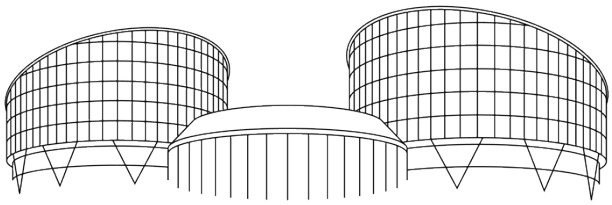

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF ANIMAL DEFENDERS INTERNATIONAL v. THE UNITED KINGDOM

(Application no. 48876/08)

JUDGMENT

STRASBOURG

22 April 2013

This judgment is final but it may be subject to editorial revision.

In the case of Animal Defenders International v. the United Kingdom,

The European Court of Human Rights sitting as a Grand Chamber composed of:

Dean Spielmann, President,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Ineta Ziemele,
Elisabeth Steiner,
Päivi Hirvelä,
George Nicolaou,
András Sajó,
Zdravka Kalaydjieva,
Mihai Poalelungi,
Nebojša Vučinić,
Kristina Pardalos,
Vincent A. De Gaetano,
Julia Laffranque,
Helen Keller, judges,
and Michael O'Boyle, Deputy Registrar,

Having deliberated in private on 7 March 2012 and 20 February 2013,

Delivers the following judgment which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48876/08) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Animal Defenders International, a non-governmental organisation ("NGO") based in London ("the applicant"), on 11 September 2008.

2. The applicant was represented before the Court by Ms T. Allen, a solicitor practicing in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms A. Sornarajah, of the Foreign and Commonwealth Office.

3. The applicant complained about the prohibition on paid political advertising by section 321(2) of the Communications Act 2003.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 21 January 2011 the Court decided

to communicate the application to the Government. It also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1). On 29 November 2011 the Chamber decided to relinquish jurisdiction to the Grand Chamber.

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

6. The applicant and the Government each filed a memorial on the admissibility and merits.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 March 2012 (Rule 59 § 3). There appeared before the Court:

– *for the Government*

Mr	A. SORNARAJAH,	*Agent,*
Mr	M. CHAMBERLAIN,	*Counsel*,
Ms	E. VAN HEYNINGEN,	
Ms	S. WHITE,	*Advisers;*

– *for the applicants*

Mr	H. TOMLINSON QC,	
Mr	A. O'NEILL QC,	*Counsel*,
Ms	T. ALLEN,	*Adviser*,
Ms	J. CREAMER,	*President of the applicant organisation.*

The Court heard addresses by Mr Chamberlain and Mr Tomlinson.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant NGO campaigns against the use of animals in commerce, science and leisure, seeking to achieve changes in law and public policy and to influence public and parliamentary opinion to that end.

1. The prohibited television advertisement

9. In 2005 the applicant began a campaign called *'My Mate's a Primate'* which was directed against the keeping and exhibition of primates and their use in television advertising. As part of the campaign, the applicant wished to broadcast a 20-second television advertisement. The proposed advertisement opened with an image of an animal's cage in which a girl in

chains gradually emerged from the shadows. The screen then went blank and three messages were relayed in sequence: "A chimp has the mental age of a four year old"; "Although we share 98% of our genetic make-up they are still caged and abused to entertain us"; and "To find out more, and how you can help us to stop it, please order your £10 educational information pack". In the final shot, a chimpanzee was in the same position as that of the girl.

10. The proposed advertisement was submitted to the Broadcast Advertising Clearance Centre ("the BACC") for a review of its compliance with relevant laws and codes. On 5 April 2005 the BACC declined to clear the advertisement. The objectives of the applicant were "wholly or mainly of a political nature" so that section 321(2) of the Communications Act 2003 ("the 2003 Act") prohibited the broadcasting of the advertisement. This decision was confirmed on 6 May 2005. The advertisement could and can be viewed on the internet.

2. The High Court ([2006] EWHC 3069)

11. On 19 October 2005 the applicant issued proceedings seeking a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("the HRA") arguing that the prohibition on political advertising on television and radio imposed by the 2003 Act was incompatible with Article 10 of the Convention. The only contested issue was whether the prohibition could be considered "necessary in a democratic society".

12. An affidavit from the Director General of the Department of Culture, Media and Sport ("DCMS") dated 16 December 2005 was submitted on behalf of the State. It detailed how impartiality was a fundamental feature of the regulatory regime applicable to broadcasting and why it was considered that political advertising was incompatible with impartiality. It explained that a less restrictive prohibition was impracticable by describing the review process which began in 1999 (see paragraphs 37-55 below) noting that the relevant bodies consulted had supported the prohibition and it considered this answered the applicant's arguments. Controls on broadcast media were justified given the unique nature of the medium and since there were other media available to the applicant. The affidavit referred to other States with similar provisions (Ireland, Denmark, Sweden and Norway), concluding that, in countries which had allowed paid political advertising, there remained "significant practical problems" in running such a system particularly in being able to guarantee equal access to all parties where the political landscape was characterised by multiple parties, where parties/broadcasters circumvented rules on time/funding limits on paid political advertising and where there was confusion over what constituted "political" advertising.

13. On 4 December 2006 the High Court (Auld LJ and Ousley J) dismissed the applicant's claim. Both judges considered the prohibition to

have been widely defined. Ousley J observed that it covered "a continuum of political activity and intensity from party political activity at election time to the pursuit by non-political bodies at any time of particular interests of public concern". While political expression was a highly prized form of expression, both found the interference justified.

