Neutral Citation Number: [2005] EWHC 1698 (Admin)

Case No: CO/2850/2005

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th July 2005

Before :

MR JUSTICE NEWMAN

- -

Between :

The Queen on the application of
NORTH CYPRUS TOURISM CENTRE LIMITED (1)
PARADISE FOUND TRAVEL COMPANY LIMTED (2)

Claimants

- and -

TRANSPORT FOR LONDON **Defendant**

- -

- -

Michael Beloff QC and **Brian Kennelly** (instructed by Addleshaw Goddard) for the Claimants
Robin Allen QC, Graham Brodie and **Ms Rachel Chambers** (instructed by Transport for London) for the Defendant

Hearing dates: 27th and 28th June 2005

- -

Approved Judgment

Mr Justice NEWMAN :

Introduction

1. These proceedings stem from an advertisement carried on London buses in November 2004. It featured a family strolling along a beach, boats beneath the Crusader/Venetian fortress at Kyrenia and the ruined Augustinian abbey of Bellapais, all in Northern Cyprus. The advertisement bore the strapline *"pure Mediterranean … North Cyprus … A sanctuary of unspoilt beauty*" and the website address of the advertiser was given www.go-northcyprus.com.

2. The advertisement caused the Chairman of the London Assembly of the Greater London Authority, Mr Brian Coleman, the member for Barnet and Camden, to write to Mr Peter Hendy, the Managing Director of Surface Transport of the defendant, in the following terms:

> "It has recently been brought to my attention that a number of London buses are now carrying an advertisement promoting holidays to North Cyprus. The advert in question being www.go-northcyprus.com.
>
> You should be aware that North Cyprus is not a country recognised by our government, or indeed any other government except for that of Turkey who have illegally occupied the territory for the past thirty years.
>
> It causes me great concern that Transport for London have taken the decision to allow such advertising to appear on their buses and request that these are withdrawn from any form of public transport immediately. Your comments regarding these advertisements and confirmation of their withdrawal would be appreciated as soon as possible."

3. The advertisement was being carried on London buses pursuant to the terms of a contract reached between the first claimant and Viacom Outdoor Limited (Viacom) acting for London Underground Ltd (a subsidiary of the defendant). At the date of the letter, namely 22nd November 2004, the contract was eight days from the date of its expiry, namely 30th November 2004.

4. Although it is not clear why Mr Coleman thought they could be withdrawn, it is clear that the defendant has power to take action in connection with advertising. In November 2004 the defendant had adopted an advertising policy. It will be necessary to refer to the terms of the policy because the decisions prompted by Mr Coleman's letter and under challenge in these proceedings were taken in reliance upon it and section 404 of the Greater London Act 1999 (the 1999 Act). That section comes into play in the following manner. Section 155 of the 1999 Act provides, as material, that:

> "The Mayor may issue to Transport for London … specific directions as to the exercise of its functions."

On 16th July 2004 the Mayor issued a direction that the defendant comply with the provisions of section 404 of the 1999 Act. Section 404 (as material) provides:

“(1) In exercising their functions, it shall be the duty of –

(a) the Greater London Authority …

(b) …

(c) …

to comply with the requirement in subsection (2) below.

(2) The requirement is to have regard to the need –

(a) to promote equality of opportunity for all persons irrespective of their race, sex, disability, age, sexual orientation or religion;

(b) to eliminate unlawful discrimination; and

(c) to promote good relations between persons of different racial groups, religious beliefs and sexual orientation.”

5. The following provisions of the policy are particularly relevant:

> “7.1 Advertisements should not be approved for, or permitted to remain on display on TfL Sites/Vehicles if they:
>
> a. …
>
> b. …
>
> c. …
>
> d. Are likely to cause widespread or serious offence to members of the public or sections of the public, on account of the nature of the product or service being advertised the wording or design of the advertisement or inference contained therein;
>
> …
>
> k. Contain images or messages that relate to matters of public controversy and sensitivity”.

6. Mr Hendy did not reply to Mr Coleman until after the expiry of the contract. By letter dated 9th December 2004 he informed him that the defendant did retain the right to refuse posting or to require removal of advertisements on various grounds. He stated that, to enable any request for future advertisements for North Cyprus to be considered, the defendant would consider whether it was required to insist that the bus operating companies carrying such advertisements did not do so.

7. Mr Hendy had not been aware of the particular contractual arrangements which had given rise to the advertising campaign in November 2004 nor had it, prior to Mr Coleman’s letter, given rise to comment or complaint. He understood

Mr Coleman's letter to represent the views of many of Mr Coleman's constituents as well as Mr Coleman's own views. Further, at the same time as he received Mr Coleman's letter, he received a complaint from the Mayor about the advertisements *"in similar terms to Mr Coleman's letter*". The view, so far as the letter expresses it, amounts to an objection to TfL carrying advertising which promotes tourism to North Cyprus because the territory is (a) not recognised by Her Majesty's Government ("HMG") and (b) illegally occupied by Turkey.

8. Mr Hendy's letter of 9th December 2004 was despatched after he had discussed matters within London buses and the legal department for the defendant and a copy was sent to Viacom. As appears from a letter dated 20th January 2005 from Viacom to Mr Hendy, discussions between them took place prior to Christmas on the subject whether Viacom could accept advertisements on behalf of the North Cyprus Tourist Board (NCTB). In the same letter Viacom refer to the "removal" of NCTB's advertisements:

> "All advertising management agreements we are party to with TfL operators stipulate the conditions governing the acceptance of advertisements. Following a complaint to the Mayor's office and at TfL's request in December, we therefore duly removed the NCTB's advertisements."

9. Viacom's reference to NCTB as the advertiser is inaccurate. The campaign had been placed by North Cyprus Tourism Centre Limited (the first claimant), which was incorporated in 1997 in the United Kingdom ("UK"). Its business had previously been conducted under the name of the North Cyprus Tourist Office. It carries on its business from 29 Bedford Square, London which is also the address of the Office of the representative of the Turkish Republic of Northern Cyprus ("TRNC").

10. North Cyprus tourist organisations have been operating in London since about 1977 (see *Hesperides Hotels Ltd& Another v Aegean Turkish Holidays Ltd & Another* [1978] 1 QB 205). Since the early eighties extensive activities in every field of tourism promotion have been carried on at various places in major towns and cities and at various times the Greek Cypriot Tourist Office has attempted to restrain or prevent the activities.

11. There is a minor conflict on the evidence as to whether the advertisements were removed before or after the expiry of the contract. It is not necessary to resolve it.

12. Andrew Oldham, the Joint Managing Director of Viacom and the author of the letter dated 20th January 2005, records that NCTB had already approached Viacom with a view to placing further advertisements in 2005. His purpose in writing to Mr Hendy was to obtain permission to place "NCTB's" 2005 campaign on the underground and the London buses. The basis of the request was that Viacom held no political stance or opinion with regard to the North Cyprus situation, although it acknowledged that the state of Northern Cyprus was not officially recognised by the government. But equally it was not prohibited under English or EU law to transact business with North Cypriot organisations or promote tourism in North Cyprus. It is clear that Mr Oldham had expressed Viacom's view to "NCTB" and that "NCTB" had asked that, in the event of the defendant's refusal, it would like the defendant's reasons to be set out in writing.

