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**R. (Application of PROGRESSIVE DEMOCRATIC PARTY)
v. GIBRALTAR BROADCASTING CORPORATION**

SUPREME COURT (Dudley, Ag. C.J.): October 3rd, 2007

Constitutional Law—fundamental rights and freedoms—freedom of expression—for purposes of 2006 Constitution, s.10, no breach of freedom of expression of small political party by denying of participation in broadcast Leaders’ Debate if party granted sufficient coverage in general or other electoral programmes—legitimacy of broadcaster’s decision to be based on entirety of party’s election broadcast coverage, not on single programme

Constitutional Law—fundamental rights and freedoms—protection from discrimination—for purposes of 2006 Constitution, s.14, no discrimination against small political party in denying participation in broadcast Leaders’ Debate since not excluded on grounds of political opinions—able to participate freely in all other electoral broadcasts/debates

The claimant sought judicial review of the defendant’s decision to exclude its leader from participation in the Leaders’ Debate broadcast during the 2007 election.

The claimant (“the PDP”) fielded six candidates in the 2007 election. During the election campaign period, the defendant (“the GBC”) (which had exclusive rights to radio and television broadcasting) ran a series of programmes to broadcast information about each of the political parties and their candidates. One such programme was the “Leaders’ Debate”

broadcast on television and radio on the eve of the election. The “Guidelines” booklet produced by the GBC described the Leaders’ Debate as “a 90 minute debate with the leaders of a party or alliance offering a candidature of nine or ten.” The Guidelines also provided that “the GBC reserves the right to change any of the above arrangements.” Despite its participation in other electoral broadcasts, the PDP’s leader was not invited by the GBC to take part in the Leaders’ Debates on radio or television. The PDP challenged the decision of the GBC management based on the significance of the Leaders’ Debate and its desire to participate. The challenge was referred to the Board which upheld the management’s decision. The PDP then challenged the decision of the Board of the GBC in the present proceedings.

The claimant submitted that the decision of the GBC should be subject to judicial review because (a) the decision was unfair, irrational, unreasonable and wrong in law because s.45 of the 2006 Constitution allowed a Government to be formed with only five Ministers but the GBC had made its decision on the incorrect assumption that the PDP could not form a Government with its six candidates; (b) the GBC had acted contrary to the 2006 Constitution since the decision had breached its s.10 right to freedom of expression providing “freedom to hold opinions . . . without interference” which implied a constitutional right to participate in the Leaders’ Debate; (c) the GBC had also failed to respect the claimant’s s.14 right against discrimination as it had favoured larger political parties by affording them greater public exposure; and (d) the GBC had breached the claimant’s legitimate expectations of participation in the Leaders’ Debate.

In reply, the defendant submitted that it had been correct to exclude the PDP from participation in the Leaders’ Debate because (a) it had reserved to itself a discretion to vary the rules; (b) it would have breached the Guidelines requiring participating parties to have fielded “nine or ten” candidates; (c) the likelihood of the PDP gaining sufficient votes to attempt to form a majority Government was minimal considering its low ratings in public opinion polls and there was therefore no reason for the PDP to participate; (d) the PDP had been granted sufficient electoral broadcast coverage generally on both radio and television—and in fact more than other similar-sized parties; (e) it had considered all relevant facts (including the number of candidates fielded, the claimant’s low ratings in the opinion polls and the unlikelihood of its forming a Government) in reaching a reasonable and lawful decision; and (f) the PDP had not, therefore, been given a legitimate expectation of participation in the Leaders’ Debate since the change to the number of fielded candidates per party required for participation had been made in 1996 and the claimant should have been aware of this.