14. Both judges rejected reliance on *VgT Verein gegen Tierfabriken v. Switzerland* (no. 24699/94, ECHR 2001-VI) which they found turned on its facts. Auld LJ found the 2003 Act to have had a number of ameliorating features not present in the scheme at issue in VgT, including a relaxation of controls on the timing and content of political and election broadcasts. They relied on the criticisms of the VgT judgment in R *(ProLife Alliance) v BBC* ([2003] UKHL 23), Ousley J finding that it was not possible to discern the basis of the VgT judgment. Both judges doubted the relevance of *Murphy v. Ireland (*no. 44179/98, ECHR 2003-IX (extracts)): it did not concern political advertising and they were not convinced by the observation therein that the margin of appreciation for restrictions on political advertising might be narrower than those on religious advertising.

15. Both judges underlined the caution to be exercised by the courts as regards Parliament's policy and legislative choices. Auld LJ reiterated that:

> " ... in such matters of social and political judgment, the executive and legislative authorities - particularly the latter - of a Contracting State may normally be expected to have a better or surer grasp of its democratic needs and their practicalities than the Strasbourg Court or its own courts. Therein lies the notion of deference which, under one name or another, still stands as a caution to our courts against interfering too readily with the Government's policies or Parliament's legislative schemes in implementation of them. Such caution is an agent for broadening rather than narrowing the margin of appreciation/ambit of discretionary judgement of a Contracting State in this context, just as it may be in the context of other important and sensitive issues peculiar to a Contracting State's traditions, to which its authorities – like those of Ireland in Murphy – are peculiarly alive and well qualified to assess.
>
> Here, the United Kingdom Parliament has chosen to introduce a prohibition on political advertising confined to the broadcast media because of its perceived greater power than that of other media and, consequently, greater potential for distortion by wealthy interests of the democratic process. It may be that it could have gone about it in a different way, but is the court to be the judge of that, faced as it is with wide and highly authoritative support for the Parliamentary scheme?"

Auld LJ was to later conclude that Parliament had acted within the ambit of the discretionary judgment available to it.

Ousley J stated that the High Court was not reliant solely on the evidence before it since the "experience, expertise and judgment of Parliament expressed in the legislation can demonstrate the necessary justification". As to the justification for the prohibition, he stated:

> "There are competing interests at stake here which a legislature is entitled and obliged to balance, taking account of the way in which it can anticipate that groups

and parties would use the greater access to the broadcast media which the Claimant seeks for itself and others. ...

In this regard, it is clear that Parliament has expressed a considered view, having grappled with the human rights implications of s321. I give great weight to its view thus expressed as evidencing the need for this restriction. This is not an executive act, not secondary legislation but primary legislation which was passed without member dissent by Parliament. It was aware of the opposition on human rights grounds of Professor Barendt, and of the reservations, based on *VGT*, expressed by the Joint Committee on Human Rights and the Electoral Commission.

I also give Parliament's considered view great weight because of the subject matter. The impact of broadcasting on the topics, framework and intensity of political debate is one which few would be better placed to assess than those who deal on a daily basis with constituents and interest groups, whether to enlist, respond to or resist their influence. They would be well placed to know what manner of groups there were or might be who would take advantage of degrees of alteration to the present ban. It is not contestable that Parliament, through its MPs and politically active peers, is far better placed to reach a judgment on those matters than judges. This is not an area which more readily falls into the sphere in which judges are more experienced and expert. This is the more true of non-national judges.

I see these factors as giving substantial evidential weight to the view of a democratically elected body in deciding what restriction was shown to be necessary in the public interest. In substance, another way of putting that is to say that the subject matter warrants a considerable discretionary area of judgment being accorded to Parliament.

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 types [of] advertiser or advertisement. However, the complexities and inevitable arbitrariness of any solution, such as it might be called, are proper matters for Parliament to consider in deciding that a complete ban on broadcasting advertisements is the only practicable and fair answer."

Whether Parliament's enactment of the prohibition was evidence for its necessity in an area of Parliament's expertise or as a judgment in an area where a wider margin of discretion should be accorded to it, Ousley J considered that Parliament's decision should be respected by the courts.

16. Having noted the lack of a relevant European consensus, Auld LJ remarked that the experts' reports submitted had been of little assistance, had been produced by the State as a matter of disclosure only and had not been relied upon by the State. Ousley J noted that the High Court had been provided with some, but not comprehensive, material about how some other Council of Europe and commonwealth States had dealt with the issue. It was not of any great use save to demonstrate that there was a general consensus that electoral periods justified advertising prohibitions and that there was no clear consensus as to whether the present prohibition was necessary outside of an electoral period. Various states had decided what restrictions were necessary given their particular political sensitivities and

broadcasting systems. The absence of consensus might have reflected those differing conditions which were properly part of a legislature's judgment as to whether or not this degree of prohibition was necessary in its democratic society.

17. Both Auld LJ and Ousley J emphasised the rationale for the prohibition: to preserve the integrity of the democratic process by ensuring that the broadcast media were not distorted by wealthy interests in favour of a certain political agenda. Ousley J characterised the prohibition as a restriction aimed at supporting the democratic process rather than one with a specific content objection. Both judges considered it legitimate to single out the broadcast media as its impact was potentially more powerful: Ousley J finding that it was not a matter of serious debate that the broadcast media was more pervasive and potent than any other media form. As to the debate about whether television was more expensive than other media, Ousley J considered it sufficient to accept that broadcasted advertisements had an advantage of which advertisers and broadcasters were aware and for which the former would pay large sums of money far beyond the reach of regular groups who would wish to participate in the public debate.

