zou moeten zijn. Deze mening past bij de gedachte dat de norm van art. 9 EVRM zich primair richt tot de lidstaat. Bij de belangenafwegingen in de zaak van *Chaplin* wijst het hof op wat andere belangen of elementen die van enig gewicht lijken, zoals de consistente lijn van het ziekenhuis met betrekking tot het dragen van loshangende kleding of sieraden. Dat het dragen daarvan religieus is ingegeven, maakt dan niet uit. Ook de reden die het ziekenhuis aanvoert als bezwaar tegen het dragen van loshangende kleding of sieraden, te weten de veiligheid en gezondheid van werknemers en patiënten, lijkt zwaar te wegen. Het hof laat zich over die belangen of elementen evenwel nauwelijks uit en als dat wel gebeurt, geeft het hof daaraan nauwelijks gewicht, zodat het lastig is na te gaan wat de doorslaggevende belangen en elementen zijn. Het is daarom lastig om een duidelijk antwoord te geven op de vraag of dit arrest tot een ander oordeel van het gerechtshof te Amsterdam in de zaak *Aziz* had moeten leiden. Ik denk dat niet. Het lijkt me dat een verbod op het dragen van religieuze symbolen door een werkgever die daartoe een zakelijk en goed onderbouwd belang kan aandragen, niet kansloos is.

6. In het geval van 'weigerambtenaar' Ladele herhaalt het hof dat verschil in behandeling gegrond op seksuele oriëntatie alleen door zwaarwegende reden gerechtvaardigd kan worden. Van dergelijke redenen is bij de weigering huwelijken van mensen van gelijk geslacht te voltrekken geen sprake. Het hof overweegt daarom dat het doel om te garanderen dat dergelijke huwelijken worden voltrokken, legitiem is. Nu ook het middel proportioneel is, wordt de klacht van Ladele afgewezen. Ik heb aarzelingen bij deze laatste overweging. Uiteraard is het beleid van de gemeente legitiem. Maar het middel om dat doel te bereiken is niet vanzelfsprekend het ontslag van de ambtenaar die dat beleid om godsdienstige redenen niet wil uitvoeren. Op de gemeente rust de verplichting om het huwelijk van mensen van gelijk geslacht te voltrekken. Dat betekent niet dat iedere ambtenaar dat beleid ook dient uit te voeren. Als de uitvoering van die verplichting van de gemeente door de weigering van Ladele gevaar loopt, ligt ontslag voor de hand. Als dat niet het geval is, bijvoorbeeld omdat er meer dan voldoende andere ambtenaren bereid zijn dergelijke huwelijken te voltrekken, is het middel (het ontslag van Ladele) naar mijn mening niet zonder meer proportioneel. De vrijheid van godsdienst dient nu juist in die gevallen bescherming te bieden waar het schuurt (zie hierover ook mijn: De angst voor anders, *TRA* 2011/76). De dissenters Vučinić en De Gaetano wijzen erop dat niet het gevaar dat de gemeente onvoldoende capaciteit heeft om huwelijken tussen mensen van gelijk geslacht te voltrekken, maar dat de intolerantie van haar collega's en de 'blinkered' politieke correctheid ('which clearly favoured 'gay rights' over fundamental human rights') de reden is voor het ontslag. Hoewel 'gay rights' mij ook fundamenteel lijken, deel ik de indruk van deze dissenters dat de vrijheid van godsdienst soms wel makkelijk wordt 'weggewogen' tegen andere (fundamentele) belangen, zoals het gelijkheidsbeginsel. Dat gebeurde bijvoorbeeld in het geval van de ambtenaar die weigert op zondag te werken: CRvB 17 november 1994, *AB* 1995/332. Ook de Raad van State pleitte voor een meer pragmatische benadering (*Kamerstukken II*, 2011/12, 32550, 34) en te bezien of een ontslag nodig was om de taak van de gemeente uit te voeren. Deze aarzeling vindt verder niet veel weerklank: de CRvB heeft het beroep van een zogenaamde 'weigerambtenaar' tegen zijn ontslag, wat betreft de verdragsrechtelijke aspecten van de zaak, tamelijk kort, onder verwijzing naar de overwegingen van het EHRM in dit arrest, verworpen (CRvB 29 februari 2016, ECLI:NL:CRVB:2016:606).

7. Dit arrest is ook gepubliceerd in *JAR* 2013/55, in *EHRC* 2013/67, m.nt. J.H. Gerards, in *NJB* 2013/499 en *RvdW* 2013/1384, en voorzien van een noot door W.L. Roozendaal in AR-Updates 2013-0055 en door S. de Jong in *JIN* 2013/21.

E. Verhulp

NJ 2016/321

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS

22 april 2013, nr. 48876/08
(D. Spielmann, N. Bratza, F. Tulkens, J. Casadevall, N. Vajić, I. Ziemele, E. Steiner, P. Hirvelä, G. Nicolaou, A. Sajó, Z. Kalaydjieva, M. Poalelungi, N. Vučinić, K. Pardalos, V.A. De Gaetano, J. Laffranque, H. Keller)
m.nt. E.J. Dommering

Art. 10 EVRM

NJB 2013/1610
ECLI:NL:XX:2013:362

Vrijheid van meningsuiting. Verbod voor non-gouvermentele organisatie uitzenden ideële en politieke reclamespots. Geen schending art. 10 EVRM.

Klaagster, de non-gouvermentele organisatie Animal Defenders International (hierna: Animal Defenders), heeft als statutaire doelstelling het beschermen van dieren. Zij voert actie tegen het gebruik van dieren bij handelspraktijken, in de wetenschap en in de vrijetijdsbestedingsindustrie. In 2005 is Animal Defenders een campagne gestart tegen het houden en tentoonstellen van apen in dierentuinen en circussen en tegen het gebruik van apen in TV-commercials. Als onderdeel van deze campagne wenste Animal Defenders een reclamespotje uit te zenden op de televisie, met beelden van een meisje achter tralies van een dierenhok, gevolgd door een aap in dezelfde positie. Bij besluit van 5 april 2005 heeft de Broadcast Advertising Clearance Centre het verzoek van Animal Defenders om toestemming voor uitzending afgewezen. Hierbij is verwezen naar de Britse Communications Act 2003, die het

uitzenden van politieke reclamespotjes verbiedt. Tot in hoogste nationale instantie (House of Lords) is dit besluit in stand gebleven.

In 2008 heeft Animal Defenders een klacht ingediend bij het EHRM en heeft aangevoerd dat het verbod op uitzending van politieke commercials via televisie en radio een disproportionele beperking vormt op de vrijheid van meningsuiting. Op 29 november 2011 heeft de Kamer aan welke de zaak was toebedeeld afstand gedaan van rechtsmacht ten gunste van de Grote Kamer.

EHRM (Grote Kamer): Niet in geschil is dat het wettelijk verbod op uitzending van politieke reclamespotjes een beperking betreft op de vrijheid van meningsuiting. In dit geval is de wettelijke grondslag van deze beperking art. 321 van de Communications Act 2003. Deze bepaling strekt ertoe de onpartijdigheid van uitzendingen over zaken van publiek belang te beschermen en daarbij het democratisch proces te waarborgen, hetgeen een legitiem doel is. Vervolgens onderzoekt het hof of de beperking noodzakelijk is in de democratische samenleving in de zin van art. 10 lid 2 EVRM. Is er een 'dringende maatschappelijke noodzaak' voor de beperking en is de beperking proportioneel ten opzichte van het legitieme doel? Daarbij stelt het Hof vast dat partijen ervan uitgaan dat het uitzenden van politieke reclamespotjes bij wet kan worden gereguleerd en dat het geschil tussen partijen zich toespitst op de inhoud van de betreffende wettelijke bepaling. Heeft de Britse wetgever bij het vaststellen van de wettelijke bepaling gehandeld binnen de hem toekomende 'margin of appreciation'?

Het Hof wijst erop dat er geen Europese consensus bestaat tussen de verdragsstaten met betrekking tot politieke televisie- en radioreclame, hetgeen een wat ruimere 'margin of appreciation' voor de staten kan rechtvaardigen.

Het Hof overweegt voorts dat het de procedure voor de totstandkoming van de wettelijke maatregel (de Communications Act 2003) heeft onderzocht, alsmede de gerechtelijke procedure in meerdere instanties waarin het aan klaagster opgelegde verbod tot het uitzenden van de politieke reclamespot is getoetst. Het Hof overweegt dat het aanzienlijk gewicht toekent aan de afwegingen van belangen die zowel de parlementaire organen als de rechterlijke instanties hebben gemaakt, in de context van het complexe wettelijk kader inzake het uitzenden van politieke boodschappen in het Verenigd Koninkrijk. Het Hof geeft daarbij aan aanzienlijk gewicht toe te kennen aan het oordeel van deze parlementaire organen en gerechten dat de wettelijke maatregel noodzakelijk was om verstoring van debatten over zaken van publiek belang te voorkomen.

Daarbij moet worden bedacht dat andere media beschikbaar blijven voor klaagster, waardoor het voor klaagster mogelijk blijft te participeren in discussieprogramma's van politieke aard op radio en televisie (anders dan politieke reclamespotjes). Ook wijst het Hof op de mogelijkheid voor klaagster om te adverteren in de geprinte media, op internet, op posters en flyers.

