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CASE AND COMMENT

APPEAL

AN APPEAL in a case noted in an earlier number of the *Journal* has now been disposed of as shown:

Tomlinson v. *Congleton Borough Council*, noted [2002] C.L.J. 522. Appeal allowed: [2003] UKHL 47, [2003] 3 W.L.R. 705

DEBATING ABORTION—THE RIGHT TO OFFEND GRATUITOUSLY

IN *R. (Pro-Life Alliance)* v. *British Broadcasting Corporation* [2003] UKHL 23, [2003] 2 W.L.R. 1403, the House of Lords held that the broadcaster's decision to prohibit a Party Election Broadcast by an anti-abortion group was a lawful exercise of its general duty not to transmit offensive programmes. This duty applies to all terrestrial broadcasters and exhorts them to ensure that their transmissions "do not include anything which offends against good taste or decency or is likely ... to be offensive to public feeling" (para. 5(1)(*d*) of the Agreement between the BBC and the Secretary of State for National Heritage dated 25 January 1996 and section 6(1)(*a*) of the Broadcasting Act 1990).

The Pro-Life Alliance is a registered political party committed to the belief that the public would reconsider the desirability of abortion were it confronted with the reality of what the termination procedure involves. In the 2001 General Election, the Alliance fielded a sufficient number of candidates to qualify for one free party election broadcast in Wales. The first three versions of its proposed broadcast were rejected by the BBC, ITV and Channels 4 and 5. These contained actual footage of the results of a suction abortion, showing bloodied and dismembered limbs and a severed head. The final version, which was broadcast five days before the election, was simply a blank screen bearing the word "censored" accompanied by a soundtrack describing the images contained in the previous programmes.

The Alliance obtained a declaration from the Court of Appeal that the broadcasters' decisions not to transmit the earlier versions of the programme were unlawful. The Court of Appeal held that the broadcasters had failed to show their refusal was necessary in a democratic society and hence it violated the common law's

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protection for free speech and/or Article 10 of the European Convention on Human Rights.

By a majority of four to one, the House of Lords allowed the broadcasters' appeal on the ground that the lower court had elided two distinct issues and as a result asked itself the wrong question. The two questions were: first, whether party election broadcasts should be subject to the same restriction on offensive matter as other programmes; and second, if so, whether the broadcasters applied the correct standard in the present case. According to the House of Lords, only the second of these questions was properly in issue since the Alliance had not sought a declaration of incompatibility under section 4 of the Human Rights Act 1998. Addressing the second question, the majority held that the manner in which the broadcasters had applied the requirement of decency could not be faulted when appropriate account was taken of their expertise and institutional position. The majority devoted substantial attention to determining what was the appropriate question before the court to the apparent detriment of addressing the issues of free speech principle which would have helped to answer it. A proper analysis of these principles would have led to a different result.

The starting-point must be (as the Court of Appeal and the House accepted) that a party broadcast in the run-up to a general election is entitled to the highest level of judicial protection. As a matter of principle, this protection cannot be lost because the broadcast contains material which many would find distressing. As Lord Nicholls (in the majority) noted, a party campaigning against war or capital punishment should be entitled to show something of the horrors of armed conflict or to include footage of an execution. Set against this right, the public's interest in being shielded from offence is very limited. Lord Scott (in dissent at [99]) put the matter best: to restrict the general dissemination of speech on a matter of great controversy on grounds of offensiveness "denigrates the voting public, treats them like children who need to be protected from the unpleasant realities of life [and] seriously undervalues their political maturity". It is, of course, true that the right to freedom of expression does not generally carry a right of access to the broadcast media. However, this argument misses the point that the Alliance had already qualified for a presumptive right to an election broadcast by fielding a sufficient number of candidates in the relevant area.

The extent of the broadcasters' power to interfere with freedom of speech was also disturbing on a number of grounds. First, it amounted to a prior restraint which could have the effect of

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preventing the expression from ever reaching an audience. The law has always been legitimately suspicious of such powers. It is no response to say that the Alliance was permitted to describe the images included in the earlier versions of the broadcast. Given the Alliance's mission, the images were in a real sense the message and this message was fundamentally undermined by their exclusion.