13. This request for permission prompted the first decision letter dated 9th February 2005. Mr Hendy replied to Mr Oldham informing him that the defendant was not prepared to give its consent to a fresh advertising campaign by NCTB. He went on to state the reasons for the decision and agreed that they could be passed on to NCTB. The reasons were as follows:-

> "As you are aware, TfL has previously received complaints (via the Mayor's office) regarding the previous NCTB advertising campaign. Having received these, TfL had a duty to consider and address the concerns outlined therein and has done so.
>
> Having considered the position carefully TfL has reached the following conclusions:-
>
> 1. The NCTB advertisements will cause TfL to breach its own advertising policy as in TfL's view they:
>
> > *are likely to cause widespread or serious offence to members of the public or sections of the public, on account of the nature of the product or service being advertised, the wording or design of the advert or inference contained therein; or*
> >
> > *contain images or messages that relate to matters of public controversy and sensitivity.*
>
> 2. Further, under the current contractual arrangements in place with the bus operators for bus services in Greater London, TfL is entitled to seek the immediate removal of any advertisements which, in TfL's opinion:
>
> > *are likely to offend the general travelling public or offend ethnic, religious or other groups on account of the nature of the product or service being advertised or design of the advertisement or inference contained in the advertisement* <u>*or*</u> *open to the possibility of defacement; and*
> >
> > *might adversely affect in any way the interest of any member of the TfL Group or are in any way considered inappropriate.*
>
> In view of the factors set out at 1 and 2 above, TfL believes that it is fully justified in adopting its present stance in relation to the proposed NCTB advertising campaign.
>
> Whilst TfL (like Viacom) has no political stance or opinion with regard to the North Cyprus situation, it is clearly a sensitive, ethnic, political issue and a matter of some controversy.
>
> I trust that this letter provides you (and NCTB) with a sufficient explanation of the reasons behind TfL's refusal to allow further NCTB advertising campaigns."

14. It has to be said that the letter leaves a lot to the reader to interpret. The respects in which the campaign breached the advertising policy are not stated. Whilst the "North Cyprus situation" (if taken to refer to political events since 1974) would probably be generally regarded as a "sensitive, ethnic, political issue and a matter of some controversy", the letter does not explain why the campaign touched the "situation".

15. The publicity given to this decision generated many responses, some by way of objection and others in support. They certainly confirm the sensitive nature of the political divide between the Greek and Turkish Cypriot communities. Addleshaw Goddard, solicitors acting for the government of TRNC, wrote on 22nd March 2005 in the belief that the defendant would be reconsidering the decision at a meeting to be held on 23rd March, but they gave notice that if the decision was not revoked, they would advise TRNC on the action which it should take with a view to having the decision quashed by the court at the earliest possible moment. The defendant confirmed that the decision originally taken on 9th February 2005 was being reconsidered and that a letter dated 21st March 2005 from the Office of the London representative of TRNC had been received.

16. The representative drew attention to a number of factors including:

    (1) A commitment of the UK government, the European Union and the United Nations to end "the isolation of Northern Cyprus and its people" and to end "the trade embargo".

    (2) The expression, by a vote in the April 2004 referendum, of a desire on the part of Turkish Cypriots for the reunification of Cyprus.

    (3) The UN Secretary-General's call "to ease the plight in which the Turkish Cypriot people find themselves through no fault of their own".

    And alleged:

    (4) Perversity on the part of the defendant in yielding to the "Greek Cypriot lobby".

    (5) That the ban was "discriminative and offensive" to the very large Turkish Cypriot community in London and not conducive to improving relations between the two communities.

17. In advance of receiving the fresh decision, Addleshaw Goddard wrote a detailed letter before action dated 30th March 2005. It recited the reasons why it was contended the decision of the 9th February (now under review) was unlawful. It is to be noted Addleshaw Goddard were, by then, acting for "*the government of The Turkish Republic of Northern Cyprus, for its London representative, Mr Namik Korhan and for The North Cyprus Tourism Centre Limited".* The letter included reference to the extensive campaigns by way of advertising in respect of holiday and travel to North Cyprus which had taken place over a number of decades and pointed out:

> "Much of that promotion has been by the North Cyprus Tourism Centre Limited (NCTC), a UK registered company. Tourism is a vital part of the economy of Cyprus both North

and South. London is a very important market for potential travellers to North Cyprus and London Transport advertising represents a very effective means of reaching that market".

18. In addition, it was observed that the decision letter of 9th February "… appears to ban all advertising seeking to encourage people to visit Northern Cyprus". The proposed grounds of challenge were stated:

(1) Procedural unfairness.

(2) Irrationality.

(3) Infringement of Article 10 ECHR.

The letter maintained, amongst its detailed arguments, that:

(a) the decision treated advertising by North Cyprus as being a political issue favouring one side in the political dispute against the other; and

(b) that it was unlawful and disproportionate in its extent "… banning all advertising for North Cyprus for an unlimited period on all tubes and buses, regardless of the identity of the person placing the advertisement and regardless of the location of the advertisement".

<u>The second decision letter dated 13th April 2005</u>

19. TfL (by its Head of Legal) replied by a letter dated 13th April 2005. In summary, it stated:

(1) "It is plain that what is at issue is the desire of the TRNC to advertise the tourism opportunities in the northern part of Cyprus and to seek if necessary to invoke the court's help to that end".

(2) That, in essence, the defendant did not accept that the TRNC may invoke justice in the courts in relation to advertising tourism in the northern part of Cyprus. "The Crown does not recognise TRNC and does recognise the Republic of Cyprus as having sovereignty over all Cyprus. Accordingly, TRNC has no lawful interest in tourism in Cyprus which is cognisable by the courts in the United Kingdom."

(3) That "the current position of the United Kingdom can be seen quite clearly from the latest advice to travellers posted by the FCO to its website on the 4th March 2005".

The letter then went on to set out parts of the website.

(4) That by reference to authority, in particular the case of *Veysi Dag v Secretary of State for the Home Department* (Immigration Appeal Tribunal decision 14th March 2001) and the case of *Luther v Sagor* [1921] 3 KB 532 and other cases referred to in the decision of *Dag*, TfL adopted the conclusion that:

> "It is not open to any United Kingdom court or tribunal to give any degree of recognition to the 'Turkish Republic of Northern Cyprus' as a sovereign State". "

20. As to the proposed grounds of challenge set out in Addleshaw Goddard's letter, the defendant replied as follows:

    (1) It was denied that the decision was procedurally unfair and in breach of the rules of natural justice. Reliance was placed upon Mr Hendy's letter of 9th February 2005 and the fact that the detailed representations in the letter dated 30th March 2005 from Messrs Addleshaw Goddard had been taken into account in reconsidering the initial decision.

    (2) As to the ban, said by Addleshaw Goddard to be a ban on all advertising for North Cyprus, being irrational and/or wholly unreasonable, TfL stated:

    > "TfL does not accept that its decision to ban all advertising for Northern Cyprus on the basis that it is likely to cause widespread or serious offence is irrational and/or wholly unreasonable.
    >
    > TfL has not banned all such advertising. It has decided it will not accept advertising from the proxies of a body that is in international law (and as accepted by the United Kingdom) in illegal occupation of a part of the territory of the Republic of Cyprus. It would accept advertising from the Tourist Board of the Republic of Cyprus in relation to any part of Cyprus, but not from a body which is seeking to act on behalf of an illegal government".

21. The defendant relied upon section 7.1 of its advertising policy which provides that advertisements should not be approved for or permitted to remain on display if they:

    > "Are likely to cause widespread or serious offence to members of the public or sections of the public, on account of the nature of the product or service being advertised, the wording or design of the advertisement or inference contained therein".