Het hof concludeert dat geen sprake is van een disproportionele beperking op de vrijheid van meningsuiting van klaagster.

Animal Defenders International
tegen
Verenigd Koninkrijk

EHRM:

The law

I Alleged violation of article 10 of the convention

76. The applicant complained under Article 10 about the statutory prohibition of paid political advertising on radio and television ('the prohibition'). Article 10, in so far as relevant, reads as follows.

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

77. The Court considers that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

78. The parties agreed that the prohibition amounted to an interference with the applicant's rights under Article 10, that the interference was 'prescribed by law' (sections 319 and 321 of the 2003 Act) and that it pursued the aim of preserving the impartiality of broadcasting on public interest matters and, thereby, of protecting the democratic process. The Court accepts that this corresponds to the legitimate aim of protecting the 'rights of others' to which the second paragraph of Article 10 refers (*VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 62, ECHR 2001-VI [*NJ* 2002/181, m.nt. E.J. Dommering; *red.*]; and TV Vest AS and Rogaland Pensjonistparti v. Norway, no. 21132/05, § 78, ECHR 2008 (extracts)) [*NJ* 2010/208, m.nt. E.J. Dommering; *red.*]. The dispute between the parties concerned whether the interference was 'necessary in a

democratic society' and the Court will now examine this issue.

1. The applicant's submissions

79. The applicant emphasised the strength of the Convention protection for political and public interest expression, argued that the interference was widely defined and considered that it constituted a form of prior restraint. A narrow margin of appreciation and strict scrutiny was therefore to be applied (*VgT*, cited above). The 'somewhat wider margin of appreciation' referred to in *TV Vest* (cited above) was relevant only insofar as the State sought to rely upon special features of its national situation which peculiarly justified the restriction (as in *Murphy v. Ireland*, no. 44179/98, ECHR 2003-IX (extracts)) [*NJ* 2005/177, m.nt. E.J. Dommering; *red.*] and that was not the situation in the present case. The broad margin accorded by the domestic courts to the legislature was inappropriate since the latter was made up of political parties who benefited from the impugned prohibition.

80. The applicant's main argument was that the prohibition on paid political advertising was too wide to be proportionate for the following reasons.

81. In the first place, the prohibition was too widely defined. While the applicant accepted the necessity of the prohibition during pre-election periods, it considered disproportionate its maintenance outside those periods for social advocacy groups on matters of public interest. A prohibition distinguishing 'party politics' and public interest social advocacy would be principled, feasible and proportionate. According to the applicant, a distinction had been made between the two notions in section 321(3) of the 2003 Act and other States had made this distinction. The wide definition unjustifiably restricted the ability of small campaign groups to engage with the public on matters of general interest. It created a monopoly in favour of established political parties who had access, albeit regulated, to the broadcast media *via* free party political and party electoral broadcasts. The prohibition therefore distorted the public debate. Finally, it was financially burdensome to set up a charitable arm to broadcast an advertisement on a non-political matter so that the prohibition favoured well-funded bodies.

82. Secondly, the different approach to the broadcast and other media was unproven, inexplicable and unnecessary. The Government had presumed that the broadcast media was uniquely powerful and expensive without any proof, analysis or comparative studies. Given the growing impact of other forms of pervasive media, there were convincing reasons to believe that those ideas might now be false. The Government incorrectly relied on the prior findings of this Court as to the power of the audio-visual media. In any event, it made no sense to restrict access to the broadcast media and allow access to other persuasive and pervasive media. If the broadcast media was particularly powerful, that would be a reason to broadcast political speech and if it was no longer that powerful compared, for example, to the internet, the State's justification for the prohibition fell away. The Government's aim of preventing the hijacking of the broadcast media by the rich and powerful was not achieved because everyone (rich and poor) was excluded from broadcasting but the rich could nonetheless still monopolise other powerful media.

83. Thirdly, the proportionality of a general measure fell to be tested against, and demonstrated by, the practical and factual realities of an individual case. Relying on the *VgT* judgment, the applicant underlined that neither itself nor the advertisement had been considered objectionable, but the prohibition denied it the opportunity to raise an important matter of public interest and to respond to broadcasts on primates already in the public domain.

84. Fourthly, it had not been proven that there was a risk of compromising the impartiality of broadcasting without the prohibition or that the three mechanisms said to ensure impartiality in broadcasting were interdependent.

85. The applicant also argued that concerns about a less restrictive system did not justify the maintenance of the prohibition. The fears of distortion of the public debate by rich and powerful interest groups were exaggerated and unproven. Other European States had managed to define other regulatory frameworks which achieved the aim espoused without the floodgate results feared. Generalisations inspired by the United States were not applicable in the United Kingdom.

86. The applicant considered that the relevant case-law (the above-cited *VgT* and *TV Vest* judgments as well as *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, 30 June 2009) was directly applicable to its case and in its favour. The advertisements and advertisers were inoffensive; the advertisers were not powerful; and, especially in *TV Vest*, the Court rejected the arguments of the Government of Norway and of the United Kingdom about the decision to adopt a general measure to protect the public debate against powerful financial groups. The *VgT* and *TV Vest* cases could not be confined to their own facts. Whether or not the applicant was responding to or launching a debate, it was the public interest nature of the expression which was determinative in *VgT* and should be so in the present case. As the *TV Vest* judgment indicated, the particular sensitivities to which the expression of religious views gave rise meant that the *Murphy* case was distinguishable. Moreover, the argument that the *VgT* judgment was erroneous was not persuasive: that judgment had been considered and confirmed three times (*Murphy, VgT No. 2* and *TV Vest*) and there was nothing new or compelling in the Government's pleadings. Clear precedents should be followed in the interest of legal certainty and the coherent development of Convention jurisprudence.

87. Finally, the applicant argued that the European Convention on Trans-Frontier television

(which protects trans-frontier broadcasting and advertising) applied to paid political advertising. It also referred to the 'Directive Without Frontiers' pointing out that, while States could make stricter demands of media service providers, a common EU-wide approach was required in relation to the issue of freedom of expression and broadcasted advertising.

2. The Government's submissions

88. The Government maintained that Parliament had considered the prohibition necessary to avoid the unacceptable risk that the political debate would be distorted in favour of deep pockets funding advertising in the most potent and expensive media. Unregulated broadcasting of paid political advertisements would turn democratic influence into a commodity which would undermine impartiality in broadcasting and the democratic process. The objective was to enhance the political debate and not to restrict it.

89. They argued that the interference was proportionate for the reasons relied upon by the domestic authorities during the adoption and review of the prohibition. The regulatory regime chosen was designed to balance, on the one hand, freedom of political speech and, on the other, the impartiality of that speech and the protection of the democratic process. These important latter aims were achieved by three interrelated mechanisms: the prohibition; the statutory duty of impartiality placed solely on broadcasters (section 320 of the 2003 Act); and free party political, party election and referendum campaign broadcasts. It was the proportionality of the prohibition as a general measure that had to be examined as opposed to its application to the facts of the case. The latter reasoning supposed, incorrectly, that it was possible, feasible and admissible for a State organ to acceptably distinguish between advertisers or advertisements in a social debate context or to otherwise apply a restriction on political advertising on a case by case basis.

90. The Government considered the prohibition to be proportionate for certain key reasons.

91. In the first place, the breadth of the prohibition was confined as much as possible to its essential aim while, at the same time, avoiding problematic case-by-case assessments. It concerned only paid advertising. It covered only the most pervasive and persuasive media, the applicant retaining access to other very useful media.

92. Secondly, access to the broadcast media was expensive and without the prohibition only well-financed groups could afford such access. It would not serve the applicant's interests if its advertisement was responded to by an avalanche of broadcasted advertisements by well-funded groups with the opposite opinion. The Government had submitted evidence to the domestic courts of the expense of advertising in the broadcast media, what mattered was that the cost was sufficiently high as to exclude most non-governmental organisations ('NGOs') and it recalled that the applicant's affidavit in the domestic proceedings noted that the advertising budget of the commercial sector for one day would be more than that of the NGO sector for the year.

93. Thirdly, allowing broadcasting of paid political advertising would undermine broadcasting impartiality. A series of complex rules would have to be adopted to ensure that any single point of view/a single advertiser would not attain undue prominence including: to clearly identify political advertising and to ensure that it would remain subsidiary to other forms of expression; to limit the percentage revenue of broadcasters from political advertising; and to avoid arbitrariness. Such a series of rules would be difficult to apply without allegations of discrimination or without undermining the principle of impartiality and they would be difficult to police and maintain with any legal certainty.

94. Fourthly, party political, party election and referendum campaign broadcasts (one of the three aspects of the regulatory system) diluted the impact of the impugned general measure.

95. Moreover, the Government argued that Court's function was limited to reviewing whether or not the solution adopted by Parliament could be regarded as striking a fair balance and falling within an applicable margin of appreciation. Even though the case involved political speech, the aim was maintaining its integrity and impartiality. *TV Vest* had acknowledged that the lack of consensus favoured a somewhat wider margin of appreciation. It was a fine balance of competing interests, which involved the detailed consideration and rejection of less restrictive alternatives by various expert bodies and democratically-elected politicians who were peculiarly sensitive to the measures necessary to safeguard the integrity of the democratic process. Parliament was entitled to judge that the objective justified the prohibition and it was adopted without dissent. It was then scrutinised by the national courts which endorsed the reasons for, and scope of, the prohibition. Accordingly, and given the margin of appreciation applicable, this Court should be slow to second-guess the solution carefully identified in a complex area by the relevant domestic bodies. As to the alleged conflict of interest of the political establishment in assessing the necessity of a prohibition, the experience in the United States showed that an unregulated system favoured politicians and would not benefit a minority party.

