

## FREEDOM OF EXPRESSION: DEFINING THE LIMITS FOR BROADCASTERS

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On 10 July 2003, the European Court of Human Rights in Strasbourg delivered a significant judgment concerning the qualified nature of the right of freedom of expression enunciated in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>1</sup> The previous May saw the House of Lords deliver a judgment on a similar matter.<sup>2</sup> The former related to the resurrection; the latter was about video footage of unborn foetuses. Each is illuminating and may prove of wider application.<sup>3</sup>

The Strasbourg case concerned events eight years earlier. Mr Murphy was a pastor attached to the Irish Faith Centre, a Bible-based Christian ministry in Dublin. In 1995 the Centre submitted an advertisement to an independent, local, commercial radio station for transmission. It sought to inform listeners of a video to be presented at Easter concerning evidence of the resurrection. The radio station was prepared to broadcast it. However, in March 1995 the Independent Radio and Television Commission stopped the broadcast pursuant to section 10(3) of the Radio and Television Act 1988 which provides:

No advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute.

Mr Murphy sought a judicial review on the basis that the Commission had wrongly construed the statutory provision or, in the alternative, that the provision was contrary to the Irish Constitution, Article 40 of which expressly provided for freedom of expression. In April 1997, the High Court found that the Commission had not infringed section 10(3) and that the provision was a reasonable limitation on the right to communicate and that there were good reasons in the public interest for the ban. The Supreme Court rejected Mr Murphy's appeal in May 1998. Having exhausted his domestic remedies, Mr Murphy took his complaint to Strasbourg.

The European Court of Human Rights considered whether there had

<sup>1</sup> *Murphy v Ireland* 10 July 2003 (Application No 44179/98)

<sup>2</sup> *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977, HL.

<sup>3</sup> This comment piece is based upon an earlier paper commissioned from the author by the *Austrian Archive for Law & Religion*.

been an interference with the applicant's rights under Article 10 of the Convention,<sup>4</sup> which provides:

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

The court made a number of comments of general application which can be summarised as follows:

- i. Even expression which could be considered offensive, shocking or disturbing to the religious sensitivities of others falls within the scope of the protection of Article 10.<sup>5</sup>
- ii. It therefore follows that there had been an interference with Mr Murphy's right to freedom of expression.
- iii. The prohibition was clearly set out in statute and therefore the condition 'prescribed by law' was satisfied.
- iv. Whilst disputing the necessity for the provision, Mr Murphy accepted that its aim was legitimate, namely public order and safety together with the protection of the rights and freedoms of others.
- v. Freedom of expression constitutes one of the essential foundations of a democratic society, but as paragraph 2 of Article 10 recognises, the exercise of that freedom carries with it duties and responsibilities.<sup>6</sup>
- vi. Any restriction of the right to freedom of expression must be 'necessary in a democratic society'. In this regard Contracting States 'enjoy a certain but not unlimited margin of appreciation'.<sup>7</sup> The margin is wider when regulating freedom of expression in

<sup>4</sup> Since the court considered that the issue primarily concerned the regulation of Mr Murphy's means of expression and not his profession or manifestation of his religion, the engagement of Article 9 was not also considered.

<sup>5</sup> This principle was recently reiterated in the English Court of Appeal in *Redmond-Bate v Director of Public Prosecutions* (2000) 7 BHRC 375, CA.

<sup>6</sup> This includes in the context of religious beliefs the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is gratuitously offensive and profane in regard to objects of veneration: see *Otto-Preminger Institut v Austria* (20 September 1994), (1995) 19 EHRR 34.

<sup>7</sup> See *Wingrove v United Kingdom* (25 November 1996). There is no clear consensus between the Contracting States as to the manner in which to legislate for the broadcasting of religious advertisements. Certain States have similar prohibitions (for example Greece, Switzerland and Portugal), certain prohibit religious advertisement considered offensive (Spain) and certain have no legislative

- relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.
- vii. There is no uniform European conception of the requirements of ‘the protection of the rights of others’ in relation to attacks on their religious convictions.<sup>8</sup>
  - viii. It is the court’s task to determine whether the reasons relied on by the national authorities to justify the measures interfering with the applicant’s freedom of expression are ‘relevant and sufficient’ for the purposes of Article 10(2). The interference must correspond with a ‘pressing social need’ and must be ‘proportionate to the legitimate aim pursued’.

Applying those principles to this case, the court noted that the Irish government justified the prohibition by reference to the particular religious sensitivities in Irish society which it considered were such that the broadcasting of any religious advertising could be considered offensive. The High Court had considered relevant the fact that religion had been a divisive issue in Northern Ireland. Religious advertising from a particular Church might be considered offensive and open to the interpretation of proselytism. It might also lead to unrest. The prohibition was limited to these considerations, an important factor in the assessment of proportionality. Further it applied only to the audio-visual media,<sup>9</sup> and left Mr Murphy free to advertise the same matter in any of the print media (including local and national newspapers) and during public meetings and other assemblies.

Further, the court considered that the ban reflected a reasonable distinction made by the State between purchasing broadcasting time to advertise, and coverage of religious matters through programming.<sup>10</sup> The latter is not broadcast because of the purchase of airtime, and must be impartial, neutral and balanced.<sup>11</sup> Mr Murphy retained the same right as any other citizen to participate in programmes on religious matters and to have services of his Church broadcast in the audio-visual media. Advertising,

restriction (the Netherlands).

<sup>8</sup> The court stated, ‘What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the “necessity” of a “restriction” intended to protect from such material those whose deepest feelings and convictions would be seriously offended’. This margin of appreciation distinguished the present case from *Vgt Verein gegen Tierfabriken v Switzerland* (2001) 10 BHRC 473.

