingham in *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307 at 342 D/E) and I would not, for my part, assume from the *VGT* case that the European Court would disagree with your Lordships' conclusion that the statutory ban on the broadcasting of ADI's "political" advertisement does not infringe ADI's article 10 rights.

44. The result of the present appeal to this House shows, therefore, no more than the possibility of a divergence between the opinion of the European Court as to the application of article 10 in relation to the statutory prohibition of which ADI complains and the opinion of this House. The possibility of such a divergence is contemplated, implicitly at least, by the 1998 Act. The 1998 Act incorporated into domestic law

the articles of the Convention and of the Protocols set out in Schedule 1 to the Act. So the articles became part of domestic law. But the incorporated articles are not merely part of domestic law. They remain, as they were before the 1998 Act, articles of a Convention binding on the United Kingdom under international law. In so far as the articles are part of domestic law, this House is, and, when this House is eventually replaced by a Supreme Court, that court will be, the court of final appeal whose interpretation of the incorporated articles will, subject only to legislative intervention, be binding in domestic law. In so far as the articles are part of international law they are binding on the United Kingdom as a signatory of the Convention and the European Court is, for the purposes of international law, the final arbiter of their meaning and effect. Section 2 of the 1998 Act requires any domestic court determining a question which has arisen in connection with a Convention right to take into account, *inter alia*, "any judgment, decision, declaration or advisory opinion of the European Court of Human Rights" (ss.(1)(a)). The judgments of the European Court are, therefore, not binding on domestic courts. They constitute material, very important material, that must be taken into account, but domestic courts are nonetheless not bound by the European Court's interpretation of an incorporated article.

45. It is, in my opinion, important that that should be so and that its importance is not lost sight of. As Lord Bingham observed in *Brown v Stott* [2003] 1 AC 681 at 703 -

> "… the case law of the European court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept"

And, per Lord Hoffmann in *R (Alconbury Developments Ltd) v Environment Secretary* [2003] 2 AC 295 at 327

> "The House is not bound by the decisions of the European Court and, if I thought that the Divisional Court was right to hold that they compelled a conclusion fundamentally at

> odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed"

The importance of the maintenance of reasonable statutory restrictions on political advertising makes these remarks particularly pertinent.

46. Section 4 of the 1998 Act empowers the court to make a declaration of incompatibility if satisfied that the legislative provision in question "is incompatible with a Convention right". Does that mean incompatible with a Convention right as interpreted by the European Court and binding on the United Kingdom under international law? Or does it mean incompatible with a Convention right as interpreted by the domestic courts of this country? An important purpose of a declaration of incompatibility is, as I see it, to draw the attention of the government, Parliament and the United Kingdom public to an inconsistency between the provision of domestic legislation in question and the rights under domestic law conferred on the applicant for the declaration by the article of the Convention in question. However another purpose of a declaration of incompatibility would be to draw the attention of the government and Parliament to an inconsistency between the legislative provision in question and the international law obligations of the United Kingdom as a signatory of the Convention. If it were to be the unfortunate case that a divergence emerged between the opinion of the European Court and the opinion of this House (or, later, the Supreme Court) as to the application or scope of one or other of the articles of the Convention that have become part of our domestic law, it might become necessary for a decision to be taken as to which purpose should be regarded as the prime purpose. They could not both be achieved. But I do not think that problem arises in this appeal

BARONESS HALE OF RICHMOND

My Lords,

47. There was an elephant in the committee room, always there but never mentioned, when we heard this case. It was the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States of America. Enormous sums are spent, and therefore have to be raised, at election times: it is estimated that the

disputed 2000 elections for President and Congress cost as much as US$3 billion. Attempts to regulate campaign spending are struck down in the name of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press": see particularly *Buckley v Valco*, 424 US 1 (1976). *A fortiori* there is no limit to the amount that pressure groups can spend on getting their message across in the most powerful and pervasive media available.

48. In the United Kingdom, and elsewhere in Europe, we do not want our government or its policies to be decided by the highest spenders. Our democracy is based upon more than one person one vote. It is based on the view that each person has equal value. "Within the sphere of democratic politics, we confront each other as moral equals" (Ackerman and Ayres, *Voting with Dollars*, 2003, p 12). We want everyone to be able to make up their own minds on the important issues of the day. For this we need the free exchange of information and ideas. We have to accept that some people have greater resources than others with which to put their views across. But we want to avoid the grosser distortions which unrestricted access to the broadcast media will bring.

49. So this case is not just about permissible restrictions on freedom of expression. It is about striking the right balance between the two most important components of a democracy: freedom of expression and voter equality. There are aspects of the ban on broadcasting political advertisements which no-one disputes: in particular, advertising by candidates for election, or by political parties, whether or not at election times. But this case is about advertising by a particular interest group which campaigns for changes in the law.

