

segmented by energy usage and possibly even more detailed information such as appliances owned, which could be highly saleable.

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Radio station seeks judicial review of ‘political ad’ ban

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Topic: Political

Who: London Christian Radio (LCR) Ltd and Christian Communications Partnership (CCP) and the Radio Advertising Clearance Centre (RACC), operator of the national radio station ‘Premier Christian Radio’

Where: High Court of Justice (Administrative Court), London

When: 20 April 2012

Law stated as at: 3 May 2012

What happened

LCR, operator of the Premier Christian Radio station, and CCP wished to broadcast the following advertisement on the radio:

We are CCP. Surveys have shown that over 60 per cent of active Christians consider that Christians are being increasingly marginalized in the work place. We are concerned to get the most accurate data to inform the public debate. We will then use this data to help make a fairer society. Please visit [CCP’s website] and report your experiences.

On 28 May 2010, they submitted this advertisement to the RACC for clearance in advance of being broadcast. The RACC refused to clear it. In the course of correspondence between LCR, CCP and the RACC, LCR and CCP confirmed that the data gathered from respondents to the advertisement would be published and would have implications for the Government and bodies such as the Equal Opportunity Commission.

In light of this, the RACC was of the view that since the advertisement sought to influence or change government policy, this rendered the advertisement unacceptable under the BCAP Advertising Code and was an infringement of the prohibitions on political advertising in Sections 319 and 321 of the Communications Act 2003 (the 2003 Act).

LCR and CCP commenced judicial review proceedings. They sought:

- (a) a declaration that to broadcast the advertisement would not contravene Sections 319 and 321 of the 2003 Act because it is not 'directed towards a political end'; alternatively
- (b) a remedy by which their right of freedom of expression under Article 10 of the European Convention on Human Rights needs to be read and given effect to under Section 3(1) of the Human Rights Act 1998 (HRA) in such a way as to be compatible with this right; and in the further alternative;
- (c) a declaration under Section 4(2) of the HRA that Section 321(2)(b) of the 2003 Act is incompatible with Article 10 of the ECHR in so far as it prohibits the broadcasting of the prohibited advertisement.

During the case, Silber J made significant reference to the House of Lords case of *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 131 (at [29]–[53]).

In that case, Animal Defenders was a body who campaigned 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'. It sought to place a television advertisement, which directed public attention towards the use of primates by humans and the threat presented by such use to the survival of primates.

Clearcast, the equivalent body to the RACC for TV ads, declined to clear the advertisement for transmission on the grounds that it was 'an advertisement which is inserted by or on behalf of the body whose objects are wholly or mainly of a political nature' under Section 321(2)(a) of the 2003 Act. Animal Defenders then sought a declaration that Section 321(2) was incompatible with Article 10 of the ECHR.

The House of Lords concluded that the prohibitions on political advertising in Sections 319 and 321 of the 2003 Act were justified as being necessary in a democratic society and therefore compatible with Article 10 ([36] per Lord Bingham; [38] per Lord Scott of Foscote; [51] per Baroness Hale of Richmond; [55] per Lord Carswell; and [56] per Lord Neuberger of Abbotsbury). Accordingly, the House of Lords unanimously declined to grant such a declaration.

Silber J concluded (at [49]) that he was bound by the decision of the House of Lords in *Animal Defenders*. However, he noted (at [29]) that the Grand Chamber in Strasbourg heard an appeal in the *Animal Defenders* case in March 2012. His Honour further noted that the parties had agreed that the present decision should not be delayed pending the handing down of the Grand Chamber's judgement. It followed that if the decision of the House of Lords in *Animal Defenders* was held to be wrong, LCR and CCP could make another application to the RACC.

As he was bound by precedent that the ban on political advertising set out in Sections 319 and 321 of the 2003 Act did not infringe one's Article 10 rights, Silber J stated (at [53]) that it was unnecessary to consider whether Section 3(1) of the HRA could be used in such a way as to ensure that the provisions in Section 319 and 321 of the 2003 Act

are read down and given effect so as to be compatible with LCR and CCP's rights under Article 10.

Silber J therefore refused LCR and CCP's application for judicial review.

Why this matters

The 2003 Act criteria are intended to be free of content bias. However, inevitably it comes down to a judgement call as to which side of the line an advertisement will fall in any given circumstances. Unfortunately, Article 10 provides no guidance in such situations.

Accordingly, we are left with the unsatisfactory situation where the House of Lords in *Animal Defenders* concluded that the 2003 Act does not infringe Article 10 and where the Strasbourg court in *VgT Verein Gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4 concluded in factually similar circumstances that Article 10 was infringed. No doubt this is why *Animal Defenders* have considered it necessary to appeal to Strasbourg.

A broader point is that this case again asks the question whether any form of issue-driven speech cannot be political when 'political' is so broadly defined in the 2003 Act.

The full case citation is as follows:

London Christian Radio & Anor, R (on the application of) v Radio Advertising Clearance Centre & Anor [2012] EWHC 1043 (Admin) (20 April 2012).

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OFT extracts undertakings from affiliate marketer MoreNiche

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Topic: Health & Beauty

Who: OFT and MoreNiche Ltd

Where: London

When: 25 April 2012

Law as stated at: 1 May 2012

What happened

The Office of Fair Trading (OFT) has accepted legal undertakings from online affiliate marketing operator MoreNiche Limited (MoreNiche) to address concerns about the way affiliates in MoreNiche's network market and promote health and beauty products.

Each affiliate agreed with MoreNiche to include a link on the affiliate's website to a product merchant's site. In return, the affiliate received a commission for every sale made after clicking on the link.