Held, dismissing the application:

(1) The GBC’s decision to deny the PDP participation in the Leaders’ Debate was justifiable since it was a reasonable decision that a broadcaster, on proper consideration of the issues, could have reached. The

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GBC had considered all relevant issues regarding the PDP election campaign and had exercised its lawful discretion in making its decision. Although s.45 of the 2006 Constitution allowed the PDP, in theory, to form a Government, this was unlikely to happen. It was necessary for the GBC to distinguish between parties of different sizes and the degrees of public support they enjoyed as the impartiality required of it in its electoral programming did not necessitate equality between all parties as to the number and type of programmes in which they were invited to participate (para. 20; paras. 24–25).

(2) The GBC's decision was not contrary to the 2006 Constitution. There had been no breach of the PDP's s.10 right to freedom of expression since its right had been respected by giving it sufficient electoral broadcast coverage in general. The air-time given to the PDP on both radio and television was more extensive than that of similar-sized parties and the legitimacy of the GBC's decision should not be based on the consideration of a single programme in isolation but on the entirety of the election coverage given to the PDP. There had been no breach of the PDP's s.14 protection against discrimination because it had not been excluded on the grounds of its political opinions and could participate in all other electoral broadcasts and debates (paras. 27–28; para. 33).

(3) There was no breach of the PDP's legitimate expectation to participate in the Leaders' Debate. Although, in 1992, a party fielding fewer candidates than was needed to form a Government took part in the Leaders' Debate, the current Guidelines limiting participation to parties with "nine or ten" candidates had been in force since the 1996 election and the events of previous elections were irrelevant to the PDP's case. Moreover, Mr. Azopardi, leader of the PDP, had participated in two elections since the introduction of the current Guidelines and he should have been aware of the updated Guidelines booklet and its contents (para. 34).

Cases cited:

- (1) *Benjamin v. Minister of Information & Broadcasting*, [2001] 1 W.L.R. 1040; (2001), 10 B.H.R.C. 237; [2001] UKPC 8, referred to.
- (2) *Figueroa v. Canada*, [2003] 1 S.C.R. 912; [2003] S.C.C. 37, referred to.
- (3) *Haider v. Austria*, [1995] 85 D.R. 66, referred to.
- (4) *Lynch v. B.B.C.*, [1983] 6 N.I.J.B. 1, *dicta* of Hutton, J. followed.
- (5) *R. (Referendum Party) v. B.B.C.*, [1997] E.M.L.R. 605; (1997), 9 Admin. L.R. 553; [1997] C.O.D. 459, referred to.
- (6) *Scottish Natl. Party v. Scottish Television Plc.*, 1998 S.L.T. 1395, referred to.

Legislation construed:

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.10: The relevant terms of this section are set out at para. 26.

s.14: The relevant terms of this section are set out at para. 30.

P. Triay, E. Phillips and Ms. S. Sacramento for the claimant;
G.C. Stagnetto for the defendant;
 The interested parties were not represented and did not appear.

1 **DUDLEY, Ag. C.J.:** The claimant (“the PDP”) together with the first to third interested parties are political parties contesting the general election to be held on October 11th, 2007. The PDP is fielding 6 candidates, the third interested party (“the GSD”) is fielding 10 candidates, whilst the first interested party (“the GSLP”) is contesting the election in alliance with the fourth interested party (“the Liberals”) and they are fielding 7 and 3 candidates respectively. Also standing for election are 2 independent candidates, Mr. Charles Gomez and Mr. Richard Martinez.

2 The defendant (“the GBC”) is a public service broadcaster governed by the Gibraltar Broadcasting Corporation Act 1963 and by virtue of s.10 thereof, has the exclusive right of broadcasting via radio and television.

3 Urged by the claimant and in my view an argument which cannot be resisted is that by virtue of it being a public service broadcaster largely financed by the taxpayer, it is implicit that the GBC must act fairly and is duty-bound to balance competing interests, particularly in the context of parliamentary elections. It flows from this, and it is not, I think, a point in issue, that the GBC is amenable to judicial review.