    It contended that the complaint received from Mr Coleman which the defendant understood represented the views of his Greek Cypriot constituents "*was fully justified by reference to the provisions of the Advertising Policy*".

22. The defendant contended that the advertisement contained a "political message" because it was clear that the advertisement related to a matter of public controversy and sensitivity and of a highly political nature, namely, the North Cyprus situation. This was so because:

    > "It refers to a web site entitled www.go-northcyprus.com. The web site says in terms in the contact section that it is the "UK Representative of the Ministry of Tourism of Northern Cyprus (TRNC)".

The defendant added:

> "It is simply unarguable that this advertisement and its basis in action of the so-called "Ministry of Tourism of Northern Cyprus (TRNC)" is anything other than deeply politically controversial."

23. The defendant responded to the claimant's reliance upon Article 10 of the European Convention on Human Rights as follows:

    (1) That it did not accept that TRNC and its proxies may claim any protection under the ECHR. That claims destructive of rights established under the Convention would not be permitted (see Articles 17 and 18 of Schedule 1 to the Human Rights Act 1998).

    (2) That the Council of Europe does not recognise TRNC and does recognise the Republic of Cyprus. Further, that it did not accept that any entity such as the TRNC which is not recognised under international law has any rights to freedom of expression under the ECHR and certainly not to claim to exercise sovereign power in relation to tourism in the north.

    (3) The defendant added:

    > "In any event, TfL considers it would be improper for a public authority such as TfL to permit advertising of this kind designed to attract tourism into an area which carries such a substantial "health warning" from the Foreign Office".

    (4) The defendant maintained that it had the power at law to act as it had done and that its actions were prescribed by law.

    (5) The defendant refuted the contention that the decision unlawfully discriminates against the Turkish Cypriot community, whether resident within the United Kingdom or in North Cyprus, relying upon the fact that section 404 of the 1999 Act was concerned with the promotion of equality in respect of "lawful opportunities for all people". Since TRNC is not internationally recognised and Turkey's occupation of North Cyprus is considered internationally to be illegal, TfL failed to see how the decision was inconsistent with the provisions of section 404 of the 1999 Act. On this point, the letter ended:

    > "There is no question of the TRNC having a lawful right to sovereignty over the north of the Republic of Cyprus and cannot offer tourism over that area without acting in a way which is contrary to the rights recognised as lawfully being with the Republic of Cyprus."

    (6) The defendant denied that its decision was irrational and unreasonable in that it was taking sides on a political issue. It added:

    > "The fact that the United Kingdom government wishes to see such reunification of Cyprus is not inconsistent to its stated policy of non-recognition of 'TRNC' and

> does not alter the present position of 'TRNC' continuing to remain an unrecognised 'State'."

(7) As to the suggestion that the advertising bore no political message whatsoever, the defendant maintained that this is advertising by a body which is illegal in international law and not recognised by the United Kingdom. The letter went on to add:

> "As we have mentioned above, the decision was reached as a result of a complaint received from Brian Coleman in November 2004 based upon NCTB's previous advertising campaign on London buses.
>
> TfL understands that this complaint was prompted by complaints Mr Coleman had received from his Greek Cypriot constituents. TfL was also informed by the Mayor's Office that the Mayor agreed that further advertisements of this kind on London Transport would not be acceptable.
>
> The decision was not a disproportionate response to the complaints received as it was the only sanction available to TfL following its consideration of the complaint and the advertisement in question.
>
> It is ridiculous to suggest that the advertising does not contain a political message. We have pointed this out above. Accordingly TfL does not accept that the advertising contains no political message whatsoever. It is clear from the complaint received that the advertisement in question promoting 'North Cyprus' does relate to a matter of political controversy and sensitivity which is of a highly political nature, i.e. the North Cyprus situation."

24. Having maintained its decision, the Head of TfL Legal wrote to Mr Simon Wood, the head of Greece and Cyprus section of the Foreign and Commonwealth Office ("FCO"), by letter dated 22nd April 2005. The letter drew attention to the past history of advertising for the North Cyprus Tourism Centre, to the fact that in November 2004 a complaint about the advertising campaign had been received from Mr Brian Coleman, the chair of the London Assembly, and the letter set out the matters which had been brought to their notice. The letter went on to point out:

> "In view of the previous complaint received (which was also endorsed by the Mayor's Office) TfL considered the terms of its advertising policy and refused to sanction this proposed campaign on the grounds that it:
>
> - was likely to cause widespread or serious offence to members of the public or sections of the public; and

- contained images/messages that related to matters of public controversy and sensitivity namely, the North Cyprus situation.

Having received further representations from interested parties TfL has reconsidered its decision to refuse to sanction the proposed NCTC campaign and has decided to maintain its stance on this issue.

This decision was reached taking into account: (1) the terms of TfL's advertising policy; (2) the fact that it would be improper for a public authority such as TfL to allow advertising designed to attract tourism into an area which carries such a substantial "health warning" from the UK Foreign & Commonwealth Office; and (3) the representations received to date."

25. Mr Wood replied by letter dated 3rd May 2005. In summary, he wrote:

(1) confirming that Britain "does not recognise any state in Cyprus other than the Republic of Cyprus";

(2) stating that "this does not mean that the UK government refrains from dealing with the Turkish Cypriot community. On the contrary, we believe that helping the Turkish Cypriots to come out of isolation and to raise their standards towards EU norms, will make a settlement in Cyprus more likely";

(3) confirming the EU's and the Secretary General's call "to end the isolation of Turkish Cypriots" and confirming the UK government's agreement with that objective;

(4) expressing a willingness to have a dialogue with the defendant "to discuss the potential presentational issues" on the media coverage in connection with the ban;

(5) rejecting the suggestion the FCO website constituted "a health warning"; and

(6) recognising that the key issues in connection with tourism were related to "… displaced people and appropriated property" and that the promotion of tourism was regularly subject to criticism from Greek Cypriots.

26. After the claimants had issued proceedings, the Head of TfL Legal responded by a letter dated 18th May 2005, refuting the grounds of the application, drawing attention to further information, including the letter from the FCO, and other communications expressing views both for and against the decision and stating that the decision of the 13th April would be reviewed. Further and as part of the review, the letter stated that TfL would take into account the matters which had been referred to in the application for permission to apply for judicial review and expressed a willingness, later fulfilled, to consult with travel agencies operating in TRNC.

27. I have now recorded enough to enable consideration to be given to the hearing.

The hearing

28. The following grounds of challenge were advanced for the claimants:

    (1) Procedural unfairness at common law and contrary to Article 6.1 ECHR.

    (2) Article 10 of ECHR.

    (3) Irrationality.

29. At the commencement of the hearing Mr Robin Allen QC, leading counsel for the defendant, applied to have the issue of the claimants' standing decided as a preliminary issue. I refused the application. The arguments he wished to advance seemed to me to be at the heart of the claimants' challenge on the substantive application. There was no advantage to be gained from holding a preliminary hearing.

30. I propose to consider the arguments and grounds of challenge raised by this application for judicial review under the following headings:

    (1) the content and meaning of the advertisement;

    (2) the nature and extent of the ban;

    (3) the standing of the claimants;

    (4) the reasons for the ban;

    And as necessary and not already considered:

    (5) the available legal bases for imposing the ban;

    (6) any remaining grounds of challenge.