96. The Government relied on the affidavit of the Director General of the DCMS (paragraph 12 above) which outlined and relied on the reflection of the DCMS on the necessity of the prohibition and on alternatives to it (paragraphs 50-52 above). The Government highlighted the following aspects.

They noted that Parliament was entitled to consider that the prohibition could not be limited to electoral periods since those with deep pockets could at any time saturate an electorate with a partial view and thereby distort the electoral pro-

cess itself. If a prohibition during electoral periods would be consistent with Article 10 (as the applicant accepted) to protect the electoral process, it was a question of fact and degree to what extent it was necessary to have a prohibition at other times for the same objective. They underlined that the prohibition could not be limited to political parties. It would be easily circumvented by parties hiding behind public interest groups thereby distorting the political agenda. Moreover, there was no clear and workable distinction between political parties and social advocacy bodies. They emphasised that attempting to avoid political content would not be realistic as it was difficult to imagine a social advocacy body whose advert did not seek to promote its objectives. Indeed, any advertisement by such a body would advance its political purposes, if only by increasing name recognition or assisting fund raising. If a body wished to advertise on a non-political matter, all it had to do (as many have done) was to set up a charitable arm. Finally, they stressed that placing financial caps on groups seeking to broadcast advertisements could easily be circumvented by deep pockets distributing funds to a variety of aligned groups or to groups created for that purpose. Financial caps on certain political viewpoints would also be difficult to objectively draft and operate. Limiting the number of political broadcasting slots available would inevitably give rise to questions of unfairness and discrimination whereas it was feasible to devise rules for the allocation of party political broadcasts by reference to registered political parties and/or elections results.

97. The EPRA comparative survey supported the Government's position. Only 4 States left the position entirely unregulated. There were 'wide-reaching bans' in France, Ireland, Malta, Spain and the United Kingdom. While three States (Switzerland, Denmark and Norway) allowed advertising by social advocacy groups, they considered themselves obliged by the *VgT* judgment, the scope and effect of which was at issue in the present case. In any case, while there was a wide European consensus that the broadcast media required regulation, there was no consensus as to how. Indeed, the Committee of Ministers when examining this issue in 1999 and 2007 (see paragraphs 73-75 above) did not recommend a common approach across Europe: the Television Without Frontiers Directive applied to commercial advertising only and, in any event, provided that it could not be used to circumvent stricter national rules. The same was true of the Audio-Visual Media Services Directive. The European Convention on Trans-Frontier Television's Standing Committee at its meeting of July 2010 concluded that political advertising lay outside the competence of the EU.

98. The Government made detailed submissions on this Court's case-law and, notably, on the above-cited *VgT, Murphy* and *TV Vest* judgments.

They argued the *VgT* judgment should be confined to its own facts as the applicant had been trying to restore balance in a debate which had already been begun whereas the present applicant was seeking to start a debate on the treatment of primates. Alternatively, the *VgT* judgment should not be followed. It had failed to accept the established need for a particular approach to the audio-visual media because of its pervasiveness and potency. It failed to address the justification of a general measure and thereby failed to address, adequately or at all, certain matters relevant thereto. *VgT (No. 2)* was not relevant as the Court did not enter into the present substantive question under Article 10 of the Convention. As to *TV Vest*, the facts were different: the applicant was a minority political party but the statutory duty of impartiality and free party political, party election and referendum campaign broadcasts, which benefitted minority parties, did not exist in Norway. While the *TV Vest* judgment recognised that the lack of a European consensus increased a State's margin of appreciation, it also failed to assess the restriction as a general measure. The *Murphy* judgment examined the restriction as a general measure and there was no reason why a case-by-case examination was unsuitable for religious advertising but suitable for political advertising.

3. The Court's assessment of whether the interference was necessary in a democratic society

99. The applicant maintained that the prohibition was disproportionate because it prohibited paid 'political' advertising by social advocacy groups outside of electoral periods. The Government argued that the prohibition was necessary to avoid the distortion of debates on matters of public interest by unequal access to influential media by financially powerful bodies and, thereby, to protect effective pluralism and the democratic process. The term political advertising used herein includes advertising on matters of broader public interest.

(a) General principles

100. The general principles concerning the necessity of an interference with freedom of expression were summarised in *Stoll v. Switzerland* [GC] (no. 69698/01, § 101, ECHR 2007-V [*NJ* 2007/127, m.nt. E.J. Dommering; *red.*]) and were recalled more recently in *Mouvement raëlien suisse v. Switzerland* ([GC], no. 16354/06, § 48, 13 July 2012):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which … must, however, be con-

strued strictly, and the need for any restrictions must be established convincingly …

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'…. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts …."

This protection of Article 10 extends not only to the substance of the ideas and information expressed but also to the form in which they are conveyed (*Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298).

101. The Court also recalls the principles concerning pluralism in the audiovisual media set out recently in *Centro Europa 7 S.R.L. and Di Stefano v. Italy* ([GC], no. 38433/09, ECHR 2012):

"129. … As it has often noted, there can be no democracy without pluralism. … It is of the essence of democracy to allow diverse political programmes to be proposed and debated … provided that they do not harm democracy itself ….

132. The audiovisual media, such as radio and television, have a particularly important role in this respect. …

133. A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest …

134. The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference, the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism …

With this in mind, it should be noted that in Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content … the Committee of Ministers reaffirmed that 'in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member states should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed."

Moreover, given the importance of what is at stake under Article 10, the State is the ultimate guarantor of pluralism (*Informationsverein Lentia and Others v. Austria*, 24 November 1993, § 38, Series A no. 276; and *Manole and Others v. Moldova*, no. 13936/02, § 99, ECHR 2009 (extracts)).

102. As to the breadth of the margin of appreciation to be afforded, it is recalled that it depends on a number of factors. It is defined by the type of the expression at issue and, in this respect, it is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest (*Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reportsof Decisions and Judgments* 1996-V, § 58). Such questions include the protection of animals (*Bladet Tromsøand Stensaas v. Norway* [GC], no. 21980/93, §§ 61-64 ECHR 1999-III [*NJ* 2001/64, m.nt. E.J. Dommering; *red.*]; as well as *VgT Verein gegen Tierfabriken v. Switzerland*, §§ 70 and 72; and *Mouvement raëlien suisse v. Switzerland*, §§ 59-61, the latter two cited above). The margin is also narrowed by the strong interest of a democratic society in the press exercising its vital role as a public watchdog (*Editions Plon v. France*, no. 58148/00, § 43, ECHR 2004-IV [*NJ* 2005/401, m.nt. E.J. Dommering; *red.*]): freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on subjects of public interest and the public also has a right to receive them (*Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; and *Centro Europa 7 S.R.L. and Di Stefano v. Italy, cited above*, §131).

103. Accordingly, the Court scrupulously examines the proportionality of a restriction of expression by the press in a television programme on a subject of general interest (*Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, § 56, 21 June 2012). In the present context, it must be noted that, when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that

of the press (*Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, § 42, 27 May 2004).

104. For these reasons, the margin of appreciation to be accorded to the State in the present context is, in principle, a narrow one.

105. The Court will, in light of all of the above factors, assess whether the reasons adduced to justify the prohibition were both 'relevant' and 'sufficient' and thus whether the interference corresponded to a 'pressing social need' and was proportionate to the legitimate aim pursued. In this respect, it is not the Court's task to take the place of the national authorities but it must review, in the light of the case as a whole, those authorities' decisions taken pursuant to their margin of appreciation (*Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I [*NJ* 1999/713, m.nt. E.J. Dommering; *red.*]).

(b) Preliminary remarks

106. Whether or not the interference was so pleaded in the above-cited VgT case, the present parties accepted that political advertising could be regulated by a general measure and they disagreed only on the breadth of the general measure chosen. It is recalled that a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases (*Ždanoka v. Latvia* [GC], no. 58278/00, §§ 112-115, ECHR 2006-IV). Contrary to the applicant's submission, a general measure is to be distinguished from a prior restraint imposed on an individual act of expression (*Observer and Guardian v. the United Kingdom*, 26 November 1991, § 60, Series A no. 216).

107. The necessity for a general measure has been examined by the Court in a variety of contexts such as economic and social policy (*James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98; *Mellacher and Others v. Austria*, 19 December 1989, Series A no. 169; and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 123, ECHR 2003-VIII [*NJ* 2003/454, m.nt. E.J. Dommering; *red.*]) and welfare and pensions (*Stec and Others v. the United Kingdom* [GC], no. 65731/01, ECHR 2006-VI; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, 10 May 2007; and *Carson and Others v. the United Kingdom* [GC], no. 42184/05, ECHR 2010). It has also been examined in the context of electoral laws (*Ždanoka v. Latvia* [GC], cited above); prisoner voting (*Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX; and *Scoppola v. Italy (no. 3)* [GC], no. 126/05, 22 May 2012); artificial insemination for prisoners (*Dickson v. the United Kingdom* [GC], no. 44362/04, §§ 79-85, ECHR 2007-V); the destruction of frozen embryos (*Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I [*NJ* 2007/459, m.nt. E.J. Dommering; *red.*]); and assisted suicide (*Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III); as well as in the context of a prohibition on religious advertising (the above-cited case of *Murphy v. Ireland*).