4 The preliminary point which does arise, albeit one not pressed by Mr. Stagnetto, is the impact that s.25 of the Gibraltar Broadcasting Corporation Act may have upon these proceedings. Section 25(1) provides that—

“no civil suit shall be commenced against the Corporation before the expiry of one month after written notice of intention to commence such suit shall have been served upon the Corporation by or on behalf of the intending plaintiff.”

5 It strikes me that a distinction is to be drawn between a “civil suit” and a public law action and, on that basis, I am of the view that s.25 does not prevent this action from being instituted.

6 In any event, to my mind the section must be read in light of the provisions of s.8(8) of the 2006 Gibraltar Constitution. This is a case requiring urgent determination if the relief is to be effective: to prevent access to the court on the basis of s.25 would in my view run counter to the fundamental right to a fair hearing before a court.

7 Whilst essentially the decision which the PDP seeks to review is the exclusion of its leader from participation in the Leaders’ Debate to be held on television the evening before the general elections (that is on October

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10th, 2007), there are in fact two decisions which need to be considered—one taken initially by the GBC management and thereafter, following representations by the claimant, a decision by the Board of the GBC.

8 Although none of the interested parties is represented in these proceedings, it appears from the evidence before me that whilst the Alliance does not object to the attendance of Mr. Azopardi at the debate, the election agent of the GSD at a meeting held at the GBC on September 20th, 2007 indicated that it supported the GBC decision.

Background to the decision by the GBC

9 Under cover of a letter dated September 18th, 2007 and received by Mr. Keith Azopardi, the leader of the PDP, on September 19th, the acting General Manager of the GBC provided a booklet which was said to “outline the proposed arrangements in respect of both electoral broadcasts and election campaign programmes.” Paragraph 11.4 of the document provides: “Leaders’ Debate: A 90 minute debate with the leaders of a party or alliance offering a candidature of nine or ten.”

10 It is noteworthy that under the entitlement of “General” in para. 12.10 of the Guidelines, it provides that “the GBC reserves the right to change any of the above arrangements.”

11 Following a letter from the PDP to the GBC dated September 19th and a press release dated September 20th challenging their exclusion from the Leaders’ Debate, *inter alia*, on the basis that, in earlier elections, the leaders of parties fielding less than the number required for a majority in the then House of Assembly had participated in the Leaders’ Debate, the GBC issued a press release. It is useful to set out that statement in full as reported in the online edition of the *Gibraltar Chronicle*:

“The GBC meanwhile, said that it is satisfied that the rules are fair and balanced, and provide for appropriate exposure to be given to all candidates. The 2007 rules are, in fact, based on those governing broadcasts and programmes for the General Elections in 1996, 2000 and 2003, it said:

‘The GBC acknowledges that, in 1992, the rules allowed the leader of a party that did not field sufficient candidates to form Government to take part in the Leaders’ Debate and Leaders’ Interviews. The rules, which were amended accordingly, are still in force today and only allow for leaders of parties/alliances that can form Government on their own to take part in Leaders’ programmes.’

The Corporation said it has duly considered the points raised by the PDP—

‘but the reality is that with only six candidates on its slate, it cannot form Government on its own under the present Gibraltar Constitution. The GBC will continue to adhere to its Electoral Broadcasts and Election Campaign Programme Rules, through which the PDP will be able to take part in three debates on Radio Gibraltar and three debates on GBC Television, as well as in phone-in programmes.’

The GBC looks forward to the transmission of a comprehensive selection of electoral programmes on GBC Television and Radio Gibraltar over the next three weeks.”

12 This press release was followed by one from the PDP dated September 21st, 2007 in which, *inter alia*, it asserted the absence of any provision in the Constitution to the effect that “a party must have a certain number of seats to form Government” and the assertion that “if the people of Gibraltar elected all PDP candidates and there were no other bigger party in the Parliament then the Governor would be obliged to ask Mr. Azopardi to try to form Government.”

