England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2004] EWHC 2493 (Admin)
Case No: CO/1871/2004

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
05/11/2004

B e f o r e :

THE HONOURABLE MR. JUSTICE MCCOMBE

Between:

THE QUEEN On the application of
(1) BRITISH AMERICAN TOBACCO UK LTD
(2) IMPERIAL TOBACCO LTD
(3) GALLAHER LTD
(4) PHILIP MORRIS LTD
(5) SOCIÉTÉ NATIONALE D EXPLOITATION INDUSTRIELLE DES TABACS ET ALLUMETTES (SEITA)
(6) CHERWELL TOBACCO LTD

Claimants

- and -

THE SECRETARY OF STATE FOR HEALTH **Defendant**

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Mr David Pannick QC & Mr Thomas de la Mare (instructed by Lovells) for the Claimants
Mr Philip Sales & Mr Jason Coppel (instructed by the Office of Solicitor to the Department of Health) for the Defendant
Hearing dates: 18th – 20th October 2004

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HTML VERSION OF JUDGMENT

Mr. Justice McCombe :

(A) Introduction

1. This is an application for judicial review challenging the lawfulness of the Tobacco Advertising and Promotion (Point of Sale) Regulations 2004 ("The Regulations"). The Regulations are made by the Secretary of State for Health ("the Minister") under powers contained in Section 4(3) of the Tobacco Advertising and Promotion Act 2002 ("the 2002 Act" or "the Act). By Regulation 1 of the Regulations, the Regulations come into force on 21 December 2004. The Claimants in the proceedings are six corporations involved in the tobacco industry. The first five Claimants are manufacturers of tobacco products; the Sixth Claimant supplies vending machines for tobacco products.

2. I shall return to certain detailed provisions of the Act and the Regulations below. In summary, however, Section 2 of the Act provides for a total ban upon the advertising of tobacco products on pain of punishment for a criminal offence. There are exceptions relating to displays of the products at point of sale ("POS") and in relation to certain non-cigarette advertisements within the premises of specialist tobacconists. These proceedings concern a further exception permitting the Minister to provide in regulations that no offence is committed in relation to a tobacco advertisement in a place or on a website where tobacco products are offered for sale, provided that the advertisement complies with such regulations. The Regulations now in issue make such provision. The substance of the Claimants' challenge to the Regulations is that the limited exception to the overall ban, to be found in the Regulations, is disproportionately restrictive of advertising at the point of sale, having regard to the legitimate aims that such regulations are designed to pursue.

(B) The Act and the Regulations

3. The Act contains the following principally relevant provisions:

> "**Section 1 Meaning of "tobacco advertisement" and "tobacco product"**
>
> In this Act –
>
> "tobacco advertisement" means an advertisement –
>
> (a) whose purpose is to promote a tobacco product, or
>
> (b) whose effect is to do so, and
>
> "tobacco product" means a product consisting wholly or partly of tobacco and intended to be smoked, sniffed, sucked or chewed."
>
> **Section 2 Prohibition of tobacco advertising**
>
> **(1)** A person who in the course of a business publishes a tobacco advertisement, or causes one to be published, in the United Kingdom is guilty of an offence.
>
> **(2)** A person who in the course of a business prints, devises or distributes in the United Kingdom a tobacco advertisement which is published in the United Kingdom, or causes such a tobacco advertisement to be so printed, devised or distributed, is guilty of an offence.
>
> **Section 4 Advertising: exclusions**

(3) The appropriate Minister may provide in regulations that no offence is committed under section 2 in relation to a tobacco advertisement which –

(a) is in a place or on a website where tobacco products are offered for sale, and

(b) complies with requirements specified in the regulations.

(4) The regulations may, in particular, provide for the meaning of "place" in subsection (3)(a)."

Section 6 Specialist tobacconists

(1) A person does not commit an offence under section 2 if the tobacco advertisement –

(a) was in, or fixed to the outside of the premises of, a specialist tobacconist,

(b) was not for cigarettes or hand-rolling tobacco, and

(c) complied with any requirements specified by the appropriate Minister in regulations in relation to tobacco advertisements on the premises of specialist tobacconists.

(2) A specialist tobacconist is a shop selling tobacco products by retail (whether or not it also sells other things) more than half of whose sales on the premises in question derive from the sale of cigars, snuff, pipe tobacco and smoking accessories.

Section 8 Displays

(1) A person who in the course of a business displays or causes to be displayed tobacco products or their prices in a place or on a website where tobacco products are offered for sale is guilty of an offence if the display does not comply with such requirements (if any) as may be specified by the appropriate Minister in regulations.

(2) It is not an offence under subsection (1) for a person who does not carry on business in the United Kingdom to display or cause to be displayed tobacco products or their prices by means of a website which is accessed in the United Kingdom.

(3) The regulations may, in particular, provide for the meaning of "place" in subsection (1).

(4) The regulations must make provision for a display which also amounts to an advertisement to be treated for the purpose of offences under this Act –

(a) as an advertisement and not as a display, or

(b) as a display and not as an advertisement.

Section 19 Regulations

(1) Powers to make regulations and orders under this Act are exercisable by statutory instrument.

(5) A statutory instrument containing regulations under any other provision of this Act shall be subject to annulment in pursuance of a resolution of either House of Parliament or of the Scottish Parliament."