Content and meaning of the advertisement

31. It is not the content of the advertisement which has given rise to complaint, but the content of the website accessible at the address appearing on the advertisement. On the title page the following words appear, as a greeting:

    > "UK Representative office of the North Cyprus Tourism Ministry."

    At the bottom of the page, a statement:

    > "This site is provided FREE by 'icCyprus' to the UK Representative Office of the Ministry of Tourism of TRNC".

    The greater part of the site is devoted to listing travel agents who promote holidays in North Cyprus. The second claimant is included in the list.

32. Mr Allen submitted:

> “Nothing could be more obvious than that the advertising of a website which is the “official” website of the illegal and purported TRNC would cause grave offence and fall to be scrutinised under the defendant’s policy” (Skeleton Argument, paragraph 86).

At paragraph 43 of the same Skeleton Argument he submitted:

> “The central point about which all else revolves is the illegality of TRNC”.

So expressed, the argument depends not upon the content or meaning of the words on the website, but upon the fact that TRNC, being a state unrecognised in international law, operated a website promoting tourism in North Cyprus, to which the advertisement referred. In oral argument, Mr Allen, put it somewhat differently. He submitted that, by referring to a “Ministry of Tourism”, TRNC was impliedly representing that it was a recognised state and that the statements including the word “Ministry” should be regarded as misrepresentations, amounting to an unjustified and misleading assertion of legality. Although the second decision letter does not supply this reason for the contentions that, “TRNC claims to exercise sovereignty over Northern Cyprus” and claims “.. to exercise sovereign power in relation to tourism in the north”, it is likely this argument forms the basis upon which those points were advanced.

33. I am bound to say that these arguments appear to me to be far-fetched and misconceived. They seek to derive too much from the legal consequences of non-state recognition. International law leaves it to each state, according to its own domestic procedure, to determine the legality and existence of other states. Political entities can be regarded as being states by some states, but not by others. For example, Turkey recognises TRNC as a state. Further, non-recognition of a state in international law does not prevent a de facto administration being in existence. TRNC is the de facto administration in North Cyprus. For many years it has been the practice of HMG to recognise states, not governments or administrations. I am unable to accept that the use of the word “Ministry” amounts to an assertion by TRNC that it has received recognition by the HMG as a state and that it exercises sovereign power in relation to tourism in the north. The use of the word “Ministry” implies no more than that the administration in North Cyprus, which does exist, participates in promoting tourism by an arm of the administration called a Ministry. As a result, I accept that the website represents that TRNC, through a Ministry, exercises a measure of governmental control over tourism in the north. As a matter of fact, it does exercise such control; this is not a misrepresentation. Nor does the representation give rise to any implied assertion that its actions over the territory have been internationally recognised as the actions of the government of the state having lawful sovereignty over the territory. Further, I would pause before concluding that when a state participates in tourism, it necessarily exercises sovereign power, as opposed to engaging in commercial activity. I cannot accept that a prospective holidaymaker would read the website and understand it to have stated that TRNC has been recognised by HMG as a state having sovereign power over North Cyprus.

34. I have concluded that if consideration is restricted to the advertisement itself, the relevant facts available to form the basis for the ban must be considered as limited to the combined effect of the subject matter, namely tourism in North Cyprus and the involvement of TRNC in the advertising campaign, either as the advertiser or as the

promoter of the campaign or as the owner of the website to which the advertisement referred.

The nature and extent of the ban

35. The decision was understood by the claimants to amount to a ban on "all advertising for North Cyprus" (Addleshaw Goddard 23rd March 2005). Contrary to Mr Allen's submission that the terms of TfL's response, by letter dated 13th April 2005, was driven more by the claimants' contention than its own intentions, I am satisfied that the response reflects the position which was then held by the defendant.

> "TfL does not accept that its decision to ban all advertising for North Cyprus on the basis that it is likely to cause widespread or serious offence is irrational and/or wholly unreasonable.
>
> TfL has not banned all such advertising. It has decided it will not accept advertising from the proxies of a body that is in international law (and as accepted by the United Kingdom) in illegal occupation of a part of the territory of the Republic of Cyprus. It would accept advertising from the Tourist Board of the Republic of Cyprus in relation to any part of Cyprus, but not from a body which is seeking to act on behalf of an illegal government".

36. Addleshaw Goddard sought clarification on the point in a letter dated 15th April 2005, asking whether "the only advertising for North Cyprus that TfL would accept from any source would be from the Tourist Board of the Republic of Cyprus", but it was not until oral argument developed that a departure from the apparent position was suggested. Mr Allen submitted that "there is not a total ban", "nor should the defendant's decision be interpreted as a total ban on advertising holidays in North Cyprus". He stated whether, for example, an independent English-owned travel agent wishing to advertise tourism in North Cyprus would be accepted was an open question.

37. If now an open question, contemporary exchanges about the decision are not clear. Mr Hendy of TfL was asked by an email dated 5th March 2005 from the London Turkish Gazette:

> "… Is this a total ban on all advertising for North Cyprus as a holiday destination or just from NCTB? Would you consider advertising for North Cyprus from other companies?"

Mr Hendy responded by letter dated 5th April 2005 to point out that the decision was to be reconsidered, but referring to the decision as being "… to refuse to allow further advertising campaigns for holidays in Northern Cyprus". It is not clear whether the reference to "all advertising campaigns" included all or only a campaign by TRNC. Or, for that matter, any advertising campaign in which it could be seen that TRNC was involved or connected.

38. The extent of the ban received further attention when the defendant commented on the joinder of the second claimant as a party. Addleshaw Goddard replied:

> "You express surprise that PFTC is a claimant. Mr Hendy's letter of 9th February at least implicitly and Mr Farmiloe's letter of 13th April explicitly made it clear that TfL banned all advertising for North Cyprus (save that from the Tourist Board of the Republic of Cyprus). Should TfL have wished to clarify its position it would have responded to the second paragraph of our letter of 15th April. In addition it should have been clear to TfL that banning advertising by NCTC would affect others with a commercial interest in North Cyprus – see our letter of 30th March".

39. The first claimant's joinder as a party should not have given rise to surprise. It was a contracting party to the agreement which gave rise to the November 2004 campaign. It was a party, ready and willing to enter into a contract with the defendant's agent, Viacom, who was also ready and willing to contract with the first claimant until prevented from doing so by the ban.

40. The claimants' detailed statement of grounds contended at paragraph 30 that the defendant was under a duty to consult with travel companies operating in TRNC. This contention and subsequent correspondence led to the defendant writing to "… those United Kingdom operators listed within NCTC's website … inviting representations upon TfL's decision" (see Mr Hendy's witness statement paragraph 92). The letters referred to:

    (1) TfL's opinion that the advertising campaign infringed TfL's advertising policy because "by referring to North Cyprus and by containing a link to NCTC's website contained images/messages that relate to matters of public controversy and sensitivity" and therefore, in TfL's opinion, infringed the policy.

    > "The North Cyprus situation being clearly a matter of public controversy and sensitivity".

    (2) TfL considering "… that it would be inappropriate to carry such advertisements taking into account the concerns highlighted within the "Travel Advice" section of the Foreign & Commonwealth Office website".

41. It is clear that the second claimant's case for being joined depends upon whether TfL's decision extends so as to prevent it, either from benefiting from the first claimant's advertising of North Cyprus as a holiday destination by its inclusion on the website list, or from advertising themselves (see Addleshaw Goddard's letter dated 24th June 2005). No argument has been advanced against the claim that its interest, in being on the website, has been affected by the ban.