13 Also on September 21st, 2007, the election agent of the PDP wrote to the Chairman of the GBC asking the Board to reconsider and reverse the decision of the management of the GBC highlighting the electoral significance of the Leaders’ Debate on the eve of the polls and making proposals for the resolution of the matter.

14 By letter dated September 25th, 2007, the Chairman of the Board wrote to the PDP, stating that, “the Board has given careful consideration to the representations made by your party. The conclusion reached by the Board are that the 2007 General Election Guidelines . . . should remain unchanged,” and that a detailed reply would follow. No such reply was provided because it is said matters were overtaken by the institution of this action.

15 Produced for the purposes of these proceedings, however, were minutes of a meeting of the Board of the GBC held on September 25th, 2007. The minutes reflect that Mr. Azopardi and Mrs. Sene of the PDP were invited to make representations to the Board and that thereafter the independent candidate, Mr. Gomez, was also afforded the opportunity to address the Board. The minutes also set out the conclusions reached by the Board. It is useful to set these out in full:

“The Board proceeded to consider the points raised and came to the following conclusions:

(a) The Board is totally satisfied that ample time and opportunity is being offered to the PDP as indeed to the other parties/alliances and independent candidates to fully explain their electoral programme.

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(b) Existing guidelines, established since 1996, have been applied for the last three elections. The Board was unaware of any objections raised by candidates or parties and no requests received over the past 11 years for the GBC to review guidelines.

(c) The leader of a party not fielding a full candidature was allowed to participate in the Leaders' Debate during the 1992 election. Representations made by other political parties representing full candidatures, lead the GBC to reconsider the existing guidelines at the time and amend them before the next election.

(d) The PDP have an electoral broadcast for each of their candidates—12 in total, one eligible to take part in one TV and one radio phone-in of their own (the same as parties with a full candidature), can participate in three of four radio debates and in all TV debates except the Leaders' Debate. It has also been invited to the "alternatives" programme. The only programmes it is not participating in are Leaders' Debate on television, one other debate and the Leaders' Interviews on radio. It was understood that broadcasters are not required to give the same amount of coverage to all candidates, but are able to take into account the relative electoral strengths of the candidates and parties.

(e) The PDP's ratings in the opinion polls of 2007 has generally been under 5%. In addition to fielding a reduced number of candidates, the electoral strength of the party in relation to the other parties is very low. The amount of coverage for the PDP can be said to be very generous in the circumstances. The PDP have recourse also to other media to put the points of view forward to the electorate, such as the local newspapers.

(f) The Board considered Mr. Azopardi's interpretation of s.45. Without delving into the interpretation of s.45, the likelihood of forming a 'minority government' at the forthcoming election appears to be remote and the Board took this into account.

(g) It was felt that changing the decision would invite representations from other candidates and parties to obtain further changes to accommodate their particular views. Furthermore, the process under the guidelines had already started and by effecting changes, the consequences would have the potential to cause the GBC difficulties in the future and defeat the object of publishing the guidelines in advance.

In conclusion, the Board decided not to change the guidelines as published."

16 The claimant seeks relief on the grounds that the decision by the GBC (i) is unfair and/or irrational and/or unreasonable; (ii) breaches the

claimant's legitimate expectations; (iii) is wrong in law; and (iv) is contrary to the 2006 Gibraltar Constitution.

The decision was wrong in law/unfair/irrational/unreasonable

17 It is argued for the claimant that the decision of the GBC management was wrong in law because, as reflected in its press release, it proceeded upon the incorrect assumption that the PDP could not be called upon to form a Government. It is apparent, however, that s.45 of the 2006 Constitution makes it clear that the Council of Ministers can have as few as five members.

18 It is common ground, I think, that strictly this is not an error of law in terms of an exercise of discretion, but rather is an erroneous interpretation of a constitutional provision upon which the GBC management relied in reaching its decision. The decision-making process by the GBC management was, to that extent, flawed. Moreover, their press release further clearly suggests that the GBC management unreasonably fettered its discretion by placing undue weight upon the "Guidelines" which it referred to as "rules" and indeed by failing to take account of the fact that the Guidelines themselves allowed the GBC the right to change arrangements.