18. Finally, both judges rejected the argument that the prohibition was disproportionate as it applied outside electoral periods and to groups such as the applicant who were not associated with party politics or electoral campaigns. Auld LJ emphasised that it would not be "a principled or logical distinction" to limit the prohibition to electoral periods. Both judges considered that political advertising in the broadcast media outside such periods was likely to have an equally obvious influence on the democratic process. In this respect, Ousley J noted that the broadcast media were ever-present, that contentious democratic issues could arise at any time and that purchased influence could affect the promotion of legislation, the decision to hold an election or its ultimate outcome. Both judges also considered that it was impracticable, arbitrary and potentially unfair to attempt to draw a line between party political matters and other matters of public importance: the distortion of the political debate could take many forms and could embrace a vast range of matters of public interest and certain issues would be difficult to categorise. There was also a risk that such a distinction might allow political parties to "contract out" their political advertising to "splinter or supporter groups" which would be free from restriction.

19. As a result, the High Court refused a declaration of incompatibility.

3. The House of Lords ([2008] UKHL 15)

20. On 12 March 2008 the House of Lords (Lord Bingham, Lord Scott, Baroness Hale, Lord Carswell and Lord Neuberger) unanimously dismissed the applicant's appeal.

21. Lord Bingham gave the lead judgment. He recognised that, since the prohibition interfered with political expression, the standard of justification

imposed on the State was "high" and the margin of appreciation was correspondingly small. The objective of the prohibition was as follows:

> "28. The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated. It is the duty of broadcasters to achieve this object in an impartial way by presenting balanced programmes in which all lawful views may be ventilated."

22. The objective was not achieved if:

> "...well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or injurious. The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them. The rights of others which a restriction on the exercise of the right to free expression may properly be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising."

Lord Bingham did not think that the full strength of this argument had been deployed in the above-cited *VgT* judgment.

23. He considered that a blanket prohibition was necessary to avoid the risk of advertisements by organisations with objectionable goals and he observed that this option had been discounted in *VgT* but recognised in the above-cited *Murphy* judgment. That the prohibition was confined to the broadcast media only was, as Ousley J had found, explained by the particular pervasiveness and potency of television and radio, a factor recognised by this Court in *Jersild v. Denmark* (23 September 1994, § 31, Series A no. 298) and in *Murphy* although he noted that the *VgT* judgment appeared to discount the point.

24. As to whether a less restrictive prohibition (regulated by time, frequency, expenditure or by the nature and quality of advertisements) would avoid the mischief sought to be avoided, Lord Bingham considered it unnecessary to explore this option in detail because, *inter alia*, any less restrictive system could be circumvented by the formation of small groups pursuing very similar political objects; it would be difficult to apply objectively and coherently; and it would be even more difficult for broadcasters to fulfil their duty of impartiality. While the JCHR had requested a compromise solution, the Government had judged that no fair and workable compromise solution could be found which would address the problem, "a judgment which Parliament accepted. I see no reason to challenge that judgment". Parliament's judgment was to be given "great weight" for three reasons. In the first place, it was reasonable to expect that

democratically-elected politicians would be "peculiarly sensitive" to the measures necessary to safeguard the integrity of democracy. Secondly, while Parliament considered that the prohibition might "possibly although improbably" infringe Article 10, Parliament had resolved to proceed because of the importance it attached to the prohibition and its judgment which should not be "lightly overridden". Thirdly, legislation could not be framed to address particular cases but had to lay down general rules and Parliament would decide where the line would be. While that inevitably meant that hard cases would fall on the wrong side of the line, "that should not be held to invalidate the rule if, judged in the round, it is beneficial."

25. The fact that other means of communication were available to the applicant was a "factor of some weight" and this was to be contrasted with *Bowman v United Kingdom* (19 February 1998, *Reports* 1998-I) where the impugned provision was found to amount to be a total barrier to the applicant's communication of her views.

26. Finally, Lord Bingham observed that there was no clear consensus among member States on how to legislate for the broadcasting of political advertisements. This Court had widened the margin of appreciation in such instances and suggested that it might be that each State was best fitted to judge the checks and balances necessary to safeguard, consistently with Article 10, the integrity of its own democracy. He dismissed the appeal, agreeing with Ousley J and, in the main, with Auld LJ. He did not accept Lord Scott's view that the domestic courts could differ from this Court in interpreting Convention rights since the former should, in the absence of special circumstances, follow any clear and constant case-law of this Court.

27. Lord Scott agreed with Lord Bingham, adding two comments.

In the first place, the prohibition could give rise to further Article 10 claims given its "remarkable" width: it could withhold from the applicant the ability to place advertisements for broadcasting with no political content or with an entirely neutral content and prevent the applicant from 'countering' permitted commercial advertising which offended their principles. As a result, there might be respects in which sections 319 and 321 were incompatible with Article 10. However, the power to make a declaration of incompatibility under section 4 of the HRA was a discretionary one. As a general rule it ought not to be exercised unless the circumstances of the case showed that the legislative provision in question had "affected a Convention right of the applicant ... in a manner that is incompatible with that right" and hypothetical examples of ways in which the legislative provision might be incompatible with a Convention right did not suffice. The conclusion was that the prohibition was not incompatible with the applicant's Article 10 rights.

Secondly, it was not possible to assume from the *VgT* judgment that the Court would disagree with the House of Lords in the present case. The Court in *Murphy* did not distinguish or qualify its reasoning in *VgT* and this

Court's judgments focused closely on the particular facts of each case. There was no more than the possibility of a divergence between the finding of the House of Lords and of this Court.

28. Baroness Hale began her judgment by pointing out that there had been "an elephant in the room" when the case was heard and it was the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States. She underlined the enormous amounts spent, and which have to be raised, for elections in the United States. There was no limit in the United States to the amount that pressure groups could spend on getting their message across in the most powerful and pervasive media available.