<sup>9</sup> Acknowledged by the court as having a more immediate, invasive and powerful impact than the print media on the passive recipient: *Jersild v Denmark* (23 September 1994).

<sup>10</sup> For example documentaries, debates, films, discussions, and live coverage of religious events and occasions.

<sup>11</sup> Note the duty of objectivity and impartiality under section 18 of the Broadcasting Authority Act 1960.

by contrast, tends to have a distinctly partial objective and is not subject to the principle of impartiality. The fact that advertising time is purchased would lean in favour of unbalanced usage by religious groups with larger resources.

Consequently, other than advertisements in the broadcast media, Mr Murphy's religious expression was not otherwise restricted. The court considered the foregoing to be highly relevant reasons justifying the Irish State's prohibition of the broadcasting of religious advertisements. It rejected Mr Murphy's contention that the State could have achieved its aims by a more limited restriction. It considered that the exclusion of all religious groupings from broadcasting advertisements generates less discomfort than any filtering by the State, or a designated organ, of the amount and content of such expression by groupings. A limited freedom to advertise would be likely to benefit a dominant religion more than religions with fewer adherents and resources. This would jar with the objective of promoting neutrality and ensuring a 'level playing field'. Accordingly, the court found there to be no violation of Article 10 of the Convention.

In the second case,<sup>12</sup> the House of Lords was required to turn its collective mind to the ProLife Alliance, a registered political party opposed to abortion. In the 2001 general election, it fielded sufficient candidates in Wales to entitle it to a party election broadcast. It submitted a video that illustrated graphically, but honestly, the process of abortion and included images of mangled and mutilated foetuses. The broadcasters refused to transmit the broadcast on the grounds of taste and decency and relied on their obligations under section 6 of the Broadcasting Act 1990. ProLife sought permission to apply for judicial review which was refused by Scott Baker J. The Court of Appeal granted permission to appeal and determined the substantive matter in favour of ProLife.<sup>13</sup> The broadcaster appealed.

The House of Lords allowed the appeal, Lord Scott of Foscote dissenting. The Law Lords considered that the principle underlying Article 10 required that access to an important medium of communication should not be refused on discriminatory, arbitrary or unreasonable grounds.<sup>14</sup> A restriction on content had to be objectively justified. 'On its face', said Lord Nichols, 'prior restraint is seriously inimical to freedom of political communication'.<sup>15</sup> However, it was for the broadcaster, and not the court reviewing the decision, to apply the right standard. The court was not to

<sup>12</sup> *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977, HL.

<sup>13</sup> *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2002] 3 WLR 1080; [2002] 2 All ER 756, CA (Simon Brown, Laws and Jonathan Parker LJJ).

<sup>14</sup> There is no right to broadcast *per se*. See the manner in which the European Court of Human Rights rejected as manifestly unfounded complaints of an Austrian that he had not been afforded enough time on television: *Haider v Austria* (1995) 83 DR 66.

<sup>15</sup> At paragraph 8.

carry out its own balancing exercise between the requirements of freedom of political speech and the protection of the public from being unduly distressed in their own homes. The broadcaster's duty was to do its best to comply with its restriction on broadcasting offensive material, however imprecise and subjective any assessment might be.

The House of Lords, because of a concession made by those acting for ProLife, expressly left open whether the taste and decency restriction itself offended ProLife's Article 10 rights.<sup>16</sup> The single issue which it was called upon to resolve was whether the broadcaster applied the right standard in this case. The Law Lords were highly critical of the Court of Appeal for substituting its own assessment for that of the broadcaster. Laws LJ had declined to show deference to the decision maker, pointing to 'the court's constitutional responsibility to protect political speech'.<sup>17</sup> He thought that issues of taste and decency would 'very rarely' be an adequate ground for interfering with free speech at election time. However, Lord Hoffmann noted that abortion was not party political as such since, by convention, members of Parliament were afforded a free vote on the issue. He considered the taste and decency restriction neither unreasonable nor arbitrary. Putting it rather prosaically, he continued, '[ProLife] had no human right to be invited to the party and it is not unreasonable for Parliament to provide that those invited should behave themselves'.

These decisions are instructive for a number of reasons. First, they demonstrate a particular sensitivity shown for religious sensibilities, and for the 'traumatic and emotional experience' of abortion;<sup>18</sup> secondly they amount to a robust restatement of the 'margin of appreciation' and the degree of deference given to national social and political factors (in *Murphy*) and to domestic decision makers performing statutory functions (in both *Murphy* and *ProLife*); thirdly for the express discussion of the limitations imposed on freedoms under the Convention, and the need for them to be objectively justified on proper grounds and with compelling evidence;<sup>19</sup> and fourthly for the exploration of the collision of rights where freedom of religion (in the case of *Murphy*) or statutory restrictions on taste and decency (in *ProLife*) and freedom of expression throw up seemingly irreconcilable principles. They will provide a useful touchstone for the future.

<sup>16</sup> It was therefore unnecessary to consider the problematic decision of the European Court of Human Rights in *Vgt Verein gegen Tierfabriken v Switzerland* (2001) 10 BHRC 473 in an action brought by an animal rights association.

<sup>17</sup> Court of Appeal at paragraph 37.

<sup>18</sup> To borrow from Lord Hoffmann at paragraph 80.

<sup>19</sup> This concept was the subject of detailed academic study by the European-American Law and Religion Consortium at its conference 'The Permissible Scope of Legal Limitations on the Freedom of Religion and Belief' held in Budapest, Hungary on 4–8 December 2003, reported at p 474 in this Issue.