19 In essence, were I only considering the decision by the GBC management, I would be quashing the decision and remitting the matter back to the GBC for it to consider the PDP's request afresh. However, what in my view fundamentally falls to be decided is whether the decision of the Board was *Wednesbury* unreasonable.

20 The minutes of the meeting of the Board in my view establish a comprehensive approach to the issue before them. In particular, the Board took account of the fact that the relevant provisions of the Guidelines were on similar terms to those used since the 1996 election—the airtime which the PDP is being afforded, the PDP's performance in opinion polls and its assessment of the likelihood of the PDP forming Government.

21 It is useful to contrast these with the United Kingdom I.T.C. Programme Code which, at para. 4.3, provides:

"Programmes at the time of elections.

. . . There is no expectation that the time devoted to all parties and candidates in an election will be equal. Licensees must exercise their judgement, based on factors such as significant levels of previous electoral support, evidence of significant current support, and the number of candidates being fielded by a party . . . [S]maller parties and independent candidates may also be among those with significant views and perspectives, to which appropriate coverage may need to be given."

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22 These are not dissimilar to some of the factors considered by the Board. Of course, in this case, what is in issue is participation in one particular debate which, because of its timing, is perceived as crucial in influencing voters' minds. The authorities to which I have been referred by Mr. Stagnetto are, I think, helpful.

23 In *R. (Referendum Party) v. B.B.C.* (5) the Divisional Court held that in the allocation of broadcasts, impartiality was not to be equated with parity as between political parties. In *Scottish Natl. Party v. Scottish Television Plc.* (6), dealing with an action by a political party seeking to interdict a broadcaster who proposed a televised debate between two or three leaders of political parties but excluding the applicant, Lord Eassie, albeit *obiter*, said (1998 S.L.T. at 1395):

“. . . [I]t is my view plain that in judging whether a licensee is observing due impartiality, particularly in the context of political broadcasting in an election campaign, it is the generality or entirety of the broadcasting output in the relevant field to which one must look, rather than a single programme in isolation.”

And later (*ibid.*, at 1396):

“[The broadcaster] would no doubt have to assess carefully whether the impact of such a programme . . . would present in the context of politics in Scotland a partiality which could not be overcome having regard to the complete range and type of programmes relating to the election . . . But in my view that is primarily a matter for their judgment.”

24 Also apposite to the matter before me is the Northern Ireland High Court decision in *Lynch v. B.B.C.* (4) in which the claimant sought to challenge its exclusion from special programmes to be broadcast during an election campaign. Hutton, J., albeit also *obiter*, said ([1983] 6 N.I.J.B. at 16):

“Once it is accepted that impartiality in allocating broadcasts between political parties of differing sizes and apparent degrees of public support does not require that there should be equality as to the number and type of programmes it follows that the B.B.C. must have a discretion in allocating programmes between the parties, and . . . the Court, in accordance with well established principles, would only intervene if it was satisfied that the B.B.C. had exercised its discretion in a manner in which no responsible broadcasting authority could have reasonably exercised it.”

25 It is a passage which I respectfully adopt. Ultimately, participation of the PDP at the Leaders' Debate is a matter for the GBC unless, that is, in the exercise of its discretion, it acts unreasonably. Whilst the decision by the GBC certainly will not have universal approval, it is not in my view a

decision which a broadcasting authority properly considering all the relevant issues could not have arrived at.

Constitutionality

26 It is said for the claimant that the decision of the GBC breaches ss. 1 and/or 10 and/or 14 of the 2006 Gibraltar Constitution. Sections 1 and 10 enshrine the right to freedom of expression and in particular for present purposes “freedom to hold opinions and to receive and impart ideas and information without interference . . .”