29. She went on to describe the rationale of the prohibition as ensuring that Government and its policies were not decided by the highest spenders:

> "Our democracy is based upon more than one person one vote. It is based on the view that each person has equal value. ... We want everyone to be able to make up their own minds on the important issues of the day. For this we need the free exchange of information and ideas. We have to accept that some people have greater resources than others with which to put their views across. But we want to avoid the grosser distortions which unrestricted access to the broadcast media will bring.
>
> So this case is not just about permissible restrictions on freedom of expression. It is about striking the right balance between the two most important components of a democracy: freedom of expression and voter equality."

30. Baroness Hale held, in full agreement with the reasons given by Lord Bingham, that the prohibition as it operated in the case was not incompatible with the applicant's Article 10 rights. On the contrary, it was:

> "51. ... a balanced and proportionate response to the problem: they can seek to put their case across in any other way, but not the one which so greatly risks distorting the public debate in favour of the rich. There has to be the same rule for the same kind of advertising, whatever the cause for which it campaigns and whatever the resources of the campaigners. We must not distinguish between causes of which we approve and causes of which we disapprove. Nor in practice can we distinguish between small organisations which have to fight for every penny and rich ones with access to massive sums. Capping or rationing will not work..."

31. She doubted the application of the Court's judgment in the *VgT* case since, like all of this Court's judgments, it was fact specific:

> "52. ... Similar though the organisations were, the advertisements were rather different: "eat less meat" is a different message from "help us to stop their suffering". Important arguments which were given less weight in *VgT* were accepted in *Murphy*. If anything, the need to strike a fair balance between the competing interests is stronger in the political than in the religious context. Important though political speech is, the political rights of others are equally important in a democracy. The issue is whether the ban, as it applies to these facts, was proportionate to the legitimate aim of protecting the democratic rights of others. As Lord Bingham has demonstrated, Government and Parliament have recently examined with some care whether a more limited ban could be made to work and have concluded that it could not. The solution chosen has all-party support. Parliamentarians of all political persuasions take the

> view that the ban is necessary in this democratic society. Any court would be slow indeed to take a different view on a question such as this. There may be room for argument at the very margins of the rule, for example, in banning any advertisement of any kind by a political body, or in banning any advertisement by anyone of matters of public controversy. But that is not this case."

32. Finally, Baroness Hale agreed with Lord Bingham (disagreeing with Lord Scott) that the correct interpretation of the incorporated Convention rights lay ultimately with this Court. The domestic courts should adopt a "cautious approach" where they must not "leap ahead" of the Court's interpretations but "keep pace with the Strasbourg jurisprudence as it develops over time, no more and no less".

33. Both Lord Carswell and Lord Neuberger dismissed the appeal for the reasons given by Lord Bingham.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Human Rights Act 1998 ("the HRA")

34. The HRA came into force in England, Wales and Northern Ireland on 2 October 2002. Section 4 allows courts to issue a declaration of incompatibility where it is impossible to interpret primary or subordinate legislation compatibly with the Convention. Section 19 of the HRA is entitled "Statements of compatibility" and provides that:

> "(1) A Minister ... in charge of a Bill in either House of Parliament must, before Second Reading of the Bill:
>
> (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or
>
> (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.
>
> (2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate."

B. The legislative background to the prohibition

1. Background to the Communications Bill 2002 ("the 2002 Bill")

(a) Television Act 1954 ("the 1954 Act")

35. Prior to the 1954 Act, the BBC was the only radio and television broadcaster in the United Kingdom and never broadcasted paid advertising.

The 1954 Act opened the market to commercial broadcasters, reliant on advertising revenue for finance, and it established a regulatory body (Independent Television Authority, "ITA") to enforce, *inter alia*, a prohibition on paid political advertising introduced by the 1954 Act:

> "No advertisement shall be permitted which is inserted by or on behalf of any body the objects whereof are wholly or mainly of a religious or political nature, and no advertisement shall be permitted which is directed towards any religious or political end or has any relation to any industrial dispute."

36. Subsequent legislation has preserved this prohibition.

(b) Committee on Standards in Public Life ("the Neill Committee")

37. The Neill Committee was set up by the Government to consider the broader issue of political party funding. Having visited Canada, Germany, Ireland, Sweden and the United States, in October 1998 it presented its Fifth Report to the Government. In Chapter 13 of the Report, the Neill Committee recommended that the prohibition on political advertising on television and radio should be maintained, describing its benefits as follows:

> "13.7 Preventing the political parties and other politically motivated organisations from buying time on television and radio has the effect of restricting the total amount of money they can spend and also, thereby, of limiting the amounts of money they have to raise. These effects are almost universally agreed to be beneficial. Election campaigns in the United Kingdom are cheaper than in many other countries. During election campaigns, television viewers and radio listeners are not subjected to a continuous barrage of party political propaganda (much of which, if it were permitted here, would undoubtedly be negative). The parties' dependence on wealthy donors is reduced. Political leaders are not forced to spend enormous amounts of time and energy raising money to fund television and radio campaigns. Not least of the benefits is the fact that the broadcasters provide the parties with free air-time. This means that all the major political parties, and not just the richest ones, are given an opportunity to state their views. Almost all those who have observed election campaigns in the United States regard these aspects of the UK system as superior. We believe that the present arrangements have served this country well and should remain in place."

38. The Neill Committee considered that the restriction on freedom of expression resulting from the prohibition was potentially justifiable. It concluded that:

> "13.11 ... it is perfectly proper for the Government to continue to proceed on the basis that the ban on political advertising on television and radio is legally defensible. We refer in particular to the Ministry's argument [in the X and the Association of Z v. the United Kingdom, no. 4515/70, Commission decision of 12 July 1971, Yearbook 14, p. 538] ... justifying the outright ban on the basis of protecting the democratic right of UK citizens not to be subjected to a barrage of political propaganda at prime advertising time from the party with the richest backers. If a court were in the future to rule to the contrary, this would potentially have a dramatic effect on the funding of the political parties. If free to do so, the parties would almost certainly feel obliged to make use of the opportunity to advertise themselves (or attack their opponents) on television and radio. In the United States a high percentage of the expenditure by the political parties at election times is devoted to television advertising. It is the pressure

> to advertise, as much as any other factor, which generates the demand for money and hence the arms race between Democrats and Republicans...”