108. It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it (*James and Others*, § 36). The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation (for example, *Hatton*, at § 128; *Murphy*, at § 73; *Hirst* at §§ 78-80; *Evans*, at § 86; and *Dickson*, at § 83, all cited above). It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess (*Pretty*, § 74). A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty (*Evans*, § 89), of litigation, expense and delay (*James and Others*, § 68 and *Runkee*, § 39) as well as of discrimination and arbitrariness (*Murphy*, at §§ 76-77 and *Evans*, § 89). The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality (see, for example, *James and Others*, cited above, § 36).

109. It follows that the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case. This approach of the Court to reviewing general measures draws on elements of its analysis in both the above-cited *VgT* and *Murphy* cases, the latter of which was applied in *TV Vest*. The *VgT(no. 2)* judgment of 2009 (cited above) is not relevant, concerned as it was with a positive obligation on the State to execute a judgment of this Court.

110. The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (*James and Others v. the United Kingdom,* § 51; *Mellacher and Others v. Austria*, § 53; and *Evans v. the United Kingdom* [GC], § 91, all cited above).

111. In addition, the Court notes that the justification offered by the Government included the need to protect the electoral process as part of the democratic order and they relied on *Bowman v. the United Kingdom* (19 February 1998, § 41, *Reports* 1998-I) in which the Court accepted that a statutory control of the public debate was necessary given the risk posed to the right to free elections. The applicant contested the relevance of that case as it concerned a restriction which only operated prior to and during elections. While the risk to pluralist public debates, elections and the democratic process would evidently be more acute during an electoral period, the *Bowman* judgment does not suggest that

that risk is confined to such periods since the democratic process is a continuing one to be nurtured at all times by a free and pluralist public debate. Indeed, in *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (cited above, § 134), the Court did not suggest that the recognition of a positive obligation to intervene to guarantee effective pluralism in the audiovisual sector was limited to a particular period.

Accordingly, it is relevant to recall that there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision (*Hirst v. the United Kingdom (no. 2)* [GC], § 61; and *Scoppola v. Italy (no. 3)* [GC], § 83, both cited above). By reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the legislative and judicial authorities are best placed to assess the particular difficulties in safeguarding the democratic order in their State (*Ždanoka v. Latvia* [GC], cited above, § 134). The State must therefore be accorded some discretion as regards this country-specific and complex assessment which is of central relevance to the legislative choices at issue in the present case.

112. Finally, the Court notes that both parties have the same objective namely, the maintenance of a free and pluralist debate on matters of public interest and, more generally, contributing to the democratic process. The Court is required therefore to balance, on the one hand, the applicant NGO's right to impart information and ideas of general interest which the public is entitled to receive with, on the other, the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media. The Court recognises that such groups could obtain competitive advantages in the area of paid advertising and thereby curtail a free and pluralist debate, of which the State remains the ultimate guarantor. Regulation of the broadcasted public interest debate can therefore be necessary within the meaning of Article 10 § 2 of the Convention. While both the *VgT* and *TV Vest* judgments expressly accepted that principle (see also, for example, the above-cited case of *Centro Europa 7 S.R.L. and Di Stefano v. Italy*), each found the operation of the prohibitions on advertising at issue in those cases to be disproportionate. The issue to be resolved in this case is whether the present prohibition has gone too far, having regard to its objective described above and to the margin of appreciation afforded to the respondent State.

(c) Proportionality

113. Turning therefore to the proportionality of this general measure, the Court has, in the first place, examined the national parliamentary and judicial reviews of its necessity which reviews are, for the reasons outlined at paragraphs 106-111 above, of central importance to the present case.

114. Although the prohibition had been an integral part of broadcasting in the United Kingdom since the 1950s, its necessity was specifically reviewed and confirmed by the Neill Committee in its report of 1998. A White Paper with a proposed prohibition was therefore published for comment. It was at this point (2001) that the above-cited *VgT* judgment was delivered and all later stages of the pre-legislative review examined in detail the impact of this judgment on the Convention compatibility of the proposed prohibition. Following the White Paper consultation, in 2002 a draft Bill was published with a detailed Explanatory Note which dealt with the implications of the *VgT* judgment. All later specialist bodies consulted on that Bill (the JCHR, the JCDCB, the ITC and the Electoral Commission) were in favour, for reasons set out in detail above (paragraphs 42-54), of maintaining the prohibition considering that, even after the *VgT* judgment, it was a proportionate general measure. The Government, through the DCMS, played an important part in that debate explaining frequently and in detail their reasons for retaining the prohibition and for considering it to be proportionate and going so far as to disclose their legal advice on the subject (paragraphs 50-53 above). The 2003 Act containing the prohibition was then enacted with cross-party support and without any dissenting vote. The prohibition was therefore the culmination of an exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public interest expression in the United Kingdom and all bodies found the prohibition to have been a necessary interference with Article 10 rights.

115. It was this particular competence of Parliament and the extensive pre-legislative consultation on the Convention compatibility of the prohibition which explained the degree of deference shown by the domestic courts to Parliament's decision to adopt the prohibition (in particular, paragraphs 15 and 24 above). The proportionality of the prohibition was, nonetheless, debated in some detail before the High Court and the House of Lords. Both courts analysed the relevant Convention case-law and principles, addressed the relevance of the above-cited *VgT* judgment and carefully applied that jurisprudence to the prohibition. Each judge at both levels endorsed the objective of the prohibition as well as the rationale of the legislative choices which defined its particular scope and each concluded that it was a necessary and proportionate interference with the applicant's rights under Article 10 of the Convention.

116. The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.

117. In addition, the Court considers it important that the prohibition was specifically circumscribed to address the precise risk of distortion the State sought to avoid with the minimum impairment of the right of expression. It only applies therefore to advertising given its inherently partial nature (*Murphy*, at § 42), to paid advertising given the danger of unequal access based on wealth and to political advertising (as explained at paragraph 99 above) as it was considered to go to the heart of the democratic process. It is also confined to certain media (radio and television) since they are considered to be the most influential and expensive media and to constitute a cornerstone of the regulatory system at issue in the present case. The limits placed on a restriction are important factors in the assessment of its proportionality (*Mouvement raëlien suisse v. Switzerland* [GC], § 75, cited above). Consequently, a range of alternative media were available to the applicant and these are outlined at paragraph 124 below.

118. However, the applicant took issue with the rationale underlying the legislative choices made as regards the scope of the prohibition.

119. In the first place, the applicant argued, referring to paragraph 77 of the *VgT* judgment, that limiting the prohibition to radio and television was illogical given the comparative potency of newer media such as the internet. However, the Court considers coherent a distinction based on the particular influence of the broadcast media. In particular, the Court recognises the immediate and powerful effect of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home (*Jersild v. Denmark*, § 31; *Murphy v. Ireland*, § 74; *TV Vest*, at § 60; and *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, § 132, all cited above). In addition, the choices inherent in the use of the internet and social media mean that the information emerging therefrom does not have the same synchronicity or impact as broadcasted information. Notwithstanding therefore the significant development of the internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the respondent State to undermine the need for special measures for the latter.

120. Secondly, the applicant contended that broadcasted advertising was no longer more expensive than other media and the Government contested this. The Court considers that it is sufficient to note, as did Ousley J in the High Court (paragraph 17 above), that broadcasted advertisements had an advantage of which advertisers and broadcasters were aware and for which advertisers would pay large sums of money, far beyond the reach of most NGOs who would wish to participate in the public debate.

121. Thirdly, the applicant considered that the provision of free party political, party election and referendum campaign broadcasts to political parties was not relevant to the proportionality of the prohibition. However, the Court considers that relaxing the prohibition in a controlled fashion for those bodies most centrally part of the democratic process must be considered a relevant factor in the Court's review of the overall balance achieved by the general measure (paragraphs 106-110 above), even if the applicant is not affected by that factor.

122. Fourthly, the applicant argued that the Government could have narrowed the scope of the prohibition to allow advertising by social advocacy groups outside of electoral periods. Concerns about a less restrictive prohibition were accepted by the parliamentary and judicial authorities and essentially two concerns were re-emphasised by the Government before this Court: a risk of abuse and a risk of arbitrariness. The risk of abuse is to be primarily assessed by the domestic authorities (paragraph 108 above) and the Court considers it reasonable to fear that this option would give rise to a risk of wealthy bodies with agendas being fronted by social advocacy groups created for that precise purpose. Financial caps on advertising could be circumvented by those wealthy bodies creating a large number of similar interest groups, thereby accumulating advertising time. The Court also considers rational the concern that a prohibition requiring a case-by-case distinction between advertisers and advertisements might not be a feasible means of achieving the legitimate aim. In particular, having regard to the complex regulatory background, this form of control could lead to uncertainty, litigation, expense and delay as well as to allegations of discrimination and arbitrariness, these being reasons which can justify a general measure (paragraph 108 above). It was reasonable therefore for the Government to fear that the proposed alternative option was not feasible and that it might compromise the principle of broadcasting impartiality, a cornerstone of the regulatory system at issue (paragraphs 62-64).