50. The proposed advertisement shows an animal's cage, in which a chained girl gradually emerges from the shadows into view; the screen goes black and the following messages appear: "A chimp has the mental age of a 4 year old"; "Although we share 98% of our genetic makeup they are still caged and abused to entertain us"; "Please help us to stop their suffering by making a donation today"; the final shot is of a monkey in a cage in exactly the same position as the girl was in. It takes little imagination to understand how powerful this would be, much more powerful than a static image on a bill-board or printed page, and beamed into every household~~s~~ in the land where anyone was watching commercial television at the time. It is also clearly part of a campaign for change in the law, and thus prohibited by sections 319(2)(g), 321(2)(b), and 321(3)(b), as well as by sections 319(2)(g) and 321(2)(a),

which prohibit any advertising by bodies whose objects are wholly or mainly of a political nature.

51. For all the reasons which my noble and learned friend, Lord Bingham of Cornhill, has so eloquently and comprehensively given, I agree that the ban as it operates in this case is not incompatible with the appellants' Convention rights. It is a balanced and proportionate response to the problem: they can seek to put their case across in any other way, but not the one which so greatly risks distorting the public debate in favour of the rich. There has to be the same rule for the same kind of advertising, whatever the cause for which it campaigns and whatever the resources of the campaigners. We must not distinguish between causes of which we approve and causes of which we disapprove. Nor in practice can we distinguish between small organisations which have to fight for every penny and rich ones with access to massive sums. Capping or rationing will not work, for the reasons Lord Bingham gives.

52. Nor do I think that the decision in the *VgT* case should lead us to any different conclusion. All Strasbourg decisions are fact-specific. Similar though the organisations were, the advertisements were rather different: "eat less meat" is a different message from "help us to stop their suffering". Important arguments which were given less weight in *VgT* were accepted in *Murphy*. If anything, the need to strike a fair balance between the competing interests is stronger in the political than in the religious context. Important though political speech is, the political rights of others are equally important in a democracy. The issue is whether the ban, as it applies to these facts, was proportionate to the legitimate aim of protecting the democratic rights of others. As Lord Bingham has demonstrated, Government and Parliament have recently examined with some care whether a more limited ban could be made to work and have concluded that it could not. The solution chosen has all-party support. Parliamentarians of all political persuasions take the view that the ban is necessary in this democratic society. Any court would be slow indeed to take a different view on a question such as this. There may be room for argument at the very margins of the rule, for example, in banning any advertisement of any kind by a political body, or in banning any advertisement by anyone of matters of public controversy. But that is not this case.

53. I also share the view expressed by Lord Bingham in paragraph 37 of his opinion. The Human Rights Act 1998 gives effect to the Convention rights in our domestic law. To that extent they are domestic

rights for which domestic remedies are prescribed: *Re McKerr* [2004] UKHL 12, [2004] 1WLR 807.But the rights are those defined in the Convention, the correct interpretation of which lies ultimately with Strasbourg: *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20. Our task is to keep pace with the Strasbourg jurisprudence as it develops over time, no more and no less: *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, para 106. This cautious approach to the interpretation of the Convention rights has been criticised, mainly on the ground that "the Convention is a floor and not a ceiling". It represents the minimum and not the maximum protection that Member States should provide. There is, of course, nothing to stop our Parliament from legislating to protect human rights to a greater extent than the Convention and its jurisprudence currently require; nor is there anything to prevent the courts from developing the common law in that direction. But we are here concerned with whether an Act of the United Kingdom Parliament is compatible with the Convention rights: if *prima facie* it is not, Parliament has given us the duty, if possible, to interpret it compatibly with those rights (Human Rights Act 1998, s 3(1)); and if that is not possible, the power to declare it incompatible (s 4). I do not believe that, when Parliament gave us those novel and important powers, it was giving us the power to leap ahead of Strasbourg in our interpretation of the Convention rights. Nor do I believe that it was expecting us to lag behind. The purpose, in my view, of a declaration of incompatibility is to warn Government and Parliament that, in our view, the United Kingdom is in breach of its international obligations. It is then for them to decide what, if anything, to do about it.

54. Hence, for the reasons given by Lord Bingham, with which I entirely agree, I would dismiss this appeal.

LORD CARSWELL

My Lords,

55. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. For the reasons which he gives I too would dismiss the appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

56. I have had the advantage of reading in draft the opinion of my noble and learned Lord Bingham of Cornhill and for the reasons he gives I too would dismiss this appeal.