39. The Neill Committee went further suggesting that, if anything, the legislation should be reconsidered to ensure that it was sufficiently wide:

> “13.12 Another possible future danger, to which reference was made in some of the evidence, is that as advances in technology bring in their train new and varied means of disseminating information (cablevision, multi-channel digital television, the Internet etc.) novel methods may be devised in an attempt to circumvent the current legal restrictions on political advertising. Vigilance will be required to prevent this happening. Existing legislation should be reviewed to ensure that its reach is sufficiently wide.”

40. In 1999 the Government began a comprehensive review of broadcasting regulation and engaged in consultation on, *inter alia*, less restrictive measures than the current prohibition on political advertising. In July 1999 the Government responded to the Neill Committee proposing legislation including maintaining the prohibition on political advertising:

> “9.2 The ban on paid political advertising on television and radio has been a major factor in limiting the amount of money political parties can spend on election campaigning and therefore on the amount they have to raise. As a result, the ban is supported across the political spectrum and the Government strongly endorses the Neill Committee’s recommendation that it should be maintained.”

2. Consultation on the 2002 Bill

(a) Communications White Paper

41. In December 2000 the Government published a Communications White Paper proposing a Communications Bill to implement new controls on the broadcasting media in England and Wales including the maintenance of the prohibition on political advertising. During the resulting consultation period the Court delivered its judgment in *Vgt Verein gegen Tierfabriken v. Switzerland* (no. 24699/94, ECHR 2001-VI).

(b) Publication and scrutiny of the 2002 Bill

42. Following that consultation period, in May 2002 the Government published the 2002 Bill, thereby opening a three-month consultation period. Programme services were not to contain any political advertising whether it was an advertisement inserted by or on behalf of a body which was political in nature or an advertisement directed to a political end. Documents published with the 2002 Bill included Explanatory Notes (which considered the *VgT* judgment, noting that it had thrown some doubt on whether the prohibition was Convention compatible) and a Policy document outlining proposals in the Bill and related policy decisions and expressing the view, *inter alia*, that the Bill reflected a proper balance of freedom of expression and the need to protect against certain types of broadcasted material.

43. The Joint Committee on Human Rights ("the JCHR", a standing parliamentary committee tasked with examining the human rights implications of draft legislation) considered the 2002 Bill and, in doing so in June 2002, took evidence from Professor Barendt who was the Goodman Professor of Media Law at University College London (1990-2010), the first chair in media law in the United Kingdom. In response to a question about whether there were restrictions that could be imposed on political advertising which could be compatible with Article 10, Professor Barendt stated that he agreed with the result of the *VgT* case. To disallow a charity with a political programme (such as Amnesty) which could afford to pay for a short commercial seemed to him to be a "monstrous and unjustifiable infringement of freedom of expression". It made no sense to him to allow commercial advertisements for automobiles and products associated with driving but not to allow groups to broadcast advertising of the opposite case. He was not advocating unrestricted access but rather the adoption of rules to limit the number of spots which could be purchased. He considered that the distortion of the political debate could be "avoided by imposing financial limits, just as we now have with regard to the financing and expenditure of political parties".

44. On 19 July 2002 the JCHR published a report on the 2002 Bill, including on the prohibition of political advertising. The JCHR acknowledged that the prohibition could well be found incompatible with Article 10 having regard to *VgT*. However, it urged caution in reversing the prohibition given the important rationale of the prohibition and the difficulty of devising a more circumscribed solution. Having noted the approach of the Canadian Supreme Court and the differing freedom of expression traditions in the United States and Australia, the JCHR preferred the European approach in that it gave "appropriate weight to the legitimate objective of securing equality of opportunity for political expression, at any rate in the broadcast media" which tradition justified the prohibition. The JCHR continued:

> "63. ... there are wider considerations which we believe urge the utmost caution in moving from the current statutory position in the UK (where television and radio access to those seeking to advance political causes is restricted almost entirely to the highly regulated system of party political broadcasts). These wider considerations include the fear of the annexation of the democratic process by the rich and powerful, to which the Court alluded in its judgment in *VgT*... The risks of this will be intensified where it proves impossible to prevent concentration of cross-media ownership in one country. We are also conscious that the compromise hinted at by the Court - a more circumscribed ban applied more discriminatingly - presents a formidable challenge to put in statutory form. In particular, it is difficult to conceive of how to devise ways of allocating air time or capping expenditure in relation to a "political viewpoint" (as opposed to a political party, however that might be defined in statute)..."

45. While the JCHR doubted the general applicability of the above-cited judgment in the *VgT* case and saw some merit in waiting for the jurisprudence in this area to mature further before deciding on the appropriate legislative response, it nevertheless considered that a total prohibition on political advertising on radio and television was likely to be held to be incompatible with Article 10, as the Government had itself recognised in the Explanatory Notes to the 2002 Bill. The JCHR recommended that the Government "examine ways in which workable and Convention-compatible restrictions of this kind could be included in the Bill".