42. I am bound to say that if, as Mr Allen indicated, it is an open question whether any person other than the claimants could advertise, I can see no reason why the request would not be refused on the ground of TfL's concerns over the "Travel Advice" from the FCO and/or the same reasoning which has been applied to the second claimant's case, namely that it has to be regarded as "parasitic on the interest of TRNC" (see paragraph 56 below).

The standing of the claimants

43. The first claimant was incorporated and its name registered in England in 1997. It is not unlawful in England and Wales to promote holidays in North Cyprus. The name of the company which combines the words "North Cyprus" and "Tourism" can be taken as not being "offensive" in the opinion of the Secretary of State (see section 26(a)(c) of Companies Act 1985). It is elementary that it is an independent entity existing as a matter of English law and entitled to pursue its lawful objects. Its objects as set out in its Memorandum and Articles of Association include to act as "travel agents, tour operators … advertising and publicity agents" and to "provide" all "services in connection therewith" including, as the name declares, the promotion of tourism in North Cyprus.

44. The second claimant is a UK company. It has no association with the government of TRNC. It promotes holidays and tourism to North Cyprus. It is an independent commercial entity existing as a matter of English law to pursue its lawful objects which it asserts have been directly affected by the ban, both in so far as it extends to the first claimant, and extends to prevent it from advertising on its own account.

45. Mr Allen submitted that:

(1) the claim is not justiciable because TRNC has no right to claim justice from the courts and the claims of each of the claimants fall for the same reason;

(2) it is an abuse of the process of the court for TRNC to appoint an agent for the purpose of seeking the assistance of the court; and

(3) neither of the claimants has a sufficient interest to bring the claim.

In truth, as he recognised, the contentions depend for their success upon the same arguments.

The standing of an unrecognised state

46. A state not recognised by the United Kingdom government has no standing in the English courts (*City of Berne v Bank of England* (1804) 9 Ves 347). Governmental acts of an unrecognised state cannot be recognised by an English court (*Luther v Sagor* (1921) 1 KB 456). "Common sense and justice may combine to require the qualification of these principles in certain respects" (see *Gur Corporation v Trust Bank of Africa* Steyn J. [1987] 1 QB 599.605 D-E). Where the acts in question can be seen as the acts of a subordinate body set up by a sovereign state, recognised as such by HMG, the acts of the subordinate body can be recognised as lawful (see *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853).

47. Mr Allen placed Steyn J's judgment in *Gur* at the forefront of his submissions. He emphasised that the judge, having refused to accept the availability of an exception based on the application of the principles of agency (the *Carl Zeiss* route), declined to accept the efficacy of an assignment by the Government of the Republic of the Ciskei to Mr Atwell, the Director General of the Public Works Department, which had been entered into after the challenge to Ciskei's standing, because:

(1) the rule on standing is not a procedural rule, but concerned "fundamental principles of English law based on important public policy considerations" (see *Gur* 609F);

(2) it was a device which would enable every unrecognised state to circumvent the fundamental principles of our law and, as such, would be contrary to public policy, being "a colourable device" (see *Gur* 609H-610A-B).

48. As I see it, Mr Allen's argument comes close to turning the *Carl Zeiss* agency exception on its head. In *Carl Zeiss,* agency had to be proved in a search to identify an entity which the law recognised (a) existed and (b) was legally responsible for the acts in issue in the proceedings. Mr Allen asserts the existence of agency between TRNC and the first claimant, an English corporate legal entity existing in English law, having the capacity to act and responsible for the lawful acts it performs, but he seeks to deny the legal validity and effect of the company's actions simply because it acted as agent for TRNC. As for the second claimant, it is submitted that it is in no better position because it has joined in the proceedings to seek the protection of the court for the interest of TRNC and because its claim is based on a commercial relationship between it and TRNC, namely appearing on the list on the website. All this comes close to a contention that TRNC's status in international law taints and restricts the claimants' powers of lawful action.

49. Steyn J. (*Gur* p. 606 C-D) summarised the basis for agency arising in *Carl Zeiss*:

> *"Carl Zeiss* was decided on the basis of the application of principles of agency: on the materials before the House of Lords the relevant acts were categorised as those of the U.S.S.R. rather than the G.D.R. This route was open to their Lordships because there was an executive certificate, which expressly stated, at p. 859:
>
> "*up to the present date Her Majesty's Government have recognised the State and Government of the Union of Soviet Socialist Republics as de jure entitled to exercise governing authority in respect of that zone [the G.D.R.]."*

50. The impact of the principle of state recognition or non-recognition is that the actions of the unrecognised state are not lawful, but, where the actions in question are or can be categorised as the lawful acts of a person recognised as existing in English law, they are justiciable by the court in the right of that person. They are not tainted by illegality because the unrecognised state can be associated with the actions. I can find no support in *Gur* for the conclusion that the result of the first claimant having acted so as to incur legal obligations is that its acts are to be regarded as invalid in English law because TRNC, not recognised by HMG, can be associated with its actions, either by agency or otherwise. The defendant has not suggested that its contract with the first claimant, which gave rise to the November 2004 advertising, was unenforceable. Had the first claimant not paid for the advertising, I have little doubt that it would have sued on its contract.

51. Mr Allen sought, by reference to *Gur,* to rely upon the absence of TRNC as a party to the proceedings and the impossibility of it being joined, as supporting the defendant's claim that the action was being brought in the name of the claimants as a "colourable device" to avoid TRNC's lack of standing. He could point to Addleshaw Goddard

being solicitors to TRNC, its London representative and the first claimant when the letter before action was sent and to the first intimation of proceedings coming from TRNC. He submitted that since the first claimant seeks to advertise TRNC, acting "as agent for TRNC", it can be in "no better position to claim justiciable rights in that regard than TRNC". Paragraph 52 of the Skeleton Argument submits "… the use of the first claimant to commence proceedings is a transparent ruse or device to seek to do what its principal, the purported TRNC, cannot. TRNC can no more commence proceedings by acting through the first claimant as agent for the purpose of seeking the assistance of the court that it can do so itself".

52. Put, as a matter of standing and not justiciability, the first claimant's interest, he submitted, is no greater than that of TRNC which the court could not recognise as an interest justifying these proceedings. "The sole or dominant aim of the advertisement is to point readers to the TRNC website" (paragraph 53 Skeleton Argument).

53. The detail of the submission can be seen in a letter dated 23rd June 2005:

> "We note that in your skeleton argument your counsel assert that 'The claim is not brought by the TRNC, through an agent or in any other capacity" (C skel paragraph 11). TfL does not accept this proposition either in fact or in law'.
>
> Whether or not it is lawful for NCTC to exist as a company in this country is beside the point, if it is acting as agent for TRNC, in this advertising campaign and this judicial review.
>
> We shall submit that there is the strongest possible basis for an inference that this is so.
>
> The facts, either in the bundle or readily accessible, make it perfectly clear that the advertising work of NCTC is undertaken to support the "Ministry of Tourism" of the "Turkish Republic of Northern Cyprus", and that it is TRNC which controls and pays for this work. It is therefore properly to be inferred that, in all material respects for this case, NCTC is the agent or proxy of TRNC.
>
> As you know we shall argue that:
>
> 1. TRNC does not have either standing or justiciable rights that the court can recognise;
>
> 2. It cannot avoid this problem through the use of agents: and
>
> 3. Both NCTC and Paradise are acting in this capacity.
>
> We shall refer the court to the following matters in support of the proposition that NCTC is an agent of TRNC.
>
> 1. The letter before action was written on behalf of TRNC, its representative Mr. Korhan, and NCTC (Bundle 1/5/149).