Second, a prohibition on offensive or indecent material is dangerously imprecise and subjective. This point was well-illustrated by Simon Brown L.J. in the Court of Appeal, where he gave actual examples in which these same broadcasters had defended before regulatory bodies their decisions to broadcast graphic depictions of the victims of terrorist bombings or of animals being killed for sport. In these cases, the broadcasters argued successfully that it was in the public interest to transmit the full horror of the images themselves rather than mere descriptions of them.

It is not a sufficient response to say (along with the majority) that this is what Parliament must have intended, because the question before the court ought to be what the grant of a generally applicable power to censor on grounds of decency means in the context of election broadcasts. It plainly cannot mean the same as it does when applied to a game show or a children's programme. Conversely, its meaning must take account of what all parties accepted to be the factual and non-sensationalised nature of the Alliance's broadcast.

While it is generally accepted that the intrusive nature of broadcasting may justify a higher level of regulation than, say, the printed word, this principle must be applied to the context of the particular case. In the present proceedings, the level of intrusion was very limited because the broadcast involved a one-off programme which lasted for fewer than five minutes, was shown after the watershed and would be preceded by a warning about the distressing nature of its contents. It is therefore difficult to argue that the Alliance's programme was more intrusive than, say, a national billboard campaign.

Although parts of the decision of the Court of Appeal make greater appeal to rhetoric than to reason, the result reached there is much to be preferred. The failure of the majority in the House of Lords properly to address the questions of free speech principle is very disappointing. Some of the arguments which were included are surprising, if not actually dangerous. For example, Lord Hoffmann regarded the Alliance's limited electoral support in the 2001 election (that is, after the events in question) as supporting the House's conclusion. However, the decision in the Lords was more finely balanced than the numerical majority would suggest since both

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Lords Millett and Walker took the unusual step of admitting that they had changed their initial views on the matter. There is some hope therefore that the majority's decision will not represent the law for long and that Lord Scott's thoughtful dissent will become the orthodoxy.

IVAN HARE

ASYLUM-SEEKERS HAVE HUMAN RIGHTS, TOO

THERE can be few minorities—with the possible exception of those who are suspected of involvement in international terrorism, whose due process rights are currently suspended under Part IV of the Anti-terrorism, Crime and Security Act 2001—who suffer greater unpopularity than asylum-seekers. Yet these are the very groups for whom enforceable human rights are most essential, in order that they may protect themselves against the tyranny of the majority—and of its elected representatives. This proposition is vividly illustrated by the Nationality, Immigration and Asylum Act 2002, section 55(1) of which provides that the Secretary of State "may not provide or arrange for the provision of support" such as food and shelter for asylum-seekers if he is "not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom". It may be recalled that broadly similar provisions, contained in secondary legislation, were quashed by the Court of Appeal in *R.* v. *Secretary of State for Social Security, ex p. J.C.W.I.* [1997] 1 W.L.R. 275, Simon Brown L.J. remarking at pp. 292–293 that they reduced those seeking to establish refugee status to "a life so destitute that ... no civilised nation can tolerate it"—a "sorry state of affairs" which "[p]rimary legislation alone could ... achieve".

The 2002 Act is rather less draconian: the harshness of section 55(1) is tempered by section 55(5)(*a*), which lifts the prohibition on assisting asylum-seekers to the degree necessary to avoid a breach of their Convention rights. The interpretation and application of these provisions has been the subject of recent judicial attention, most notably in *R. (Q)* v. *Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] 3 W.L.R. 365 and *R. (S)* v. *Secretary of State for the Home Department* [2003] EWHC 1941 (Admin) (*The Times*, 6 August 2003). These cases raised two important issues: was section 55 itself compatible with the ECHR and, if so, was the scheme being implemented in a manner consistent with the Convention?

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