46. The Joint Committee on the Draft Communications Bill ("the JCDCB") was a parliamentary body set up to consider the Bill. Its report of 25 July 2002 supported the principles underlying the proposed prohibition:

> "301. ...The Government's view is that there are strong grounds for re-enacting the long-standing ban on political advertising in the broadcast media, but it acknowledges that a recent decision of the European Court of Human Rights has cast doubt on the compatibility of that ban with the Convention. Professor Eric Barendt argued that a blanket ban on political advertising was not compatible with human rights and suggested that the aim could best be secured by limits on expenditure on political advertising. The Joint Committee on Human Rights has argued that a ban on the purchase of advertising time for political purposes is likely to be compatible with Convention rights. We support the principles underlying the proposed ban on political advertising ... and urge the Government to give careful consideration to methods of carrying forward that ban in ways which are not susceptible to challenge as being incompatible with Convention rights."

47. The Independent Television Commission ("the ITC") had overall responsibility for commercial television at the time. On 10 October 2002 the ITC invited the Government to maintain the prohibition:

> "The ITC shares the Government's principled objections to political advertising and hopes that the ban, which has been effective, will be retained. Our own assessment is that an OFCOM/broadcaster-administered scheme to 'control' political advertising based around tests of due impartiality and undue prominence would, fairly swiftly, collapse on the grounds of unworkability in practice ... Once the absolute bar is removed, the broadcasters...would at the very least be open to challenge if they refused to accept political adverts. We are then on a slippery slope ... banning named political parties is fairly ineffectual where ... it is not difficult to create front organisations. The same will be true of many other emotive single issues, such as right to life. The Strasbourg decision in the Swiss case provided no clear guidance as to when a political advertisement may be subject to prohibition. So there must be at least a risk that any 'halfway house' would – in addition to being ineffective – still be held to be incompatible."

(c) Introduction of the 2002 Bill to Parliament and related debates

48. On 19 November 2002 the Government introduced the 2002 Bill to Parliament with the prohibition on political advertising intact. The Minister introducing the Bill made a statement under section 19(1)(b) HRA 1998:

> "I am unable (but only because of [the prohibition on political advertising]) to make a statement that, in my view, the provisions of the [2002 Bill] are compatible with the Convention rights. However, the Government nevertheless wishes the House to proceed with the Bill".

49. This was the only time since the enactment of the HRA that the Government had adopted such a procedure: it did not mean that the Government considered the 2002 Bill incompatible but rather that it could not clearly state that it was compatible given the *VgT* judgment.

50. On 22 November 2002 the Secretary of State for the Department of Culture, Media and Sport ("DCMS") published a Department Memorandum in response to the report of the JCHR of July 2002:

> "... the Government is aware that the case of [*Vgt*] casts doubt on whether the ban on political advertising (which the Bill would re-enact) is compatible with the ECHR. We note the Committee's view that the legitimate objective of securing equality of opportunity for political expression in the broadcast media justifies restrictions on political advertising, and that the utmost caution should be exercised in changing the present statutory position ....
>
> With the Committee's observations in mind, the Government has followed the Committee's recommendation to examine ways in which workable and Convention-compatible restrictions could be included in the Bill. We have in particular considered an alternative regime based on specific prohibitions, such as banning all party political advertising, and all political advertising of any kind around the time of elections or referenda, coupled with other rules to avoid the predominance of any particular point of view, to provide visual or audible identification of political advertisements, and to control the scale of political advertising in terms both of broadcasting time and the proportion of advertising revenue that a broadcaster is permitted to derive from political advertising. We have concluded that it would be very difficult to make such a scheme workable, and that in any event it would fall significantly short of the present outright ban and allow a substantial degree of political advertising to be broadcast."

51. On 3 December 2002 the Secretary of State for the DCMS explained to Parliament why a compatibility statement had not been possible:

> "Although there will of course be an opportunity for this matter to be debated fully in Committee, I wanted to explain the position to the whole House. The decision to proceed with a Bill containing a provision of this kind was obviously exceptional, and was made only after careful deliberation and a full examination of both the legal arguments and the policy alternatives.
>
> For many years, successive Governments have maintained a complete ban on advertising of a political nature on television or radio. The Government's intention in this case is to continue with the current ban—a ban that was supported by the Neill committee in its 1998 report on funding of political parties—and to define more precisely what is meant by "political", so that OFCOM may continue to use the broad reading of the word that existing regulators use. ...
>
> However, a potential complication exists in the form of [the *VgT* judgment] which [concerned] an apparently similar ban. That point was also noted by the [JCHR]. In response to the ECHR's judgment and to the [JCHR's] concerns, we looked hard at the current ban to see whether some minor changes would make it more certain that it

> was human rights compatible. Unfortunately, any such change would still allow substantial political advertising, and I hope that there is cross-party agreement that that would not be a desirable outcome. By denying powerful interests the chance to skew political debate, the current ban safeguards the public and democratic debate, and protects the impartiality of broadcasters.
>
> Having examined all the facts, and following extensive legal advice, I have concluded that very strong arguments could be advanced in favour of the ban contained in this Bill being compliant with the ECHR. ...
>
> The Government apply testing standards to the consideration of the compatibility of their legislation with the convention and, given the existence of [*VgT*], I must ask the House to consider this Bill with a section 19(1)(b) of the Human Rights Act 1998 statement attached to it. That does not mean that we believe the Bill to be incompatible with the ECHR, and we would mount a robust defence if it were legally challenged. Of course, if that defence subsequently failed before the domestic courts, we would need to reconsider our position. Beyond that, we take our international obligations extremely seriously and we would seek to amend the ban in accordance with any judgment of the European Court of Human Rights in Strasbourg that ruled against the UK legislation. As things stand, however, the Government believe that it is right to ask the House to continue the ban on political advertising."