2. TRNC fund NCTC (Bundle 1/4/22 at para 5, C skeleton 6112).

3. NCTC only make a short form return to companies house, and have no independent means of funding this litigation.

4. NCTC is the representative office of Tourism Ministry of TRNC (Bundle 1/4/22 at para 5)

5. There are only two shareholders of NCTC, Yalcin Vehit and Hakki Muftuzade each holding one share (Bundle 1/51/46).

6. They both give their address as 29 Bedford Square, London WC1B 3EG (Bundle 1/5/45 –46). This is the address of the Office of the London Representative for TRNC (Bundle 2/12/379), which is also the address of the NCTC.

7. We know from the Bundle that Yalcin Vehlt is an Under-Secretary of the Ministry of Tourism of the TRNC (Bundle 1/5/44).

8. Hakki Muftuzade is described as the UK Representative of the TRNC see http://www.cypnet.com/ncyprus/tourism/embassies.html#uk. We shall ask for this document to be added to the bundle.

9. There are only two directors of NCTC,

    a. One is Namik Korhan who is another London Representative of TRNC (Bundle 1/5/43, 1/5/149); and

    b. The other is the same Mr. Vehit.

10. The secretary of NCTC is Yilmaz Kalfaoglu (Bundle 1/5/43 .He says that he is the Tourism Coordinator of the first claimant NCTC. Whether or not that is true, he is also the Tourism Coordinator of the Ministry of Economy and Tourism of North Cyprus (see http://www.holidayinnorthcyprus.com/arrival rep.jsp). We shall ask that this document be added to the bundle.

11. The obvious purpose of the advertising campaign is to promote www.go-northcyprus.com (Bundle 1/5/124 and passim).

12. This website is explicitly stated to be the website of the Office of Tourism of the Turkish Republic of Northern Cyprus (Bundle 1/5/52).

13. NCTC carries on no independent commercial activities.

14. It is perfectly plain that the funds for purchasing advertising on TfL's sites must come and only come from TRNC.

Accordingly we invite you admit forthwith that NCTC is the agent (or proxy) of TRNC in its activities of advertising the TRNC website and tourism in the Northern Part of Cyprus.

In the absence of an admission we shall ask the Court to infer as much from the above documents. If the court considers that it still needs to hear from Mr. Kalfaoglu before it is willing to draw such an inference we shall ask that it directs cross-examination of Mr. Kalfaoglu on this issue.

As to The Paradise Found Travel Company Limited, it is plain that they were added as Claimants when TRNC decided not to proceed with the litigation. We have perfectly reasonably asked you to confirm to us who is paying for their part in the litigation. You have declined to do so. We shall ask the court to either infer that their part of the litigation is paid for directly or indirectly by TRNC or (on the same basis as above) to direct cross-examination of Mr. Suleyman on the question whether Paradise's intervention in the litigation is also in this respect as an undisclosed agent of TRNC.

In each case we consider that it is necessary that the court should consider such cross-examination to ensure that the rule against judicial recognition of non-recognised states is not being abused".

54. The application for cross-examination was not pursued.

55. In my judgment the submissions are misconceived for a number of reasons:

(1) The first claimant has not purported to perform governmental acts on behalf of TRNC. The promotion of tourism is a commercial activity which confers benefits on the administration or government of the territory in question and the people of the territory. Governments of states recognised by HMG, indeed HMG itself, encourage, support by finance and otherwise, the activities of companies in a wide variety of commercial fields, but, merely by doing so, they do not become bound by the acts of the companies. The first claimant has engaged in commercial activity on its own behalf and has not sought to bind TRNC or render it liable for any obligation. The fact that it is funded by the government of TRNC is irrelevant. Further, it enjoys separate legal personality from its shareholders who are, in any event, not TRNC.

(2) The first claimant was incorporated before this dispute arose. It has contracted with the defendant in its own name as principal. It wished to enter into a further contract, but the defendant's decision has prevented it from doing so. It has not been appointed as agent "for the purpose of seeking the assistance of the court" on TRNC's behalf. As the contracting party

prevented from contracting further, it is obviously the party primarily affected. The facts do not approach the facts which led Steyn J. to conclude the assignment was "a colourable device".

(3) I reject the thrust of the submission, which presses for the consequences of the non-recognition of TRNC as a state, to operate so as to render non-justiciable any and all activity carried on by any legal person in or in connection with the territory of North Cyprus, on the ground that the Republic of Cyprus is sovereign in North Cyprus. I accept that the administration in the name of TRNC is illegal according to the law which the English court recognises as governing the territory, namely the law of the Republic of Cyprus. I recognise that this court cannot act so as to accord recognition to TRNC as a sovereign state, but, in according standing to the first claimant in respect of its legal rights and obligations as a corporate entity existing in English law, no recognition is accorded to TRNC. According to English law, I can see no basis for concluding that the first claimant is the agent of TRNC, which, according to English law, cannot be recognised as lawfully existing. Nor can the mutuality of interest, which I accept can be shown to exist in the first claimant being able to exploit the commercial advantages of tourism in North Cyprus and TRNC's ability to receive revenue from tourism, operate so as to deny the first claimant access to the court in connection with its own legal rights.

(4) I should add that, had it been necessary, I would have called for argument on the issue whether "common sense and justice" did not require the court to acknowledge the existence of a qualification to the principles flowing from non-recognition, for the purpose of doing justice to individuals "who were caught up in a political situation which was not of their making" (see *Gur* p. 605 G). The UN Secretary-General's exhortation to the international community "to ease the plight in which Turkish Cypriot people find themselves through no fault of their own" echoes the rationale for the UK government's approach, which is:

> "… whilst respecting this position [the fact of non-recognition], this does not mean that the UK government refrains from dealing with the Turkish Cypriot community. On the contrary we believe that helping the Turkish Cypriots to come out of isolation, and to raise their standards towards EU norms, will make a future settlement in Cyprus more likely" (Simon Wood: letter 3rd May 2005).

It is unnecessary to do so because, in my judgment, the law is consistent with that objective being achieved.

The second claimant

56. It follows that the second claimant has standing. For completeness, I should add that it has no association with TRNC, save for it being on the website, alongside travel agents from Orpington, the Isle of Wight, Salisbury and elsewhere in England, and I can see no basis for concluding that its claim is "entirely parasitic on the interest of TRNC".

The reasons for the ban

57. The decision to impose the ban was taken after the complaint from Mr Coleman and a complaint in similar terms from the Mayor. It follows that their complaints were based on the fact of non-recognition and an erroneous belief that "… Turkey … [have] illegally occupied the territory for the past thirty years". I would be minded to disregard the error, notwithstanding that it amounts to a regrettable allegation against a friendly sovereign state, which has been adopted as a reason for the decision. It might be excused on the part of Mr Coleman and the Mayor, but it was adopted as part of the first decision and remained as part of the reasoning for the decision contained in the second decision letter dated 13th April 2005, impliedly because Mr Coleman's complaint was relied upon and expressly in the following passage:

> "Taking into account the fact that TRNC is not internationally recognised and Turkey's occupation of North Cyprus is considered internationally to be illegal, TfL fails to see how the decision is inconsistent with the provisions of section 404 of the Greater London Authority Act 1999".