Under headings, which speak for themselves, the Act contains related prohibitions upon free distribution, sponsorship and brandsharing. By section 22(1) it is provided that the relevant provisions should come into force on such day or days as the Minister may by order appoint. The Act received Royal Assent on 7 November 2002.

4. By the Tobacco Advertising and Promotion Act 2002 (Commencement) Order 2002 ("the Commencement Order") made on 19 November 2002 it was provided that section 2 (the prohibition) was to come into force on 14 February 2003,

" except …

(ii) for the purposes of the promotion of a tobacco product in a place or on a website where tobacco products are offered for sale; …"

(See paragraph 2(2) of the Commencement Order).

5. The Commencement Order also brought into force, from 20 November 2002, the power (conferred on the Minister by section 4(3) and (4) and sections 5 to 8 of the Act) to make regulations. Regulations have been made under Section 6 concerning specialist tobacconists. No regulations have been made under section 8 affecting displays. Moreover, although the Regulations (on point of sale) are due to come into force on 21 December 2004, no Commencement Order has yet been made appointing a day for the coming into force of the prohibition on point of sale advertising or removal of the exception as to such advertising, contained in paragraph 2(2) of the Commencement Order. I was told by Counsel for the Minister that the intention was to make appropriate provision before the Regulations came into force on 21 December next.

6. I attach as Annex A to this judgment a copy of the Regulations. A study of the Regulations shows that they limit advertisements at point of sale to a two dimensional advertisement not exceeding A5 size on a "gantry", display cabinet, tray or other product in which a tobacco product is held pending sale that is –

> "(a) fixed to one place within fixed or moveable premises and
>
> (b) primarily used for the display of tobacco products to customers." (Regulations 2 and 3(1))
>
> The A5 area must include a health warning occupying 30% of its area.

If premises have more than one point of sale tobacco products may be advertised at only one such point (Regulation 3(3)). If premises are occupied by more than one separate business the products may be advertised at only one point of sale within the part of the premises occupied by each of those businesses (Regulation 3(4)).

7. Advertising on tobacco vending machines is confined to a picture of the packets available from the machine. The advertisement must be no larger than the largest face of the packet and must include a health warning amounting to 30% of its area. Each tobacco product on sale from the machine can have its advertisement but there must be no more than one advertisement for each product, however many "chutes" or "drawers" in the machine dispense that particular Product. (see regulation 5)

8. The exemption provided by the Regulations only applies to advertisements that remain fixed in a static position: see Regulation 6(2).

(C) <u>Illustrations</u>

9. For ease of comprehension, I attach as Annex B, three illustrative examples or "mock ups" of advertisements, extracted from the evidence, which (it is said) would satisfy the limitations in the Regulations. For the same purpose, I attach as Annex C photographs, extracted from the evidence, of point of sale advertising as presently developed and free from the prohibitions in the Act and from the limitations proposed to be introduced by the Regulations. These are, of course, only examples. Evidence also produced advertising on change mats, bar towels, "open/closed signs" and so forth.

(D) <u>The Proceedings and the arguments in outline</u>

10. The Regulations were made on 16 March 2004 and were laid before Parliament on 18 March 2004. There has been no annulment resolution by either House of Parliament. These proceedings were issued on 14 April 2004. The Minister did not object to permission being granted: see section C of the Acknowledgement of Service dated 6 May 2004. Permission was granted by Mr. Justice Bennett on 26 May 2004.

11. As happens frequently in litigation, the arguments of the parties have become progressively refined and focussed in the course of the proceedings and I intend to focus upon and deal with the arguments as finally presented at the hearing before me rather than any of the precursors to such arguments. However, it is material to note that, in support of the claims, the Claimants adduced evidence from an expert witness on advertising (Mr. A.W.Brown) who, while dealing with other matters, advanced the following opinion in his witness statement of 6 April 2004:

> " 19. In any consideration of advertising and its effects, it is important to recognise that in essence there are only two kinds of advertising (1) Advertising that "seeks out" consumers … "
>
> (2) Advertising that is "sought out" by consumers who have already taken, in principle, a decision to purchase but are looking for the best deal …
>
> 20. Although generally POS advertising can fall into both of these categories … POS advertising of tobacco products specifically does not "seek out" new consumers, principally because of the controlled retail environment in which tobacco products are usually sold. It is typically read or seen by those who are already seeking out tobacco products … .
>
> 35. … [In] the context of tobacco products, POS advertising acts as a reminder to reinforce an existing smoker's prior or latent decision to purchase a tobacco product by alerting him/her to its availability in the outlet concerned. It does not create a demand that does not already exist and it does not persuade non-smokers to start smoking … "

12. This evidence prompted an extensive academic debate between expert witnesses as to the validity of Mr. Brown's expressed opinions. Before me, Mr. David Pannick QC (who appeared with Mr. de la Mare) for the Claimants did not contend that this argument could be resolved satisfactorily in his clients' favour on this application; Mr. Phillip Sales (who appeared with Mr. Coppel) for the Minister confined himself to pointing out that those disinterested bodies who had cause to examine the point had favoured the opposite view to that of Mr. Brown and submitted that the evidence against Mr. Brown's view was strong.