52. On 10 December 2002 the Secretary of State of the DCMS responded to an MP's query as to the Convention compatibility of the prohibition enclosing a detailed DCMS "Explanatory Note" setting out the Government's reasons for maintaining the prohibition. The DCMS Explanatory note recorded that, while the *VgT* case had called into question whether the prohibition was compatible with the Convention, the prohibition had enjoyed wide and cross-party support and was strongly supported by the Neill Committee. The pre-legislative scrutiny committee and the JCHR supported the principles behind the prohibition and had urged the Government to examine ways of ensuring that it was Convention-compatible. The Government had taken appropriate advice. A more certainly Convention-compatible prohibition could only be achieved by a significant shift in the approach to the prohibition which would open the way "at the very least to substantial advertising by lobby groups and issue campaigners". Moreover, there was a "very strong case" that the prohibition was ECHR compatible which was why the Government asked Parliament to proceed with the Bill with the prohibition intact.

Alternatives to the prohibition had been examined in order to examine how the prohibition might be maintained in a Convention compliant manner:

> "In particular, consideration was given to an alternative regime based on specific prohibitions, such as banning all party political advertising and all political advertising around the time of elections or referendums; coupled with other rules to avoid the predominance of any particular point of view on one channel, to provide visual or audible identification of political advertisements, and to control the scale of political advertising in terms both of broadcasting time and the proportion of advertising revenue that a broadcaster is permitted to derive from political advertising.

8. The conclusion was reached, taking account of legal advice, that it would be very difficult to make such a scheme workable, and that in any event it would fall significantly short of the present outright ban, and allow a substantial degree of political advertising to be broadcast across a number of channels."

The DCMS Explanatory Note went on to outline advice the DCMS had received from counsel as to the Convention compatibility of the prohibition despite the *VgT* judgment:

"20. The Government sought Counsel's advice regarding the effect of the Swiss case on the compatibility with the Convention of the ban on political advertising contained in the Broadcasting Act 1990. Counsel advised that, but for the Swiss case, there is a very strong case that it would be consistent with Article 10 for domestic law to prohibit political advertising. He also expressed the view that the judgment of the European Court of Human Rights in the Swiss case was unconvincing and that there were strong arguments to justify a domestic court and the European Court itself not following that decision in the present context.

21. The main points of Counsel's advice in coming to this view related to the following factors:

(a) the fundamental importance of maintaining impartiality in the broadcast media because of its reach, immediacy and influence;

(b) to allow advertising by political bodies, or advertisements of a political nature, would conflict with the principle of impartiality, allow powerful groups to buy influence by buying airtime, and deprive broadcasters of protection from political advertisers seeking to exert editorial influence over other programmes in the service;

(c) special treatment for broadcasting in this respect is supported by considerations of spectrum restrictions, the third sentence of Article 10(1) (permitting broadcasting licensing) and the Television Without Frontiers Directive;

(d) recent independent consideration has supported the ban: e.g. the Neill Committee and the Joint Committee on Human Rights;"

(e) the criticism that the ban applies to political bodies rather than looking at the nature of each advertisement is unjustified, because any advertisement by such a body will tend to promote its interests (if only by promoting name recognition or fund-raising), because it would be inherently difficult and uncertain to say whether or not the content of a particular advertisement was "too political", and because (in the light of supporting factors) Parliament is acting within its discretionary area of judgment in focusing on the nature of the body, rather than the nature of the advertisement, to pursue its objective of impartiality.

22. Counsel's explanation as to why he found the reasoning in the Swiss case to be unpersuasive, included the following points:

(a) the Strasbourg Court's "puzzling" conclusion that the concerns which the ban sought to address (e.g. stopping powerful groups from having undue influence) were not "pressing" in light of the fact that the ban did not cover other forms of media;

(b) the Court accepted that a prohibition on political advertising could be permissible in certain circumstances, but Counsel pointed out that there is authority that general ("bright line") rules can be justified, even if they can produce hard cases at the margins;

(c) the Court gave insufficient weight to the fact that other forms of publicity (e.g. newspapers, leaflets, hoardings) were available."

53. On 10 December 2002 the JCHR wrote to the Government seeking a fuller explanation why the prohibition was being maintained. On 20 December 2002 the JCHR released a report regretting the Government's failure to explain why it had not included a less strict prohibition in the Bill. On 9 January 2003 the Secretary of State of the DCMS answered the JCHR referring to the letter and the accompanying DCMS Explanatory Note sent in December 2002 to the MP (paragraph 52 above). On 10 February 2003 the JCHR responded that it was satisfied that the Government's course of action was legitimate. In particular, it noted (Fourth Report of the Session 2002-2003):

"40. In our First Report, we set out six factors which we provisionally thought were relevant to an assessment by Parliament of the propriety of proceeding to legislate in a way that would give rise to an acknowledged risk of incompatibility with a Convention right. Taking those matters into account, and in the light of the correspondence mentioned above, we are satisfied that—

- in any litigation about the ban on political advertising and sponsorship in the broadcast media under clause 309 of the Bill, the Government would argue that the decision in [*Vgt*] should not be followed, or alternatively that the decision does not necessarily entail the incompatibility of clause 309 with the right to freedom of expression under ECHR Article 10, and that such an argument would have a reasonable chance of success;

- the Government would feel obliged to amend the law if that particular provision were held by the [Court], after argument, to be incompatible with Article 10, and would consider its position if a court in the United Kingdom were to make a declaration of incompatibility under section 4 of the Human Rights Act 1998; and

- in the meantime, pending the opportunity to advance before the courts its arguments relating to the compatibility of a ban with Article 10, the Government has good reasons for believing that the policy reasons for maintaining the ban outweigh the reasons for restricting it, particularly as it would be difficult to produce a workable compromise solution."