It is true another part of the letter alleged that TRNC is "in illegal occupation of a part of the territory of the Republic of Cyprus" (see the extract in paragraph 20(2) above). Whilst this has the merit of being legally accurate, it leaves this aspect of the decision in confusion.

58. In the course of the history of the Cyprus dispute since July 1974, it has been from time to time a contention on the part of the Greek Cypriot community that Turkey landed armed forces in North Cyprus, not in discharge of the Treaty of Guarantee between Greece, Turkey and the United Kingdom, as Turkey asserted, but in order to occupy the territory (see the account in *Hesperides Hotels* p. 219 D-E). Its adoption by Mr Coleman and then the defendant as a reason for the decision does call into question the true purpose and character of the ban and has an impact on the impartiality and rationality of the defendant, which has sought to justify the taking of its decision to avoid "political controversy".

Decision letter 9th February 2005

Paragraph 7.1(d) and (k) of the Advertising Policy

59. The letter recited the provisions of the policy, but did not identify "the nature of the product or service being advertised the wording or design of the advertisement or inference contained therein" upon which reliance was placed. Nor did the letter "identify the image or message" or public controversy or sensitivity to which reference was being made, save for stating that the "North Cyprus situation … is clearly a sensitive, ethnic, political issue and a matter of some controversy" (see paragraph 13 above).

60. At this stage, the defendant must be taken to have acted on the content of "complaints", from which it had inferred that the advertising touched the North Cyprus situation so as to be "likely to cause widespread or serious offence to members of the public or sections of the public".

61. The nature of the product or service being advertised was a holiday to North Cyprus. The image or message was the same. The "complaints" took account of the website

reference and, by inference, the message from the title page that TRNC was promoting the tourism. The decision letter did not develop this approach. However, the letter of 13th April 2005 clearly raised it.

Decision letter of 13th April 2005

62. The letter falls into parts. A response to the threat of proceedings and the reasons for maintaining the ban after consideration of the further representations. The principal reason for the ban and the defence is that:

> "…what is at issue is the desire of the TRNC to advertise the tourism opportunities in the northern part of Cyprus and to seek if necessary to invoke the court's help to that end".

The role of TRNC in promoting tourism by advertising is the source of offence, but only because TRNC is not recognised:

> "If the political position pertaining to North Cyprus were to change or the territory were to become subsumed within an internationally recognised state, TfL would, of course, reconsider its position".

But the letter also puts forward another reason, a reason for not permitting any advertising for tourism in North Cyprus:

> "In any event, TfL considers that it would be improper for a public authority such as TfL to permit advertising of this kind designed to attract tourism into an area which carries such a substantial "health warning" from the Foreign Office".

63. The letter from Mr Wood, subsequently received by the defendant which refuted the so-called "health warning", created difficulty for Mr Allen, but he manfully attempted to argue that the reason was nevertheless sound. It has to be said it was not abandoned by the defendant, even after the letter from Mr Wood, although it was rephrased. In the letter to agents in May 2005, the defendant put it thus:

> "in its capacity as a public authority, TfL also considered that it would be inappropriate to carry such advertising taking into account the concerns highlighted with the Travel Advice section of the Foreign and Commonwealth Office website".

64. In my judgment, the FCO website information, sensibly, could not be described as amounting to a substantial "health warning". It is enough that the FCO rejected the defendant's suggestion that it was intended as such. But more than that, after the defendant received the letter, it had been informed that the UK government supported "moves to start direct flights between the UK and northern Cyprus". It was an exaggeration to suggest that concerns were highlighted by the FCO. The advice draws attention to the existence of border controls and the implications for buying property. I have little doubt that such advice has to be given regularly in respect of many countries, not to deter travellers from going there, but to inform them of relevant facts. Mr Allen submitted that "someone might take advantage of a holiday there and things could go wrong" and the defendant could be "seen" to have advertised the holiday. This argument bore little or no relationship to the reliance

upon a substantial health warning. The ban was not imposed to protect travellers from some of the usual vagaries of foreign travel. In truth, the original "FCO reason" advanced by the defendant was plainly wrong.

65. The reasons based on the defendant's advertising policy was developed in the following passage:

> "TfL's decision, based upon the complaint received from the Chairman of the London Assembly … pointed out quite clearly that TRNC was not recognised by the UK (and which TfL understands represents the views of his Greek Cypriot constituents) was fully justified by reference to the provisions of the Advertising Policy".

Later:

> "It is simply unarguable that this advertisement and its basis in action of the so called "Ministry of Tourism of Northern Cyprus" (TRNC) is anything other than deeply politically controversial".

66. I do not doubt that many Greek Cypriots in London object to and are offended by any form of promotion of tourism in North Cyprus. As Mr Wood pointed out, the key issues in connection with tourism were related to "displaced people and appropriated property". In *Hesperides Hotels Limited* the action was brought by the displaced owner of the hotel. The complaint advanced by Mr Coleman on behalf of his constituents was not put forward on behalf of dispossessed property owners. No constituents have been identified. The defendant, if it had in mind the case for any particular Greek owners of property who could have been offended by the advertising, gave no thought to inquiring into the matter. On the evidence, whatsoever possibility there may be that one of Mr Coleman's constituents is a dispossessed property owner, there is no evidence before the court on the issue.

67. In truth, on the evidence, it is clear that the substance of the complaint was that it was seen to be the campaign of the administration of TRNC, an unrecognised state. This perception and thus the decision which was driven by it, disregarded the independent status and existence of the first claimant, which had its own commercial interests in promoting tourism and failed to draw a distinction between the first claimant and TRNC. Drawing upon the principles in connection with state recognition, it was reasoned that the campaign was "offering tourism" over an area contrary "to the rights recognised as lawfully being with the Republic of Cyprus". I have already stated why, in my judgment, the first claimant's right to promote tourism in North Cyprus stands apart and is unaffected by the fact that the Republic of Cyprus is the power which HMG recognises as sovereign in the territory.

68. Mr Beloff submitted that the ban was imposed for an improper political motive. The target, he submitted, was the regime or administration in North Cyprus. It is difficult to interpret Mr Coleman's complaint as not being politically motivated. He was reticent about attributing his intervention to his Greek Cypriot constituents and expressed the matter as being his concern, but the material shows it was driven by representations from the Greek Cypriot community. It is not likely that he had in mind the arguments on standing and justiciability laid out in the second decision letter.

69. It seems to me to be unnecessary to inquire beyond the validity of the legal peg of non-recognition upon which the defendant has hung its decision. In my judgment, it cannot sustain the case and it is unnecessary to consider whether it was a cloak to disguise an ulterior motive (see *Wheeler v Leicester City Council* [1985] AC 1054).

70. It follows that judicial review must be granted for error of law, error of fact and irrationality, on the grounds above and for the following reasons which I shall state briefly as possible.

The available legal bases for imposing a ban

71. The defendant, being a public authority within the meaning of the Human Rights Act 1998, must exercise its powers in accordance with the Act and the ECHR.

72. As a matter of interpretation, it is not clear that the advertising policy extends to complaints or offence caused to persons, not based upon the content or message of the advertisement, but upon the identity of the person perceived by the complainant to be behind or participating in the advertising campaign.

73. Nor can I see any part of the Policy which permits the defendant to find that North Cyprus could not be advertised at all because of "the substantial health warning" allegedly given it by the FCO. No provision has been identified for the making of this part of the decision.