13. In support of the claim Mr. Pannick advanced four principal submissions. Before enunciating those propositions, Mr. Pannick was at pains to stress two preliminary matters; a) that the Claimants do not dispute that there are health risks associated with smoking and b) that the Claimants do not challenge the validity of the Act itself. (It emerged, however, as will appear, that the second preliminary point was somewhat qualified.) Mr. Pannick's four main submissions were as follows:

> (1) The Regulations are disproportionate to the aim of promoting health because they allow so limited an amount of advertisement at POS as to impair the "very essence" of commercial free speech. Accordingly, the Regulations infringe Article 10 of the European Convention on Human Rights and are unlawful by virtue of section 6(1) of the Human Rights Act 1998.
>
> (2) The Regulations are also disproportionate because they amount to "too blunt an instrument" to meet the perceived objective. Mr. Pannick submits that the express purpose of the Regulations was to protect children and that they go far beyond what is required for that purpose. The Regulations fail to draw distinctions between different

types of retail outlets, e.g convenience stores, newsagents, supermarkets, department stores, hotels, bars, night clubs etc.

(3) The Regulations infringe the laws of the European Union (Article 28 of the EU Treaty) by operating in a discriminatory manner against foreign manufacturers who find it particularly difficult to maintain market share and introduce new products without POS advertising.

(4) There is no adequate evidence to show that the Secretary of State properly assessed for himself whether less severe regulations would be sufficient for his purposes. The evidence supporting the regulations suggests that the material now offered in justification of the Regulations is "ex post facto" and was not considered by the Minister when the Regulations were made. (In reply, Mr. Pannick accepted that this fourth point was "supplementary" to the other three rather than a free standing ground of challenge of substance.)

14. Mr. Sales for the Minister also argued under four principal heads:

(1) He submitted that the structure of the Act indicated that the "proportionality" review is properly less intense than might otherwise be appropriate on a challenge to subordinate legislation.

(2) The discretionary area of judgment open to the Minister in this case was particularly wide. This was a case in which freedom of expression was to be curtailed in order to meet a very serious public health concern. The protection of commercial free expression is less stringent in such a context. Therefore, the Court must occupy a strictly reviewing function and must avoid any tendency to stray into the role of a primary decision maker on questions of how precisely the public health objective was properly met within the statutory framework.

(3) The object of the Regulations was far wider than the protection of children and young persons.

(4) Mr. Sales then advanced detailed argument in opposition to Mr. Pannick's four heads of submission outlined above.

15. In the light of this structure of argument I propose to address the points in the following manner and order. First, I look at Mr. Sales's argument arising out of the structure of the Act and the Regulations and Mr. Pannick's response thereto. Secondly, I shall deal with the "discretionary area of judgment" as advanced by Mr. Sales and contested by Mr. Pannick. In the light of conclusions upon those two matters, I shall turn, thirdly, to Mr. Pannick's first two submissions on "proportionality", which appear to me to be inter-linked. Fourthly, I shall address Mr. Pannick's E.U. Law point. Finally, I shall consider the "supplementary" point on the Minister's assessment of the matter at the time of making the Regulations.

16. Before dealing with these heads of argument, however, it is right to remind oneself of the Convention context in which the present arguments arise and the test of proportionality in general terms formulated in the authorities.

(E) <u>Article 10 of the Convention and the "proportionality" test</u>

17. Article 10 of the Convention is in the following terms:

"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 national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Section 6 of the Human Rights Act 1998 provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if –

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(6) "An act" includes a failure to act but does not include a failure to-

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order."

18. The right contained in Article 10 is not absolute as can be seen from Article 10(2). In R v Shayler [2003] 1 AC 247 at 268G – 269A, in paragraph 23 of the speech, Lord Bingham of Cornhill said,

"It is plain from the language of article 10(2), and the European Court has repeatedly held, that any national restriction on freedom of expression can be consistent with article 10(2) only if it is prescribed by law, is directed to one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a democratic society. "Necessary" has been strongly interpreted: it is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable": *Handyside v United Kingdom* (1976) 1 EHRR 737, 754, para 48. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reason given by the national authority to justify it are relevant and sufficient under article 10(2): *The Sunday Times v United Kingdom* (1979) 2 EHHR 245, 277-278, para 62."

19. On the question of what is proportionate, I should remind myself of the well-known passage in the speech of Lord Steyn in R (Daly) v Secretary of State [2001] 2 AC 532 at pp. 547-8

"The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."
>
> Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671; Professor Paul Craig, *Administrative Law*, 4th ed (1999), pp 561-563; Professor David Feldman, "Proportionality and the Human Rights Act 1998", essay in *The Principle of Proportionality in the Laws of Europe* edited by Evelyn Ellis (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test must go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. ….
>
> In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
>
> The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood* at p 847, para 18, "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything."

20. Having reminded myself of those principles, I turn to the first principal matter outlined in paragraph 15 above.

(E) <u>The Structure of Act and of the Regulations</u>

21. Mr. Sales's argument here was to stress that section 2 of the Act imposed, in principle, an outright prohibition upon advertising, including POS advertising. The Act permits product displays expressly. Further, there is no control upon the publication of price lists at POS, which must permit of some communication of information at POS, not least availability of brands. POS advertising is not permitted unless the Minister intervenes to make Regulations. The corollary is necessarily that he might not have intervened and Parliament must have contemplated that an outright ban on advertising might be the result. Mr. Sales's argument was that it was inherent in the Claimants' position, therefore, that they should be seeking a declaration of the Act's

incompatibility with the Convention, a course which they have expressly eschewed. Further, this legislative framework requires the Court to afford a considerable area of discretion to the legislature in considering the balance to be struck under Article 10 of the Convention.