123. Moreover, the Court would underline that there is no European consensus between Contracting States on how to regulate paid political advertising in broadcasting (paragraphs 65-72 above) and the parties accepted this. It is recalled that a lack of a relevant consensus amongst Contracting States could speak in favour of allowing a somewhat wider margin of appreciation than that normally afforded to restrictions on expression on matters of public interest (*Hirst v. the United Kingdom (no. 2)* [GC], § 81 and *TV Vest*, § 67, both cited above, as well as *Société de conception de presse et d'édition and Ponson v. France*, no. 26935/05, §§ 57 and 63, 5 March 2009). It is true that EPRA recommended some caution when relying on comparative material in this context (paragraph 65 above). However, while there may be a trend away from broad prohibitions, it remains clear that there is a substantial variety of means employed by the Contracting States to regulate such advertising, reflecting the wealth of differences in historical development, cultural diversity, political thought and, consequently, democratic vision of those States (*Scoppola v. Italy* (no. 3) [GC],

cited above, § 83). Such is the lack of consensus in this area that the Committee of Ministers of the Council of Europe, in considering the issue of paid political advertising in the broadcast media in 1999 and 2007, declined to recommend a common position on the issue (paragraphs 73-75 above). This lack of consensus also broadens the margin of appreciation to be accorded as regards restrictions on public interest expression.

124. Finally, the Court does not consider that the impact of the prohibition in the present case outweighs the above-described convincing justifications for the general measure (paragraph 109 above).

The Court notes, in this respect, the other media which remain open to the present applicant and it recalls that access to alternative media is key to the proportionality of a restriction on access to other potentially useful media (*Appleby and Others v. the United Kingdom*, no. 44306/98, § 48, ECHR 2003-VI [*NJ* 2010/207, m.nt. E.J. Dommering; *red.*]; and *Mouvement raëlien suisse v. Switzerland*, cited above, §§ 73-75). In particular, it remains open to the applicant NGO to participate in radio or television discussion programmes of a political nature (ie. broadcasts other than paid advertisements). It can also advertise on radio and television on a non-political matter if it sets up a charitable arm to do so and it has not been demonstrated that the costs of this are prohibitive. Importantly, the applicant has full access for its advertisement to non-broadcasting media including the print media, the internet (including social media) as well as to demonstrations, posters and flyers. Even if it has not been shown that the internet, with its social media, is more influential than the broadcast media in the respondent State (paragraph 119 above), those new media remain powerful communication tools which can be of significant assistance to the applicant NGO in achieving its own objectives.

125. Accordingly, the Court considers the reasons adduced by the authorities, to justify the prohibition of the applicant's advertisement to be relevant and sufficient. The prohibition cannot therefore be considered to amount to a disproportionate interference with the applicant's right to freedom of expression. The Court concludes therefore that there has been no violation of Article 10 of the Convention.

(…)

Concurring opinion of judge Bratza

1. I have voted with the majority in favour of finding no violation of Article 10 in the present case and can, in general, fully subscribe to the reasoning in the judgment. I only add some words of my own because of the importance of the issues involved in the case on which the Court has been sharply divided.

2. There are several features of the case which in my view deserve emphasis at the outset.

3. In the first place, as pointed out by Lord Bingham in the House of Lords, the principle that an advertisement which is directed towards any religious or political end should not in general be permitted to be broadcast has a long history in the United Kingdom. It is a principle which has been consistently preserved and was given effect to when incorporated in section 321 of the Communications Act 2003. The word 'political' has always been given a wider meaning than 'party political'. Under the section, an advertisement can fall foul of the prohibition either because of the nature or character of the advertiser or because of the content and character of the advertisement. In the present case, it was the fact that the objectives of the applicant association were 'wholly or mainly of a political nature' which was the ground of the prohibition. It is not disputed by the applicant that the advertisement in question was to be treated as a political advertisement for the purposes of the section; nor is it contested — indeed, it was expressly accepted in the evidence of the Chief Executive of the applicant association — that the object was to persuade Parliament to legislate to outlaw the use of animals for the purposes of commerce, science or leisure. It was, as Baroness Hale put it, an advertisement by 'a particular interest group which campaigns for changes in the law'.

4. Secondly, as in the *VgT* and *TV Vest* cases (*VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001 VI [*NJ* 2002/181, m.nt. E.J. Dommering; *red.*]; and *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, 11 December 2008 [*NJ* 2010/208, m.nt. E.J. Dommering; *red.*]), the interference with the applicant's freedom of expression stemmed not from a decision or exercise of discretion of a court or executive authority but from a statutory prohibition applicable to all forms of political advertising. Where the interference is the result of an individual decision, the Court's approach has been to examine the necessity and proportionality of the restriction in the particular circumstances of the case. Where, however, as here, the interference springs directly from a statutory provision which prohibits or restricts the exercise of the Convention right, the Court's approach has tended to be different. In such a case, the Court's focus is not on the circumstances of the individual applicant, although he must be affected by the legislation in order to claim to be a victim of its application; it is, instead, primarily on the question whether the legislature itself acted within its margin of appreciation and satisfied the requirements of necessity and proportionality when imposing the prohibition or restriction in question. There are, as the High Court and House of Lords pointed out, numerous examples in the Court's case-law where the question of the necessity, proportionality and balance have been examined not in the context of the specific circumstances of the individual applicant but in the context of the legislation itself which was the source of the interference. Equally importantly, there are many

cases where the Court has accepted the need for a 'brightline' or general statutory rule and has found no violation of the Convention even though loyalty to the rule may involve apparent hardship to the applicant in the individual case. In such a case, the answer to the question of compatibility is not and cannot be determined by reference to the particular circumstances of the applicant caught by the statutory provision in question. As Lord Bingham put it, 'the drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial', which I would in the context in which the word is used interpret to mean consistent with the Convention. Several examples of such cases are set out in paragraph 107 of the judgment. As is apparent from the short description in that paragraph, the cases dealt with a wide variety of different legislative measures, none of which concerned a prohibition of the present kind. However, this does not detract from the importance of the principle established in those cases, which is in my view directly applicable in the present case.

5. Thirdly, the Court has consistently emphasised the fundamental role of freedom of expression in a democratic society, where it serves to impart information and ideas of general interest, which the public are moreover entitled to receive. It has also emphasised the high level of protection afforded to political speech and has, in general, required an especially pressing social need if restrictions are to be imposed on it. It is, however, of central importance that the legislation with which the Court is concerned in the present case did not and does not impose a prohibition or restriction on political speech in general. It is, instead, legislation directed specifically at a particular mode of political expression (namely, advertising) and a particular part of the media (namely, radio and television broadcasting). It does not, and does not purport, to have an impact on other mediums of communication of political opinion — newspapers, magazines, direct mailshots, billboards, public meetings, marches or more modern technological forms of communication, such as the internet or e-mail. Nor does it prohibit the use of the broadcast media to spread a public message other than through direct advertising, as for instance by contributing to broadcast current affairs programmes or radio phone-ins.

The applicant association plays down the importance of these alternative methods of conveying its message, some of which methods it indeed used. Like the House of Lords, I regard it as a matter of considerable significance. As pointed out by Lord Bingham, the case is quite different from that of *Bowman* where the legislative provision operated for all practical purposes as a total barrier to the applicant's communication of her views. It is, of course, true that television advertising is the most powerful and potent form of conveying a political or other message and it is for this reason that this was the medium chosen by the applicant. But it is also because of the power of the television medium that for the past 60 years Parliament has seen the need to treat this form of communication as in a special category, with its potential for distorting the political scene and giving unfair advantage to those espousing particular political causes.

6. Fourthly, the fact that restrictions imposed are confined to advertising through the medium of broadcasting has been treated in the Court's case-law as a matter of some importance and as having direct relevance to the question of the proportionality of the measure. This emerges clearly from the *Murphy* case, in which the Court emphasised that the State was not only entitled to be wary of the power of audio-visual media but of the risks of uncontrolled advertising, because of its distinctly potent objective and the risk to the principle of impartiality of the broadcasting media.

The applicant argues that the Government have not proved that the broadcast media are particularly potent and contend that, given the increase in other forms of highly pervasive mass-media, there are convincing reasons to believe that that idea might now be false. It is also complained that the Government incorrectly rely on the findings of the Court as to the power of the audio-visual media, those findings not being made with the benefit of evidence and confusing broadcasting through live television and radio with audio-visual media more generally, including film, sound recordings and multimedia internet sites. I do not share this view. Whether or not audio-visual has a wider meaning than television broadcasting as such, it is clear from cases such as *Jersildv. Denmark* (judgment of 23 September 1994, Series A, no. 298) and *Murphy v. Ireland* (no. 44179/98, ECHR 2003 IX (extracts) that television broadcasting has consistently been treated by the Court, as well as by the legislature in the present case, as having a particularly powerful influence which may require special provisions of control. Whether, as the applicants contend, its importance has been or will be replaced by other forms of mass media, including the internet, it remains the fact that, although the advertisement in question appears on the internet, it is broadcasting through the medium of television that is still regarded by the applicant itself as having the most powerful impact.

7. The arguments of the parties have to a great extent concentrated on the question whether the *VgT* case, where the facts were very similar to those in the present case and in which a violation of Article 10 was found should be followed or distinguished. Even though the case has stood for over 10 years, I confess to entertaining certain doubts about the Chamber's judgment in the case.