27 In essence what is said for the claimant, at least as I understood it, is that the fundamental right to freedom of expression affords the claimant the constitutional right to participate in the Leaders’ Debate. The claimant relies upon the judgment in *Haider v. Austria* (3) where the Commission ruling on the admissibility of the applicant’s complaint states ([1995] 83 D.R. at 74):

“The Commission recalls that Article 10 (Art. 10) of the Convention cannot be taken to include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio or television in order to forward his opinion, save under exceptional circumstances, for instance if one political party is excluded from broadcasting facilities at election time while other parties are given broadcasting time.”

28 The difficulty which the claimant has in bringing itself within that statement of principle is that it does not complain about the broadcasting time it has been afforded generally. Indeed, according to the witness statement of John Tewksbury, the acting General Manager of the GBC, the PDP will have 10% more airtime per candidate than the GSD or the Alliance. All that is challenged is its exclusion from the Leaders’ Debate.

29 In essence, therefore, the PDP argues that its right to freedom of expression entitles it to participate in the Leaders’ Debate. Taking this argument to its logical conclusion would mean that the GBC would not, for the purposes of their electoral programming, be able to draw a distinction between mainstream parties, single issue or fringe parties or independents participating in the electoral process. Irrespective of the size of candidature, it would follow that all leaders of parties and indeed independents would have the constitutional right not merely to be given a fair amount of air time but also to participate not just in the Leaders’ Debate but presumably in all other debates. That is not a proposition which in my view can be sustained.

30 I have also been referred to s.14 of the 2006 Gibraltar Constitution, the relevant terms of which provide:

“(2) Subject to subsections (6), (7) and (8), no person shall be

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treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority.

- (3) In this section, the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of or social origin, political or other opinions or affiliations, colour, language, sex, creed, property, birth or other status, or such other grounds as the European Court of Human Rights may, from time to time, determine to be discriminatory, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.”

31 It is said for the claimant that the decision by the GBC discriminates against the PDP by favouring other political figures and affording them greater public exposure. The claimant relies upon *Benjamin v. Minister of Information & Broadcasting* (1) which is authority for the proposition that constitutional freedoms, including freedom of expression, are to be given a generous and purposive construction. I have also been referred to *Figueroa v. Canada* (2). The basis upon which it is relied is simply in support of what is a common sense proposition that political parties contribute to the democratic process in different ways, not least by participation in debate and exchange of opinion.

32 It is conceded by the PDP that the GBC has acted fairly as regards general arrangements in connection with electoral broadcasts and election campaign programmes. The issue therefore is whether by not inviting Mr. Azopardi to participate in the Leaders’ Debate, the GBC have fallen foul of the discrimination provisions of the Constitution.

33 It is apparent from the minutes of the Board that the basis for the exclusion of the PDP from the Leaders’ Debate does not arise by virtue of the political opinions which it espouses nor indeed is this contended by the PDP. To my mind, however purposive an interpretation one places upon the definition of discrimination in s.14(3) of the Constitution, on the material before me it cannot be said that the PDP have, for the purposes of the rights enshrined in the Constitution, been afforded “different treatment . . . attributable wholly or mainly to their . . . political or other opinions or affiliations.”

Legitimate expectation

34 The claimant also relies upon the principle of legitimate expectation in support of the relief claimed. This, I think, is an issue that I can deal

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with briefly. The requirement of a full candidature was first introduced in the 1996 election Guidelines albeit that, as I understand it, no “minority parties” have participated since then. The undisputed fact remains that the present criteria has been in place for about 10 years, during which period Mr. Azopardi has participated in two elections. It simply does not avail him to say that the Guidelines are a matter for the election agent rather than the politicians. The circumstances in which parties may have been afforded the opportunity of appearing in Leaders’ Debates prior to the 1996 elections is, in my view, of no consequence for the purposes of the present claim.

35 The claim is dismissed. I shall hear the parties on costs.

Application dismissed.