22. I was taken to the dissenting judgment of Laws LJ in International Transport Roth G.m.b.H v Secretary of State [2002] 3 WLR 344 where the degrees of deference to be afforded by the Courts to administrative and legislative action respectively were examined. Although Laws LJ dissented from the conclusion of the majority in that case, it does not appear that his reasoning is in this respect at odds with the majority judgments. The relevant passages are to be found primarily at paragraphs 82 and 83 of the judgment which include the statement that,

> "the first principle which … emerges from the authorities is that greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure … ."

The judgment also concludes that greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility and less where it lies in one particularly within the constitutional responsibility of the courts. Areas of defence, macro-economic and social policies are particularly the responsibility of government.

23. The Claimants countered that Parliament had distinguished POS advertising from other forms in producing the Act. Regulations were envisaged by it as a matter of language and of fact. They did not have to challenge a total ban as provided for by section 2 because no such ban was ever proposed. If such a ban was proposed it would be challenged on similar grounds to those on which the Regulations are now challenged.

24. As in so many cases which are as excellently argued as this one has been, I think there is validity in each of the contentions on this aspect of the case. Part of the legislative scheme under review is the total ban enacted as primary legislation in section 2. The Minister can, I think, take comfort in the present argument from the fact that the legislature was collectively in a "stern" frame of mind. It was, however, prepared to contemplate an exemption from the prohibition as regards POS advertisements. Further, it was, we know, informed that regulations in this area were contemplated. The framework within which the Court must examine the measure is an expression of legislative will that tobacco advertising will be banned, subject to the possibility of the Minister regulating to permit POS advertising. In such a context, Parliament can, I think, be taken as being prepared to countenance measures that were substantially stricter in their scope than to permit advertising at POS of the nature that has in fact developed before regulation. To that manifestation of Parliamentary intent the Court will, of course, pay appropriate deference. While a total ban on advertising at POS might or might not be challenged, as Mr. Pannick said on present instructions it would be, there was no suggestion that an outright ban on forms of advertising other than POS advertising, would be capable of challenge. Thus, the strict atmosphere in which these Regulations are made is not in issue.

25. I agree with Mr. Sales to this extent that, following the principles set out by Laws LJ in the Roth case, the Court can and should take into account, in assessing the proportionality of the Regulations, the fact of the strictness of the ban enacted by primary legislation and the making of the Regulations in the context that I have endeavoured to describe. Further, in that context, there has been no step taken to annul the Regulations as laid before Parliament. However, the Regulations remain subordinate legislation and are open to challenge as such, without recourse to the declaration of incompatibility procedure. Their "proportionality" falls to be considered in the light of the well-known criteria by which that issue is to be judged. The matters set out in this section of my judgment are just one aspect to be borne in mind along with the others, to which I now turn, in considering the second main point summarised in paragraph 15 above.

(F) Discretionary Area of Judgment

26. Mr. Sales argued that there was a wide area of discretion afforded to the Minister in the present context and that the " intensity of the review" required by the Court was relatively low. Mr. Pannick submitted that the Minister's submissions amounted to an attempt to avoid the proportionality test completely. Not so, was the riposte: the question is simply as to the "intensity of the review" required in this context (Mr. Sales's stress)

27. Given that "context is everything" in this area, the problem is to find the relevant context in the individual case. It is perhaps not surprising that, in a developing field of constitutional principle, identification of "context" is not greatly assisted by authority, which is little comfort to a first instance judge adjudicating upon the struggle of titanic proportions between the competing interests of protection of health and freedom of expression. Each side offered "pointers" to the solution of the problem.

28. It is accepted that the freedom of commercial expression has been treated traditionally as of less significance than freedom of political or artistic expression: a useful summary of the cases on this aspect of the law is to be found in Clayton and Tomlinson on The Law of Human Rights, paragraphs 15.171 -176 et seq., pp 1070 – 2.

29. Next, the restrictions now under challenge are directed at an acknowledged serious risk to health and the need for public protection against that risk. The evidence on this point is clear and uncontested in these proceedings. On behalf of the Minister, Mr. N. J. Adkin, the head of the Department of Health's Health Improvement and Prevention Group, stated that the Minister's calculation was that in the United Kingdom 120,000 people died every year from smoking related illnesses and that such illnesses cost the National Health Service up to £1.7 billion per year. While the risk to health is not disputed by the Claimants, it is important to remind oneself of the magnitude of that risk.

30. In virtually every jurisdiction, the courts have recognised the high public importance of the protection of public health and the degree of discretion that has to be afforded, either to national legislators or decision makers, in deciding the extent to which they are entitled to go in seeking to afford such protection, e.g. Hahn v Austria (2002) ECR 1 – 9193, Artegodan GmbH v Commission [2002] ECR 11 – 495, R v Secretary of State, ex p. Eastside Cheese Company Limited (1999) EULR 968 and the opinion of the Advocate–General in Germany v the Parliament and Council [2000] ECR 1-8599.