First and foremost, even though, as in the present case, the interference with the applicant's freedom of expression stems directly from legislation which prohibited radio and television advertising which

was religious or political, the focus of the *VgT* judgment was not, as I see it, on the justification in Convention terms for the legislation itself but on the proportionality of its application in the particular case of the applicant. True it is that the Chamber found that the legislation served the legitimate aim of ensuring independence, equality of opportunity and support of the Press. But there the examination of the legislation effectively ended. There was no scrutiny of the question whether the reasons given for the legislation were such as to justify a general prohibition of 'political advertising', of which the applicant's case was but one example. Instead, the Court found that, whatever the grounds advanced for supporting a general prohibition, it had to be shown that the interference was justified in the particular circumstances of the applicant association's case. The Chamber concluded that it could not be justified since it had not been argued that the association was a powerful financial group which endangered the independence of the broadcaster and since the intent of the association was only to participate in an ongoing general debate on animal protection and the rearing of animals with which many in Europe agreed.

This approach may well have reflected the way in which the case was argued by the parties before the Court but I believe that it did not do full justice to the purpose of the general prohibition in the legislation, which was to avoid leaving to individual judgment questions such as the wealth or influence of the individual, political party or association or the worthiness or morality of the political cause in question, with the attendant risks of discriminatory treatment. As pointed out by the national courts, while the protection of animals from commercial exploitation might be a relatively uncontroversial subject, there are other areas where this would be very far from the case and where the risks of distortion would be particularly high — abortion, immigration, gay marriage and climate change are obvious examples. Although the situation of an individual applicant cannot be ignored, it is the justification for the law in general which should in my view be at the heart of the Court's examination. In this regard, I consider that the approach of the Chamber in the *Murphy* case is to be preferred. Unlike *VgT* and the present case, it was concerned with religious and not political advertising. But the principle is the same and the Court's primary examination should be focused on the relevance and sufficiency of the reasons for justifying the United Kingdom's general prohibition of the broadcasting of political advertisements.

8. For the same reason, I have hesitation in accepting that the margin of appreciation should fluctuate, depending on the nature of the association concerned or the political message conveyed. I find difficulty with the idea, reflected in paragraph 71 of the *VgT* judgment, that since what was at stake was not a given individual's purely 'commercial' interests but his participation in a debate affecting the general interest, the margin should shrink. Where, as here, the issue is and should be the justification for a general legislative measure designed to protect the democratic system from the risk of distortion, the margin afforded should in my view be wider, particularly in a case where there is an absence of consensus among Member States as to how political advertising should be controlled, a point which was not directly addressed in *VgT* itself.

9. I am also somewhat puzzled by the suggestion in paragraph 74 of the *VgT* judgment that a prohibition of political advertising which applied only to certain media, namely the broadcasting media and not to others, did not appear to be of a particularly pressing nature. This would seem to me to be in contradiction to the Court's traditional approach, which one finds reflected in *Murphy*, not only that the audio-visual media have a more immediate and powerful effect than the print media and may require different measures of control but that the very fact that the prohibition of political advertising is confined to broadcasting is an indication of its proportionality. What I cannot accept is that, by limiting the prohibition to the broadcast media, the State should be seen as accepting that the issue was not one of a pressing social need.

10. However, I do not find it necessary to determine whether *VgT* was correctly decided, the issue being whether the restrictions on political advertising in the 2003 Act were in the circumstances of the present case compatible with the requirements of Article 10.

11. There is no dispute that the legislation served a legitimate aim. At the heart of the legislation was the protection of the impartiality of public interest broadcasting and the democratic process itself, by ensuring that financially powerful groups were not able directly or indirectly to dictate the political agenda, and thereby making effective the principle of the equality of opportunity.

12. As to the question of the necessity and proportionality of the measure, the Court has frequently reiterated that, by reason of their direct and continuous contact with the vital forces in the society, national authorities — and particularly national legislatures — are in principle better placed than an international court to evaluate the local needs and conditions and to decide on the nature and scope of the measures necessary to meet those needs. I would, like the national courts, give significant weight to Parliament's considered view in this case. It is, as Lord Bingham noted, reasonable to expect that democratically-elected politicians will be particularly sensitive to the measures necessary to safeguard the integrity of democracy. The impact of broadcasting on the topics, framework and intensity of political debate is one which the legislature is best placed to assess, as it is in deciding what restrictions are necessary to ensure the political process is not distorted. This consideration is reinforced in the circumstances of the present case by the depth of

the parliamentary and judicial examination of the necessity of the Act and of the feasibility of any less restrictive alternatives. While it is unclear from the *VgT* judgment what was the precise extent of the parliamentary scrutiny of the measure in question in that case, in the present case it is quite clear. The summary of the background to the 2002 Bill, which is contained in paragraphs 35 to 55 of the judgment well illustrates the exceptionally detailed examination given to the question of the controls on the broadcasting of political advertisements. The Neill Committee in 1998; the White Paper in 2000; the Joint Committee on Human Rights; the Joint Committee on the 2002 Bill; the Independent Television Commission; the Electoral Commission were all in favour of maintaining the prohibition which had been in effect since 1954. The Government additionally went to some lengths to explain why, despite the *VgT* judgment, it considered, on Counsel's advice, that there were strong grounds for maintaining the prohibition because of the fundamental importance of maintaining impartiality in the broadcast media having regard to its reach, immediacy and influence. It was further explained why it would be difficult to produce a workable compromise solution, permitting lesser restrictions confined to the timing of the broadcast, the nature of the person, party or association responsible for the advertisement or the content of the advertisement itself. This was a view which was ultimately accepted by the Joint Committee on Human Rights, which found that the Government had good reasons for believing that the policy reasons for maintaining the ban outweighed the reasons for restricting it. It is also of central importance that the 2003 Act was enacted by Parliament without any member dissent on either side of the political divide. In these respects, the case is far removed from that of *Hirst (No. 2) v. the United Kingdom* where, as emphasised by the Court in its judgment in that case, there had been, prior to the judgment, no independent examination of the issues at stake and no recent substantive debate on the continued justification for maintaining a general restriction on the right of serving prisoners to vote.

13. It is also of importance that the compatibility with Article 10 of the measures in question were analysed with care and in detail by two national courts, whose judges reached the unanimous conclusion that the restrictions in question were justified. The High Court and the House of Lords are accused of being over-deferential to the views of Parliament. I do not find this to be a fair criticism of the judgments, which explained — in my view, correctly — why, in the particular circumstances of the 2003 Act, special weight should be accorded to the decision of Parliament to maintain the restrictions on political advertising.

14. I would also attach some weight to the lack of European consensus between States in this area. The EPRA Survey referred to in the *TV Vest* case found no such consensus at that time. It is argued that the intervening years since the *VgT* case have witnessed at least a trend in favour of allowing the broadcasting of advertisements of a general and social interest and that the United Kingdom remains one of the few States with a prohibition of such breadth. Even if such a trend is revealed, what is clear from the survey and from the applicant's own observations is that there remain a wide variety of approaches to the question in the Member States, some imposing a blanket ban on political broadcast advertising, some regulating paid political broadcast advertising generally or during an election period, some offsetting any legislative ban by a regulated system of free but limited, political advertising by recognised political parties. Certainly, I find nothing in the material before the Court to justify it in shrinking the margin of appreciation afforded to the respondent State.

15. Finally, in common with the judges of the two national courts, I attach importance, in assessing the proportionality of the measure, to other elements in the case — the fact that it was limited to the broadcast media; the fact that it was confined to advertising and that the applicant had access in principle to the broadcast media for non-commercial programming; the fact that, if a body wished to advertise on a non-political matter, all it had to do (as many had done) was to set up a charitable arm; and the fact that the restrictions were offset by permitting free party political, party election and referendum campaign broadcasts to ensure coverage of a range of political and social views through the broadcast media.

16. As in many other cases which the Court has decided, I readily accept that Parliament could have regulated the situation differently. As noted in the judgment of Ousley J.: 'No doubt Parliament could have devised a form of words which would present a solution of sorts to any problem as to where a line was drawn as between advertiser or advertisement'. It could have limited the prohibition to election times; it could have confined the prohibition to political parties and excluded social advocacy groups from its scope; it could have left any restriction to be based on a case-by-case examination; it could have placed a financial cap on groups seeking to broadcast advertisements. All these options were expressly considered and found not to be workable or capable of being applied without the risk of discrimination or arbitrariness and without undermining the principle of impartiality and legal certainty.

