

## Freedom of Expression and Restrictions on Political Advertising

*TV Vest AS & Rogaland Pensjonisparti v Norway* [2008] ECHR 21132/05 (11 December 2008)

In this case, the European Court of Human Rights considered the right to freedom of expression in the context of political advertising in the media. This judgment again shows that there must be a reasonable relationship of proportionality between the legitimate aim pursued by a statutory prohibition and the means deployed to achieve that aim.

### Facts

Rogaland Pensjonisparti (Pensioners Party) is a small political party, which was contesting regional elections in Norway but receiving little mainstream editorial coverage. In order to reach a broader section of the electorate, it purchased television advertising from TV Vest AS, a local television station. However, s 3-1(3) of the *Broadcasting Act 1992* (Norway) read: 'Broadcasters cannot transmit advertisements for life philosophy or political opinions through television'.

TV Vest notified the State Media Authority of its intention to broadcast the political advertisements and argued that such broadcasting was protected by art 10 of the *European Convention on Human Rights*, which relevantly states:

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.
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 reputation or rights of others, ... or for maintaining the authority and impartiality of the judiciary.

Following the broadcast of the political advertisements, the State Media Authority fined TV Vest. TV Vest appealed to the Oslo City Court and then to the Supreme Court, which both upheld the State Media Authority's decision to impose the fine. TV Vest then appealed to the European Court of Human Rights.

### Submissions

#### The applicants

The applicants argued that the existence of an absolute prohibition of political advertising on television combined with the absence of rules securing party political broadcast had the effect that the Pensioners Party had been prevented from communicating directly with its electorate on television. The absolute prohibition was neither supported by sufficient reasons nor proportionate to the aims pursued.

#### Norway

The Government submitted that the case did not primarily engage the freedom of expression but first and foremost the integrity of the democratic process and specifically the public's – the voters'- right to fair democratic elections, a right protected by the *Universal Declaration of Human Rights* and the First Protocol to the Convention. The very essence of democracy was fair elections in which all parties could compete on an equal footing without anyone being able to buy an undue advantage in the form of television advertising.

The governments of the United Kingdom and Ireland, given leave to intervene in the case, supported the Norwegian government's argument that the prohibition was a necessary measure for preserving central elements of Norwegian democracy.

### **Decision**

The Court held that the test of 'necessity in a democratic society' required the Court to determine whether the 'interference' complained of corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient. In assessing whether such a 'need' exists and what measures should be adopted to deal with it, the Court acknowledged that national authorities are left a certain margin of appreciation, but stated that this power of appreciation is not unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by art 10.

The Court considered a survey performed by the Secretariat of the European Platform of Regulatory Authorities, which compared the regulation of political advertising across 30 European countries. The EPRA report, discussed in some length in the Court's judgment, noted that there were a variety of means used by European governments to protect the integrity of political processes, including allowing political advertising (including restricted advertising during election periods) and allowing free or subsidised addresses on public broadcasters. The Court also considered recommendation No R (99)15 of the Council of Europe's Committee of Ministers on measures concerning media coverage of election campaigns, which provided standards for regulatory frameworks for paid political advertising.

In that context, the Court examined the justifications for the disputed interference in this case, whether it was supported by relevant and sufficient reasons and was proportionate to the legitimate aim pursued, regard being had to the balance to be struck between the applicants' freedom of expression, on the one hand, and the reasons adduced by the Norwegian authorities for the prohibition of political advertising, on the other.

The Court held that there was not a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means deployed to achieve that aim. The restriction (being the advertising prohibition and the fine imposed on TV Vest) could therefore not be regarded as having been necessary in a democratic society (as demonstrated by the different restrictions imposed in other European countries), within the meaning of art 10(2) for the protection of the rights of others.

### **Relevance to the Victorian *Charter***

The factual issues in this case, being the infringement of the right to free speech by restrictions on political advertising, will have limited relevance in the Australian context, given the comparative lack of restrictions on political advertising (other than some 'blackout' periods preceding elections). While the Victorian *Charter* offers protection to the right to freedom of expression (s 15) and taking part in public life (s 18), these *Charter* rights are generally not impugned by the existing regulation of political advertising.

Arguably, this case is more relevant to the procedural aspect of s 7 of the *Charter*, which allows the human rights may be subject only to such reasonable limits as can be demonstrably justified

in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors. This judgment further strengthens the view that there must be a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition and the means deployed to achieve that aim. The 'balancing' test used by the Court is indicative of how courts might approach a similar conflict under the *Charter*, including particularly the availability of less rights-intrusive means of achieving a legitimate end.

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