31. Mr. Pannick was correct in drawing distinctions between the authorities cited in the preceding paragraph and the present case, in so far as they either related to restrictions upon trade rather than upon human rights, e.g. Artegodan, or were concerned with human rights less fundamental than freedom of expression, such as the enjoyment of property (Eastside Cheese). Further, in the case of Germany v Commission the Advocate-General recognised that POS advertising was not in issue under the European Directive there being considered: see paragraph 166 of the Opinion at p. 1- 8492 of the Report. The Advocate-General considered that commercial expression was not unacceptably impaired where examples of scientific and other information and of political views about the regulation of the trade in question remained unrestricted. He noted further that tobacco producers remained free to market their products and might even engage in POS advertising "if national rules permit this". (Emphasis added). Accordingly, he recognised that some national restrictions on POS advertising might still exist compatibly with other competing interests.

32. While distinctions may be drawn, along the lines indicated, between the authorities cited and the present matter, I believe it remains established that the protection of public health is a very important counter-balance to unrestricted commercial expression. It is not a factor affording to a

decision maker an unfettered discretion. That would clearly be contrary to the principles that I have endeavoured to indicate above. However, the point remains valid nonetheless.

33. Mr. Pannick's point was that it will be an unjustified infringement of the freedom of commercial expression where the restriction in question, as he submits here, negates the very essence of commercial free speech. He relied in particular for this proposition on two cases in the Supreme Court of the United States: Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc (1975) 425 U.S. 748, at pp 761-5 and Lorillard Tobacco Co. v Riley (2001) 533 U.S. 525.

34. In the Virginia case Mr. Justice Blackmun gave the opinion of the Court and, after emphasising the protection given to commercial free speech by the First Amendment to the Constitution, he said this (at p.764)

> "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic discussions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal."

35. In Lorillard, the Supreme Court struck down a prohibition on outdoor advertising of tobacco within 1000 feet of schools and playgrounds. The evidence suggested that this would cover between 87% and 91% of (for example) the City of Boston. It also struck down a requirement that POS advertising should not be placed lower than 5 feet from the floor of a retail establishment within the same area around schools and playgrounds. In delivering the principal opinion of the Court, Justice O'Connor said at p. 564,

> "The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving independent speech on the internet we explained that "the governmental interest in protecting children from harmful materials … does not justify an unnecessarily broad suppression of speech addressed to adults .." As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication."

36. From these cases, Mr. Pannick submitted that care has to be exercised so as not to impede communication between manufacturers and adult consumers of a lawful product. I think, however, that Mr. Sales was right to invite attention to certain features of the U.S. law and the cases which must limit their relevance to the present case. First, the First Amendment to the U.S. Constitution is expressed in broad terms and does not have a "justification" provision such as Article 10(2) of our Convention. Secondly, the interests to be balanced in the Virginia case were less stark than in the present matter: i.e. the public interest in upholding the professional standards of pharmacists could not be equalled with the need to counter the significant health risk posed by smoking. Thirdly, it is necessary to re-focus on the decisions actually taken by the Court in Lorillard. In that case, the outdoor and POS advertising had been pre-empted by an alternative

federal enactment. The restriction of advertising at POS below a level of 5 feet from floor level was struck down because it simply failed to achieve its purpose. When seen in this context, I am not satisfied that the American cases advance the present debate under our consideration much further. With the very greatest of respect to that distinguished Court, it was dealing with the United States Constitution rather than our Convention. While it is instructive, in general terms, to see how another respected jurisdiction has dealt with a related but confined problem, the balance between State legislation and federal legislation in the United States is a subject of renowned complexity. Decisions on such matters can have limited effect on our consideration of the balance to be struck in considering a restriction of a limited Convention right and the measure of a discretion to be afforded to Parliament and ministers under our own rather different constitutional system.

37. Having considered the cases to which I have expressly referred above and others cited, (including Wilson v Secretary of State for Trade and Industry [2003] 3 WLR 568, James v United Kingdom (1986) 8 EHRR 123, R (Carson & Reynolds) v Secretary of State for Work and Pensions [2003] 3 All ER 577, Commission v France (ECJ) 13 July 2004 Case C – 262/02 and Krone Verlag G.m.b.H & Co K.G.v Austria (ECHR) 11 December 2003 Application no. 39069/97), each demonstrate that the discretionary area of judgment to be afforded to a decision maker will vary in accord with the subject matter in hand and that, while the restriction of free expression must be proportionate, there are areas in which the Court must be particularly wary of imposing its own value judgments upon a legislative scheme. The protection of health is a far reaching social policy. The right to commercial free speech, while less fundamental than political or artistic free speech, is protected by the Convention and restrictions must be justified. However, it will be principally for the decision maker to resolve how best the aim can be achieved by restricting promotion of extremely harmful but historically lawful products. While the test of "proportionality" cannot be escaped, the need for advertising restriction on tobacco products is not substantially in issue and we are dealing with a restriction on the very edge of a much wider restriction that is not challenged nor is capable of challenge. That is the "context" in which the Regulations fall to be judged as to their proportionality to the object in hand.

(G) Are the Regulations disproportionate because they impair the very essence of commercial free speech or because they are "too blunt an instrument" to meet this objective?

38. The starting point under this heading is to decide what was the objective behind the Regulations. The Claimants argue that the restrictions on advertising at POS are aimed solely at the protection of children. The Secretary of State says that the objective was far wider. The main point to which this question was directed was the justification of the application of the Regulations to licensed premises, night clubs, etc. to which children's access is restricted either by law or by the proprietors of the premises.