17. The role of the Strasbourg Court in a case of this kind is not to carry out its own balancing test or to substitute its own view for that of the national legislature, based on independent scrutiny, as to whether a fair and workable compromise solution could be found which would address the underlying problem or as to what would be the most appropriate or proportionate way of resolving that problem. Its role is rather, as the judgment makes clear, to review the decision taken by the national authorities in order to determine whether in adopting the measures in question and in striking the balance in the way they did, those authorities exceeded the

margin of appreciation afforded to them. For the reasons given above and more fully developed in the Court's judgment, I am unable to find that Parliament stepped outside any acceptable margin or that the restrictions imposed by the 2003 Act violated the applicant's rights under Article 10 of the Convention.[1]

Noot

1. Een Brits 'dierenbevrijdingsfront' start in 2005 een publiciteitscampagne tegen de kwalijke manier waarop dieren worden behandeld. Onderdeel van de campagne moet een 20 seconden durende televisiespot worden waarop wij een meisje van vier jaar in ketenen langzaam in een dierenkooi zichtbaar zien worden. De voice-over zegt dan dat een chimpansee het brein heeft van een vierjarig mensenkind dat voor 98% uit hetzelfde DNA als de mens bestaat, maar niettemin een 'gekooid' leven leidt om ons te amuseren. Het meisje verandert geleidelijk in een chimpansee. Aan het eind van de spot wordt de kijker opgeroepen om tegen betaling van £ 10 thuis een informatiepakket te ontvangen zodat hij of zij meer te weten komt over de deplorabele toestand waarin dieren in het VK leven. Het lijkt een verwijzing naar de eerste regel van *Du Contract Social* van Rousseau: 'Het dier is vrij geboren, maar overal ligt het in de ketenen.' De Broadcast Advertising Clearance Centre (BACC) die in het VK vooraf reclameboodschappen op rechtmatigheid beoordeelt, weigert toestemming te geven. 'Dat is een politieke boodschap', oordeelt het en politieke reclame is in de VK door de Communications Act verboden. Wat volgt in het arrest is een beschrijving van de boeiende interne discussie die in het VK daaraan voorafgaand is gevoerd over de handhaving van het verbod op politieke reclame en de reflecties daarover van de Law Lords bij de berechting van deze zaak. Dat eindigt in een oordeel in deze zaak van een zwaar verdeelde Grand Chamber van het Hof dat het Britse verbod niet in strijd is met het Verdrag (zeven tegen, verdeeld over twee dissenting opinions, en acht voor met een concurring opinion binnen deze nipte meerderheid).

2. De reclameboodschap is altijd een heikele kwestie binnen het Hof geweest, die het vaak heftig verdeelt. Vrijwel alle zaken waarin het Hof moest oordelen of de reclame onder de bescherming van artikel 10 viel bevonden zich in een glijdende schaal van politiek, godsdienst en commercie. De beperkingen die op nationaal niveau op reclameboodschappen worden gemaakt maken onderdeel uit van heel verschillende normcomplexen, waarvan het Hof de nationale toepassing met verschillende graden van 'margin of appreciation' beoordeelt. Bij de politieke reclame boodschap speelt de vraag van de gelijkheid van kansen in het democratische debat (het weren van commerciële belangen). Bij de godsdienst de nationale gevoeligheden in godsdienstzaken. Bij commercie, de eerlijke mededinging, consumentenbescherming en (beroeps)fatsoensnormen. Het maakte daarom veel uit hoe de boodschap in nationale instanties werd gekwalificeerd, hoewel het Hof zich daar niet altijd aan gebonden acht. In de *Barthold*-zaak bekritiseerde een dierenarts het feit dat dierenklinieken in zijn woonplaats in het weekend niet bereikbaar waren, maar attendeerde hij er tegelijk op dat zijn kliniek wel open was om aan deze misstand een einde te maken. De Duitse dierenartsorganisatie paste de fatsoensnorm van het reclameverbod voor dierenartsen toe, maar daar keek het Hof doorheen. Dit was deelname aan het publiek debat en het paste geen 'margin of appreciation' toe (EHRM 25 maart 1985, *NJ* 1987/900, m.nt. EAA: vijf tegen twee). Dat liep anders bij de *markt Intern Verlag*-zaak, die staat als hét precedent waarin het Hof de reclameboodschap in beginsel onder de bescherming van artikel 10 heeft gebracht (EHRM 20 november 1989, Volume 165 Series A, *NJ* 1990/738, m.nt. EAA; E.J. Dommering, 'De zaak markt intern Verlag', *IER* 1990/3, p. 49-52, opgenomen in de bundel *De Achtervolging van Prometheus*, Amsterdam: Otto Cramwinckel 2008). Het ging om een discussie over de kwaliteit van een dienst, waarbij degene die kritiek had zelf commerciële belangen had om de dienst in een kwaad daglicht te stellen. De Duitse rechters hadden de kritische mededeling als commercieel gekwalificeerd. Het Hof past artikel 10 toe, maar tegelijkertijd zijn leerstuk van de 'margin of association' in commerciële zaken en laat daarom het resultaat van de Duitse procedure die was geëindigd in veroordeling op grond van oneerlijke mededinging in stand (stemverhouding 9 tegen, 9 voor, beslist op grond van de casting vote van de kamerpresident). De Duitse zaak *Jacubowski* over het verspreiden van een concurrentievervalsende circulaire (EHRM 23 juni 1994, *NJ* 1995/365, m.nt. E.J. Dommering) wordt eveneens afgedaan als een commercieel geschil dat ter beoordeling is van de nationale autoriteiten (zes tegen drie in een gezamenlijk dissenting opinion). In de Spaanse zaak over het reclameverbod van advocaten (de zaak *Casado Coca*, EHRM 24 februari 1994, *NJ* 1994/518, m.nt. EJD) wordt dit verbod (unaniem) niet in strijd geacht met het Verdrag als een advocaat in de Gouden Gids reclame voor zich zelf maakt, hoewel de advocaat zegt in die advertentie het publiek te hebben willen waarschuwen voor beunhazen. In de *Hertel*-zaak (EHRM 25 augustus 1998, *NJ* 1999/721, m.nt. E.J. Dommering) waarschuwde de Zwitserse wetenschapper Hertel in een commercieel tijdschrift dat in grote oplage binnen de branche werd verspreid dat het bereiden van voedsel in Magnetronovens kankerverwekkend is. De omzet van magnetronovens kelderde, en de belangenorganisatie van de magnetrons trok tegen Hertel ten strijde. Hertel werd op grond van de strenge mededingingsnormen die gelden voor vergelijkend warenonderzoek

1 De joint dissenting opinion of judges Ziemele, Sajó, Kalaydjieva, VučiniĆ en De Gaetano alsmede de dissenting opionin of judge Tulkens, joined bij judges Spielmann en Laffranque zijn hier niet opgenomen.

door de Zwitserse rechters veroordeeld. Hier kijkt het Hof weer door de kwalificatie heen en acht het een schending van artikel 10 aanwezig (6 tegen drie separate dissenting opinions). Een keerpunt leek de Zwitserse zaak *Verrein gegen Tierfabriken*, ook wel *VgT* genaamd (EHRM 28 juni 2001, *NJ* 2001/181, m.nt. E.J. Dommering, ook opgenomen in de bundel *Achtervolging*). Deze lijkt nog het meest op de onderhavige zaak. Het ging om een tv-spotje tegen dierenmishandeling (nog forser aangezet dan de Engelse wegens de vergelijking met Duitse concentratiekampen) dat door de Zwitserse bevoegde autoriteit was geweigerd. Het Hof oordeelt unaniem dat het een weigering betrof om een puur politieke boodschap uit te zenden die in strijd was met art. 10 EVRM (unaniem). Maar bij godsdienstige reclame gaat het Hof weer (unaniem) de andere kant op in de Ierse zaak *Murphy* (EHRM 10 juni 2003, *NJ* 2005/177, m.nt. E.J. Dommering, ook opgenomen in de bundel *Achtervolging*). De Ierse reclameautoriteit voor televisiereclame weigerde het uitzenden van reclame voor het bijwonen van kerkdienst, omdat de Ierse wet religieuze televisiereclame verbood. Unaniem was het Hof ook bij het veroordelen van een Noors verbod politieke reclameboodschappen uit te zenden op televisie waardoor een klein partijtje dat nog niet bekend was het electoraat niet kon bereiken (de zaak *TV Vest*, EHRM 11 december 2008, *NJ* 2010/208, m.nt. E.J. Dommering). Maar bij de Zwitserse zaak *Mouvement Raëlien tegen Zwitserland* (EHRM 13 juli 20102, *NJ* 2014/319, m.nt. E.J. Dommering) over de naar de ziener Raël vernoemde beweging die gelooft in buitenaardse wezens raakte het Hof weer in grote verdeeldheid. Het ging om een verbod van een kantonale overheid om posters te verspreiden waarin de beweging haar opvattingen uitdraagt en een bezoek aan een door haar onderhouden website propageert. Wat de zaak triggerde was dat de beweging pedofilie en het klonen van embryo's op haar website propageerde. Hoewel de site zelf niet was verboden, achtte het Hof het verbod om er grotere bekendheid aan te geven niet in strijd met het verdrag. Maar de Grote Kamer van het Hof besliste met negen (met één concurring opinion) tegen acht (verdeeld over drie dissenting opinions), een soortgelijke stemverhouding dus als in de onderhavige zaak.

3. Is er een lijn in deze casuïstiek te bespeuren? Het lijkt allemaal ingegeven door een beoordeling van de proportionaliteit van de beperking als gevolg van normen die het Hof zelf niet ter discussie stelt, evenals de 'gevoeligheid' van de materie waar de berechte zaak betrekking op heeft. Het reclameverbod voor vrije beroepen snijdt in de *Barthold*-zaak kennelijk volgens het Hof dieper in de vrije discussie dan in *Casado Coca*, een appreciatie van de feiten dus. Hetzelfde geldt voor het verschil tussen *Hertel* enerzijds en *markt intern Verlag*- en *Jacubowski*-zaken anderzijds. Bij *Murphy* en *Mouvement Raëlien* geldt de ruime margin of appreciation die het Hof bij godsdienstige en zedelijke kwesties hanteert. Blijft over het verbod op politieke reclame dat in de *TV Vest* en de *VgT*-zaken in de toepassing disproportioneel wordt geacht. In het ene geval ging het om een kleine actiegroep in het andere geval om een nieuwe onbekende politieke partij.