74. Section 404(2) requires regard to be had to the need to "promote equality of opportunities for all persons irrespective of their race …" and to "promote good relations between persons of different racial groups". The attention of the defendant was drawn to matters falling under this subsection by the London Representative of the TRNC and the FCO. I have seen nothing to satisfy me how these important considerations were taken into account and, if they were, how it was thought that the ban was consistent with these statutory considerations.

Article 10 ECHR

75. Since I have already concluded that judicial review must be granted, I propose to summarise the position under Article 10, but, as expressed, it will be clear that some of the points go to the validity of the decision on *Wednesbury* grounds. The fact that I state the points briefly should not be taken as an indication that I do not regard Article 10 as an important ground of challenge, but I do not wish to add unnecessarily to the length of this judgment. As well as being important, it is also a valid and effective challenge to the legality of the decision.

76. The right to freedom of expression is not personal to the individual and is capable of being enjoyed by corporate legal persons (*Casado Coca v Spain* (1994) 18 EHRR 1, ECtHR paragraph 35). Commercial advertising, such as that of the claimants, is protected by Article 10(1) ECHR (*Casado Coca*). Any restriction upon free speech must pass three distinct tests:

36.1 it must be prescribed by law;

36.2 it must further a legitimate aim; and

36.3 the interference must be shown to be necessary in a democratic society (*Shayler* [2003] 1 AC 247 per Lord Bingham at paragraph 23 page 268.269).

77. The role of the court is to assess not merely whether the defendant had a rational basis for the restriction but whether the restriction is justified by a "*pressing social need*" on grounds which are relevant and sufficient and are "*convincingly established*" by evidence (*Human Rights Law and Practice* (eds. Lester & Pannick) 2nd edition, 2004, paragraph 4.10.28).

78. Contrary to the defendant's submission, the decision restricted the first claimant's freedom of expression by denying it a vital medium for its advertisements. The decision involves a "restriction" regardless of the possibility that the first claimant could advertise elsewhere. It interfered with the freedom of the first claimant to contract with a willing counterparty.

79. I am satisfied the seriousness of the restriction is clear. The defendant has a very high profile in London and carries a large proportion of all commercial advertising in the Greater London area with a very substantial reach. The undisputed evidence of Mr Kalfaoglu is that advertising on London transport is of critical importance for the first and second claimant.

80. The reasons given for the ban can be taken to apply beyond the particular advertising campaign of the first claimant. The extent of the decision means that no entity or company other than the Tourist Board of the Republic of Cyprus may advertise Northern Cyprus as a holiday destination on public transport in London. The second claimant is thus prevented from advertising in any way on London buses, stops, tubes or stations.

81. The decision is liable to cause or influence other advertisers to reject or avoid transactions with the second claimant. News International plc decided on 24th March 2004 not to proceed with a joint marketing arrangement with the second claimant citing as one of its reasons the decision to ban the first claimant's advertisements.

Prescribed by law

82. Foreseeability is inherent in the requirement that restrictions must be "prescribed by law". A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able, if need be with appropriate advice, to foresee to a degree that is reasonable in the circumstances, the consequences which any given action may entail (*Sunday Times v United Kingdom* (1979) 2 EHRR 245, ECtHR paragraph 49).

83. There is no express power in the 1999 Act clearly permitting the defendant to make the decision. But Schedule 10, paragraph 1(3) of the 1999 Act provides that:

> "it shall be within the capacity of Transport for London to do such things and enter into such transactions as are calculated to facilitate, or are conducive or incidental to, the discharge of any of its functions".

84. The defendant's advertising policy is stated to comply with section 404(2) of the Act, but does not state the provision, if any, under which it is made.

85. The general words in paragraph 1(3) of Schedule 10 to the 1999 Act entitle the defendant to have an advertising policy, but there is no specific power in sections 154-155 or in Schedule 10 to the 1999 Act permitting the defendant to institute a complete ban on advertising in a particular geographic location on the basis that it might cause offence to a section of the public. Such general words should be presumed to have been enacted as subject to fundamental rights and construed as such, pursuant to the principle of legality (*R v Home Secretary, ex parte Simms* [2000] 2 AC 115, per Lord Steyn at 130C-G).

86. Furthermore, it is not possible to foresee, to any reasonable degree, which part of this Advertising Policy, if any, permitted the defendant to find that North Cyprus could not be advertised at all because of the "substantial health warning" allegedly given by the FCO. As I have already stated, this part of the decision does not appear to have been made under any identifiable provision and could not have been anticipated by the claimants in the circumstances of this case.

87. For the reasons I have already given, it is not possible to foresee, to any reasonable degree, that paragraphs 7.1d and 7.1k of the Defendant's advertising policy would lead to the taking of the decision.

88. Further, it is impossible to see how the images and words employed in the first claimant's advertisement could be likely to cause:

> "widespread or serious offence to members of the public or sections of the public, on account of the product or service being advertised the wording or design of the advertisement or inference contained therein".

89. No offensive product or service was offered by this advertisement, which merely illustrated the cultural and environmental delight of Northern Cyprus. The images and words used could not have caused offence unless the "*section of the public*" referred to by the defendant was seriously offended by the use of the words "*North Cyprus".* The advertisement carried no political message. Reliance has been placed on the content of the website www.go-northcyprus.com as a source of offence sought but the words in the policy:

> "the nature of the product or service being advertised the wording or design of the advertisement or inference contained therein"

do not foreseeably cover the separate content of a website referred to in the advertisement.

90. Even if literally construed, the words in paragraph 7.1d may extend as far as contended by the defendant, the principle of legality operates to subordinate those words to the rights of free expression.

91. The principle of construction is particular apposite in relation to paragraph 7.1k of the defendant's advertising policy. The words *"images or messages that relate to matters of public controversy and sensitivity*" are extremely general.

92. Paragraph 7.1k should not be permitted such a broad reading as to render the words “North Cyprus” a statement which relates to matters of public controversy and sensitivity, where the effect is a breach of the fundamental right of the claimants to provide and the public to receive the information provided in the November 2004 advertisement: the relationship, if any, is far too remote.

Legitimate Aim

93. In my judgment and for the reasons which already appear, no legitimate aim within the ambit of Article 10(2) ECHR is identifiable in the decision, nor is any referred to in the communications from the defendant.

94. The letter dated 13th April 2005 implied a need to adhere to the policy of the UK government in its treatment of the TRNC and a basis for the decision was the “substantial health warning” allegedly given by the FCO in respect of travel to North Cyprus. Cyprus (including the North) is not a country where the FCO advises that no or only essential travel should be undertaken. On the contrary, the FCO envisages that travel may be undertaken to North Cyprus.

Necessary in a democratic society

95. In my judgment, the defendant has failed to demonstrate any “pressing social need” for the decision. The first claimant and its predecessor have advertised North Cyprus as a holiday destination for twenty years. In 1999 and in November 2004 the first claimant advertised successfully on London transport without any complaint being made to it.

96. The decision is, in any event, disproportionate. It bans all advertisements for North Cyprus on all property controlled by the defendant from any source at any time.

Remaining grounds of challenge

Procedural Unfairness

97. The defendant’s decision-making process was not entirely satisfactory because the first decision letter hardly grappled with the issues. The second decision letter introduced (1) the proxy or agency issue and (2) the FCO “substantial health warning” without the first claimant being given an opportunity to make any representations. That said, no prejudice has resulted therefrom because the defendant reviewed the decision after the issue of proceedings.

98. I shall hear counsel, if necessary, on the form of relief to be granted.