39. In evidence for the Minister, Mr. Adkin said,

> "The Claimants complain that the Regulations do not distinguish between retail shops and bars, pubs, clubs etc. where, it is said, children are not, in any event, present. The premise of this complaint, that restrictions on point of sale advertising were only intended to benefit children or young people is not correct". (I return to this point below) (Paragraph 44 of Mr. Adkin's first statement.)

Later Mr. Adkin said this,

> "As for the contention that [bars, pubs, clubs etc] … should have been subject to a different regime because children will not and cannot be present, I have already stated that the proposition is not accepted. The criticism is also premised on the assumption that

> the restrictions on POS advertising are designed only to protect children. As I have made clear, and as was consistently stated during the legislative process leading up to the regulations, POS advertising also plays a part in encouraging tobacco consumption by adults and the Regulations form part of a comprehensive advisory prohibition which, it is believed, will help to promote the effectiveness of other aspects of the prohibition."

(Paragraph 89 of the same statement.)

40. In evidence for the Claimants, Mr. Lord said,

> " …The Claimants understand perfectly well that the Regulations were aimed at children and young people in particular but they were not the only targets."

(Paragraph 49 of the second statement of Mr. Lord.)

41. In the hotly contested evidence about the effect of advertising on levels of consumption, the Minister also relied on expert evidence which indicated that advertising at POS contributed to the increase of consumption, not only by young people but by older consumers as well. Prior to the hearing, all seemed to be agreed, however, that regulation at POS advertising was necessary "to protect children in particular from the dangers of smoking": Mr. Sales's skeleton argument at paragraph 12(11) (emphasis added.).

42. At the hearing, however, the Claimants argued that material published by the Government, in the period leading up to the Regulations, demonstrated that the Regulations were in fact aimed exclusively at the protection of children. I was referred to the White Paper of December 1998 paragraphs 3.8 – 3.15 pp. 22-24 under the heading, "Minimal tobacco advertising in shops", there are several references to the protection of children and there is the following paragraph;

> "We want children to be able to go into shops without being faced with tobacco adverts or promotional materials. We have had detailed discussions with the retail sector to hear their views. Shopkeepers would like to retain the wall fixture (or 'gantry') for displaying tobacco products. Gantries are usually on the wall behind or near the till. Shopkeepers also want to continue to be able to put a poster in their window, or elsewhere, giving details of the prices of various tobacco products to customers who already smoke."

43. I was taken to the Consultation Paper (dated 21 August 2002) prior to publication of the draft regulations which considered the following paragraph;

> "The sale of cigarettes and other products is a legal activity and both retailers and adult consumers have a right to carry out transactions without any unnecessary inconvenience. However, the importance of protecting children and young people in particular from tobacco advertisements has long been recognised. The White Paper "Smoking Kills", published in December 1998, stated that: *"when children go into a shop to buy sweets nor a magazine, they are now faced with cigarette adverts on the walls or hanging from the ceiling, tobacco-branded till covers, dispensers with cigarette special-offer leaflets or any other tobacco promotion material."* The Government made clear in Smoking Kills its intention to: *"protect children as far as possible from exposure to pro-tobacco messages in shops, whilst taking account of the legitimate desire of retailers to display products for sale and indicate their prices."* These regulations are intended to restrict advertising at point of sale in a way that protects children in particular whilst permitting a reasonable level of information about the products and their prices to be given to consumers so they can make their purchases. In Smoking Kills the Government commended the policy of the Co-op which sold tobacco but did not promote it any way which could glamorise or induce people to smoke."

44. Finally, in this vein, Mr. Pannick referred to paragraph I of the Regulatory Impact Assessment of 18 March 2004 and in particular to paragraph 1 which reads,

> "The Government made a commitment in 'Smoking Kills', published in December 1998, to take action to ensure minimal tobacco advertising in shops. For many years, tobacco products have been advertised to both smokers and non smokers via a variety of media. This has included advertising at many places where tobacco products are sold – for example, branding or other advertisements on or around gantries and other display items in shops or advertising on vending machines.
>
> The proposed approach was to:
>
> 'limit advertising aimed at purchasers strictly to gantries displaying tobacco products themselves and their prices
>
> in order to:
>
> 'protect children as far as possible from exposure to pro-tobacco messages in shops, whilst taking account of the legitimate desire of retailers to display products for sale and indicate their prices."

45. I think that it is right that these documents do lay emphasis on protection of children as being a particular objective of the restrictions on POS advertising. But, the use of the word "particular" is important. The parties in their evidence were in no doubt the objectives of the restrictions on POS advertising were not confined to the protection of children alone. Mr. Lord, for the Claimants', was at pains to emphasise this. He is an experienced executive in the industry and he was in no doubt that the Regulations are aimed beyond protection of children alone. Accordingly, I reject Mr. Pannick's submission on this point.

46. Bearing in mind the wide objective of the Regulations, there can be no doubt that it is sufficiently important to justify limiting a fundamental right. It seems to me that the measures proposed are rationally connected with the objective. The question that remains is whether the means used are no more than is necessary to accomplish the objective. The intensity of the review to be undertaken depends upon its context in the manner which I have sought to analyse above.

47. The argument of the Claimants is succinctly expressed in the evidence of Mr. A. W. Brown, the expert advertising witness who provided a statement for the Claimants. At paragraph 48 of his statement he says,

> " In my view, these constraints are so restrictive that they would amount, in practice, to an advertising ban at point of sale. The limitation on location, distance from consumers, size and quantity of advertising material will mean that its visibility is negligible … In practice, this will preclude meaningful competition for smoker's attention and business … ."