4. Zowel voor de Britse rechterlijke instanties in deze zaak, als de parlementaire commissies die eerder moesten beoordelen of het verbod op politieke televisiereclame in stand moest blijven, speelde de betekenis van de *VgT*-zaak een grote rol. De rechters schuiven het als een precedent opzij, omdat het in die zaak vooral om de proportionaliteit van het verbod zelf ging (zie ook mijn noot onder dat arrest en de ook in dit debat genoemde beslissing over regulering van publiciteit bij verkiezingen in de *Bouman*-zaak, EHRM 19 februari 1998, *NJ* 2000/338, m.nt. EJD). VgT had geen alternatief (gelijkwaardig) verspreidingsmiddel en de Animalsbeweging nog wel. Een argument dat daarbij ook over de tafel gaat is de disproportionaliteit van een algemeen verbod van politieke reclame omdat het geldt buiten de verkiezingsperiode, ook geldt voor pressiegroepen die geen politieke partij in strikte zin zijn en zowel de grote als de kleintjes treft. Het doel van de beperking is immers om de invloed van partijen met onbegrensde middelen om televisiereclamecampagnes te betalen te weren en dat is bij klein actiegroepje niet in het geding.

5. In deze zaak is door het Hof ook het European Platform of Regulatory Authorities (EPRA) gehoord over de regels die in de verschillende landen beperkingen opleggen aan politieke reclame boodschappen waarover in vrijwel alle landen regels bestaan, die onderling nogal verschillen (Voor Nederland, zie mijn noot onder 6 in de *VgT 6*-zaak). Er is ook een Recommendation (R 1999, 15) van de Raad van Ministers van de Raad van Europa, waarin wordt gewaarschuwd voor de commerciële invloeden op de politieke reclameboodschappen. Het Hof noemt niet de controverse die inmiddels in de VS is gegroeid nu het Supreme Court in 2014 het Buckley-precedent uit 1976 (*Buckley vs Valo*, 424 US, 1 (1976)) van het progressieve Burger Court dat enige regels formuleerde voor campagnefinanciering, opzij heeft gezet. Was het financieren ('expenditure') van politiek campagnes 'conduct' dat je kon reguleren en maximeren door statelijke en federale regels, in de uitspraak uit 2014 (*McCutcheon vs. FEC*, 572 US_ (2014)) van het huidige conservatieve Supreme Court is het plotseling First Amendment Speech geworden waar de wetgever niet meer aan mag komen. Het heeft de sluizen naar door miljardairs gestuurde presidentsverkiezingen opengezet. In het Amerikaanse debat over deze beslissing wordt wel gesproken van 'one dollar, one vote'.

6. Regulering van reclame in het algemeen is dus al lastig, de regulering van politieke reclame is een beladen democratisch onderwerp. Hoe gaat het EHRM met het VgT precedent om? Na inleidende beschouwingen over wat de freedom of expression inhoudt, concludeert het Hof in overweging 104 dat het hier om een type uitlating en een soort spreker

(een actiegroep) gaat die grote bescherming genieten waardoor er voor de verdragsstaat weinig margin of appreciation is. Het uitgangspunt is echter ook (overweging 106) dat regulering van politieke reclame op zich is toegelaten. Het concentreert zich daarom op de proportionaliteit van de algemene regel. Die moet worden beoordeeld aan de mate van overtuigendheid van de redenen die aan het vaststellen van de algemene maatregel ten grondslag liggen (overwegingen 108-110). Het Hof gaat vervolgens de besluitvorming binnen het VK na, waarin na ampele overweging opnieuw de noodzaak van een algemene maatregel is erkend en welke redengeving vervolgens door de Britse rechters in deze zaak uitvoerig is onderzocht (overwegingen 114-116). Een afzonderlijke factor is de beschikbaarheid van alternatieve media (overweging 117 slot en 124) en de impact van de omroepmedia (overweging 119, een apart punt in de *Murphy*-zaak). Zo gaat het nog een aantal bezwaren van de actiegroep langs om in overweging 123 af te ronden met de vaststelling dat het een materie is waarover in Europa verschillend wordt gedacht.

7. Concurring rechter Bratza vindt het van belang er op te wijzen dat de bestreden beslissing niet steunt op een discretionaire bevoegdheid, zoals in de *TV Vest* en *VgT*-zaken, maar op de toepassing van een algemeen verbod. Verder zegt hij (overweging 7 van de opinie) dat hij aan de juistheid van de beslissing in de *VgT*-zaak is gaan twijfelen, omdat daarin de belangen die zijn gemoeid met het reguleren van politieke reclame onvoldoende aan bod zijn gekomen. De eerste dissentergroep onder leiding van rechter Ziemele vindt dat de zaak gelijk ligt aan de Zwitserse *VgT*-zaak. Zij vindt het verbod te algemeen. Ook de toepassing van een algemene wettelijke regeling moet door het Hof zonder terughoudendheid op proportionaliteit worden onderzocht, ook al is er op nationaal niveau voldoende over de regeling nagedacht. Daarbij valt deze groep rechters over het feit dat het niet alleen kapitaalkrachtige partijen treft, maar ook een sociale actiegroep als de onderhavige. De door rechter Tulkens geleide dissenting opinion gaat met een iets andere argumentatie dezelfde weg: de maatregel zelf is te algemeen en de effecten daarvan op de appellanten disproportioneel.

8. De conclusie moet zijn dat algemene regelingen die de politieke reclameboodschappen op de omroepmedia verbieden nog wel door de beugel kunnen, maar dat de overwegingen van de nationale bestuurders en de toetsing daarvan door de rechters in Straatsburg zeer nauwkeurig op hun geldigheid zullen worden onderzocht. De beschikbaarheid van alternatieve verspreidingsmiddelen is eveneens een factor die in ogenschouw moet worden genomen. Wanneer er een zware politieke besluitvorming, culminerend in de vaststelling van een wettelijke regel is geweest, krijgt de toetsing van het verbod op politieke reclame dus eerder een procedureel dan een materieel karakter. (Dit is een soortgelijke aanpak als in de *Hatton II*-zaak over de nachtvluchten op Heathrow, zie EHRM 8 juli 2003, *NJ* 2004/207, m.nt. E.J. Dommering, een zaak die in het arrest in overweging 106 bij de precedenten wordt genoemd). Geheel overtuigend is de argumentatie niet omdat de verboden in de *VgT* en *TV Vest*-zaken ook op een wettelijke regel berustten, maar misschien moeten we het toch zo zien dat het Hof op deze precedenten is teruggekomen (voor een analyse met dezelfde conclusie verwijs ik naar Ronan O'Fataigh, *Political Advertising and Freedom of Expression*, in Greek Public Law Journal Vol 26, p. 226, te vinden op www.ivir.nl/download/1534, geraadpleegd mei 2016).

E.J. Dommering

NJ 2016/322

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS

14 april 2015, nr. 24014/05

(Dean Spielmann, Josep Casadevall, Mark Villiger, Isabelle Berro, Işıl Karakaş, Ineta Ziemele, Luis López Guerra, Mirjana Lazarova Trajkovska, Nona Tsotsoria, Zdravka Kalaydjieva, Vincent A. De Gaetano, Angelika Nußberger, Paul Lemmens, Helena Jäderblom, Krzysztof Wojtyczek, Faris Vehabović, Robert Spano)

m.nt. T.M. Schalken

Art. 2, 6, 34 EVRM

ECLI:NL:XX:2015:343

Turkse sergeant overlijdt tijdens dienstplicht. Effectief onderzoek? Beoordeling onafhankelijkheid. Verhouding tussen procedurele positieve verplichtingen onder art. 2 EVRM en art. 6 EVRM. Geen schending art. 2 EVRM.

Verzoekers zijn de ouders van Cihan Tunç, een Turkse sergeant die op 21-jarige leeftijd tijdens het vervullen zijn dienstplicht als dienstdoende gendarme op het terrein van een door de nationale gendarmerie beveiligde oliemaatschappij door een geweerschot wordt geraakt en als gevolg daarvan komt te overlijden. In het kader van het daarop door een militaire officier van justitie geëntameerde forensische onderzoek wordt onder meer een lijkschouwing verricht, het terrein onderzocht en vinden verhoren plaats. Het onderzoek leidt tot de conclusie dat Cihan Tunç zichzelf onopzettelijk heeft neergeschoten. Er wordt geen strafvervolging ingesteld. Verzoekers stellen daartegen beroep in. De militaire rechtbank gelast een aanvullend onderzoek, waaruit blijkt dat suïcide onaannemelijk is en het incident waarschijnlijk is veroorzaakt door het onachtzaam hanteren van het dienstwapen. Het beroep wordt daarop verworpen. Verzoekers wenden zich vervolgens tot het militaire administratieve hooggerechtshof ter verkrijging van schadevergoeding wegens het overlijden van hun