48. It is clear, however, that this view is not universally held. Professor Pollay who gave evidence for the Secretary of State disagreed. In his view, the proposed A5 size adverts will be of commercial value and can be useful in providing information on price and other characteristics. Further, M. Frédéric Gaiddon of the Fifth Claimant gave evidence from the perspective of a non – U.K. tobacco company; he expressed the fear that companies like his own might be forced out of the limited advertising available because of the space being dominated by the domestic manufacturers. His evidence was directed to what he saw as the potentially anti-competitive consequences of the new restrictions for foreign manufacturers. However, if his view is correct, it supports the argument that even the limited advertising to be permitted is of commercial value. Indeed, it suggests that his own company would wish to use such space as may be available. The evidence of Mr. Lord for the Claimants, in paragraph 76(d) of his first witness statement was to similar effect: he thought that in the early stages at least manufacturers would be anxious to secure whatever POS advertising space they could.

49. The Claimants criticise further the requirement that relevant advertising should be affixed to display gantries that are themselves fixed to a single point in the sales outlet. This restriction would prevent, for example, the use of moveable display cabinets. It will also require a change of practice for those outlets such as some restaurants, cafés and public houses which have tended not to use "gantries" in the past. This is clearly an advertisers' concern. I was informed by Mr. Sales that there had been no concern expressed by any organisation representing the catering industry at the time of the Consultation.

50. It seems to me that tobacco manufacturers have traditionally been anxious to use whatever advertising facilities that are available to promote their product. I find it hard to imagine that under the Regulations, advertising at POS would simply die out for lack of demand. The Claimants' own evidence, through Mr. Lord and Mr. Gaiddon, is (perhaps unguardedly, but instructively) to the contrary effect, notwithstanding Mr. Brown's professional opinion.

51. I do not consider it to be disproportionate to meet the objective of promoting health by restricting advertising at POS to a single advert of the type to be permitted. Displays of the products for sale will continue and, in addition to the A5 advert, price lists will also be allowed. Simply casting one's eye over the photographic evidence of existing POS advertising, it is not difficult to see that the combination of display, price list, generic advertising and the limited A5 advertisement proposed could have a significant effect of demonstrating, at POS, the products available, their prices, the pack sizes available and their characteristics (such as tipped or un-tipped, menthol content, size and the like.) The traditional shop gantry and display will remain and the customer will be able to see what is available and he or she can ask for other information, if it is needed.

52. I consider it was entirely legitimate for the Secretary of State to regulate in the manner now proposed, in a context where Parliament obviously intended some restriction of POS advertising which would lead to the reduction of the impact of the promotions which have developed hitherto. Given the enormous health risks and economic costs to society caused by smoking tobacco and a substantial weight of expert opinion as to the effects of advertising (including at POS) upon the levels of consumption, I believe it to have been a responsible and proportionate step to have regulated as the Minister has now done. In my view, the Court is in no position on a judicial review application to weigh up the pro's and con's of particular levels of this type of advertising. It is clearly desirable to draw a line somewhere. Having regard to the constraints, which I have endeavoured to express, I see no basis in law for criticising the Secretary of State for drawing that line where he has. He must be permitted a considerable discretion in finding the correct line. As the argument proceeded, in the light of hotly contested evidence as to the effects of advertising and the likely effects of the Regulations, I became more and more convinced of the futility of legal argument about the size of posters to be allowed, the fixing or positioning of gantries and similar matters of detail.

53. Equally, I do not find that the Regulations are "too blunt an instrument" in their application to premises such as catering establishments (including licensed premises), night clubs or large supermarkets or stores. In view of my finding as to the purpose of this legislation and of the Regulations, I do not consider that the criticism of the application of the restrictions to licensed premises and clubs can be sustained. The regulations are in part at least designed to shelter adults from intrusive tobacco advertisements wherever they may be. Moreover, as is common knowledge, young adults or almost adults are prominent users of such establishments. I see no reason why the Minister should not prescribe a limit to advertising in a single, comprehensive and easily enforceable form. Precisely what that form should be seems to be pre-eminently a matter for him rather than the Courts.

54. I see no "proportionality" objection in confining advertisement to one sales point in a large store. Permitting more extensive promotion in such stores could only serve to assist proliferation of such material. It is no hardship to communicate with a customer that he or she is required to seek out the tobacco counter in the same way as he or she would seek out the pasta shelf or the

delicatessen. I also bear in mind that the Minister took into account that flexibility and "loopholes" in the rules would be likely to be ruthlessly exploited by the industry: the evidence suggests that he was entirely reasonable in so doing.

55. Finally, under this heading, I must turn to the question of vending machines. Here too I am satisfied that the Minister was entitled in the Regulations to draw a line delimiting permissible advertising on vending machines. He has decided to limit it to one packet size depiction of each brand dispensed. Criticism is levelled at this limit for being arbitrary. Many limits are arbitrary: such as legal ages for smoking, drinking alcohol and even voting at elections. It is not to say that for that reason the limits are disproportionate. The idea is to limit the intrusiveness of tobacco advertising. One can see the commercial convenience of a pictorial illustration of a product over each drawer or chute of a machine dispensing that product, even if the result is two pictures of brand X and one picture each of brands Y and Z. But, that is not the sole route to commercial convenience. I cannot see a disproportionate commercial inconvenience in one picture per brand, plus a verbal description marking the relevant button or drawer. I felt that the potential for customer confusion was much exaggerated by the Claimants. Here as with other POS advertising, I consider that, in the light of the legislative aims of the Act and the Regulations, the Minister was entitled to set the prohibition at a low threshold.

(H) The E U Law point

56. The Claimants contend that the Regulations impact in a discriminatory fashion upon foreign producers. Therefore, they submit the Regulations infringe Article 28 of the EC Treaty. Article 28 is in the following terms:

> "Quantitive restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

Article 28 is qualified by Article 30:

> "The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public authority, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or disguised restriction on trade between Member States."

57. The Claimants argue that the evidence given by M. Gaiddon of the Fifth Claimant demonstrates that these Regulations will impact harder upon foreign producers than upon the domestic producers who already have a much larger share of the market. They would be likely to "squeeze" foreign producers from the limited display and advertising facilities available. This will artificially distort the ability of companies such as the Fifth Claimant to export into the U.K. market. This evidence is supported in paragraph 57 of Mr. Brown's statement already referred to.

58. There was significant debate between the parties as to whether Article 28 of the Treaty was engaged at all. The Minister argued that the restriction was no more than a "selling arrangement" which applied "to all relevant traders operating within the national territory and … affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States": Keck v Mithouard [1993] ECR 1-6097.

59. I agree with Mr. Sales that it is not necessary to resolve in this case the interesting argument as to whether Article 28 is engaged. The reason is that the test of objective justification of a restriction engaging Article 28 is, for all practical purposes, similar to that which applies under

Article 10 of the Human Rights Convention: see Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR 1-3689, 3715-6.

60. In Commission v France Case C-262/02, 13 July 2004 the European Court of Justice was concerned with a national measure prohibiting television advertising for alcoholic drinks, marketed in that state in the case of indirect television advertising resulting from the appearance on screen of advertisements visible during the re-transmission of certain sporting events. This was said to infringe the freedom to provide services contrary to Article 59 (now 49) of the Treaty. Relevant restrictions are again capable of justification under Article 56 and 66. The Court observed:

> "24. In that context, it is for the member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, observe the principle of proportionality … which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not to go beyond what is necessary in order to attain it."

61. Having found that the measure constituted a relevant restriction the Court held that the rules pursued an objective relating to the protection of public health and were appropriate to secure that aim, going no further than necessary to achieve such an objective. It was said that, "They limit the situation in which hoardings advertising alcoholic beverages may be seen on television and are therefore likely to restrict the broadcasting of such advertising, thus reducing the occasions on which television viewers might be encouraged to consume alcoholic beverages."

62. Meeting an argument that the French rules were inconsistent , " … since they apply only to alcoholic beverages whose alcohol content exceeds 1.2%, concerns only television advertising, and do not apply to advertising for tobacco." The Court said, " … it is significant to reply that that option lies within the discretion of the Member states to decide on the degree of protection which they wish to afford to public health and as the way in which that protection is to be achieved … ."

63. It seems to me that the justification for the present Regulations, argued for by the Minister in this case, would amply satisfy the criteria employed by the Court in Commission v France. Mr. Pannick submitted that the proportionality test has a particular dimension with regard to the free movement of goods. I agree. However, whether the matter is looked at in the context of Article 28 or Article 10, the proportionality test is satisfied.

(I) Assessment of the need for the Regulations by the Minister.

64. Finally, Mr. Pannick argues that there is no material on which the Court can be satisfied that the Minister assessed for himself whether less severe regulations would have satisfied the legislative purpose. He submits that a great deal of the material now produced has been so produced "ex post facto"; there is nothing to suggest that this material framed part of the Minister's decision making process. Therefore, for this further reason, the test of "proportionality" has not been satisfied.

65. Mr. Pannick conceded that this was merely a "supplementary" point in support of his three other heads of argument considered above. However, even for this limited purpose, I do not consider that the argument is well-founded. Mr. Adkin explains fully in his first witness statement the reasoning process adopted in framing the Regulations. For example, in paragraph 65 of that statement in particular he sets out six principal factors which were taken into account in framing the Regulations. Each of those considerations seem to me to be entirely appropriate foundations for regulations such as these. As I have said, given those objectives, the Minister consulted and then produced the rules, drawing a line where he considered appropriate to meet the objectives. I

do not consider he infringes any test of proportionality if he fails to address every single potential grievance that a producer may ultimately have even before the draftsman puts pen to paper. He has promulgated regulations meeting the objectives. The proportionality of his decision is not to be impugned because, where grievances are raised in litigation, he answers them in a more detailed fashion than he could have done when the policy decision was taken and before the objections were raised. Provided that some particular flaw is not identified, which undermines the rationality or proportionality of his policy and his regulations, he is, I think, entitled to justify the application of the regulations made in the particular context of the criticism raised. That is not "ex post facto" rationalisation of the regulations, it simply serves to demonstrate that the specific criticism does not dent the integrity of the decision as originally made. It may always be that, when tested in practice, regulations of this or any other type, may be seen to require refinement or they may prove to be satisfactory for many years. It is obviously important for any Minister to consider and, if thought fit, meet any specific criticism raised. In the alternative, he may decide to amend the relevant regulations. If he takes either of these steps it does not necessarily detract from the rationality or proportionality of the regulations as originally promulgated.

(J) Conclusion

66. For these reasons, this application for judicial review is refused.