54. On 13 January 2003 the Electoral Commission (an independent body established by Parliament to keep under review a range of electoral and political matters) published a report entitled "Party Political Broadcasting: Report and Recommendations". It considered the case for the prohibition to be persuasive. A principal concern was to avoid those with higher financial resources from hijacking the political agenda in that the electorate would receive information only from a very small number of well-financed (large) political parties**.** It would also be difficult for the broadcasters to maintain

balance and impartiality. International comparisons did little to alleviate concerns regarding the impact of paid advertising, the Commission referring to experiences in the United States and to Germany where, despite reduced rates for advertising, only the largest parties had the resources for such advertising. Notwithstanding the *VgT* judgment, the proposed prohibition could be justified under Article 10(2) of the Convention (pages 16-17 of the Report):

> "...it is to be noted that the [*VgT*] case was concerned with paid political advertising in general and not with political party advertising within a context where the ban on paid advertising operated alongside a regime of free broadcasts which are essentially unmediated by the broadcasters. Such a [regime] has not been the subject of a ruling either in Strasbourg or by our own courts under the Human Rights Act. ... [it] is undoubtedly a counterbalance to the ban on paid advertising. While it does not offset the ban in its entirety ...we nevertheless consider it to be a significant counterbalance because it applies principally at the time of elections.
>
> It seems to us that the UK system would survive scrutiny under the ECHR and the HRA, at least if the regime of free and unmediated broadcasts is robust."

55. The *VgT* judgment was considered by the House of Lords in *R (ProLife Alliance) v BBC* ([2003] UKHL 23). Lord Hoffmann described the *VgT* judgment as "a guarded, if somewhat opaque, decision", although he noted that the Court would not "exclude that a prohibition of 'political advertising' may be compatible with the requirements of Article 10 in certain situations". Lord Walker commented that the *VgT* judgment "does not, with respect, give full or clear reasons for what seems to be a far-reaching conclusion... The true significance of the *VgT* case is therefore rather imponderable".

C. The Communications Act 2003 ("2003 Act"), enacted in July 2003

1. The prohibition on political advertising

56. The 2003 Act was enacted by Parliament without member dissent. The 2003 Act replaced the existing regulators with a unified regulator for media, telecommunications and radio communications called the Office of Communications ("OFCOM"). However, until 31 December 2007 the Broadcast Advertising Clearance Centre ("BACC") was responsible for pre-transmission examination and clearance of advertisements proposed for broadcasting.

57. Section 319(1) requires the OFCOM to set and review standards to achieve certain fixed objectives listed in section 319(2) which objectives include that news on television and radio is presented with due impartiality and that the impartiality requirements of section 320 are complied with and,

further, that advertising contravening the prohibition on political advertising is not included in television or radio services.

58. Section 321(2) contains that prohibition and provides that:

> "(2) For the purposes of section 329(2)(g) an advertisement contravenes the prohibition on political advertising if it is:
>
> (a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
>
> (b) an advertisement which is directed towards a political end; or
>
> (c) an advertisement which has a connection with an industrial dispute."

59. Section 321(3) defines objects of a "political nature and political ends" as including:

> "(a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;
>
> (b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;
>
> (c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;
>
> (d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;
>
> (e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;
>
> (f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;
>
> (g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends."

60. Accordingly, the prohibition applies, not only to advertisements with a political content, but also to those bodies which are wholly or mainly of a political nature irrespective of the content of their advertisements.

61. Section 321(7) provides an exception for public service advertisements inserted by or on behalf of a government department and for party political and referendum campaign broadcasts of certain political parties (paragraph 64 below). The political parties on whose behalf such broadcasts may be made are determined by OFCOM and only those registered with the Electoral Commission are eligible to be selected.

2. The obligation of impartiality in the broadcast media: 3 mechanisms

62. Political impartiality has been a core feature of the legislative regime governing broadcasting from the outset and is achieved by three mechanisms. The first is the prohibition against paid political advertising.

63. The second is the statutory obligation of impartiality on all broadcasters. Section 320 of the 2003 Act is entitled "Special Impartiality Requirements" and subsections 1 and 2 provide as follows:

> "(1) The requirements of this section are–
>
> (a) the exclusion, in the case of television and radio services ... from programmes included in any of those services of all expressions of the views or opinions of the person providing the service on any of the matters mentioned in subsection (2);
>
> (b) the preservation, in the case of every television programme service, teletext service, national radio service and national digital sound programme service, of due impartiality, on the part of the person providing the service, as respects all of those matters;
>
> (c) the prevention, in the case of every local radio service, local digital sound programme service or radio licensable content service, of the giving of undue prominence in the programmes included in the service to the views and opinions of particular persons or bodies on any of those matters.
>
> (2) Those matters are–
>
> (a) matters of political or industrial controversy; and
>
> (b) matters relating to current public policy."

64. The third mechanism is the provision of free party political, party election and party referendum campaign broadcasts by broadcasters, a mechanism which has been part of the regulatory landscape since broadcasting began. The first such broadcast on the radio was in 1924 and on the television in 1951. Section 333 of the 2003 Act provides that licences for certain broadcasters must require the inclusion of free broadcasts and the observance of OFCOM Rules. Those Rules regulate party political broadcasts (offered to the major parties at the time of key events in the political calendar); party election broadcasts (offered during electoral periods to each of the main parties and to smaller registered parties contesting one sixth or more of the seats up for election at a general election) and referendum campaign broadcasts (offered to each designated referendum organisation in the run-up to a referendum).

D. The European Platform of Regulatory Authorities ("EPRA")

1. EPRA Survey, May 2006

65. This survey was completed by the Secretariat of EPRA on the basis of information received from 31 States/territories: Austria, Belgium (2), Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, the Isle of Man, Israel (2), Italy, Latvia, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden and Switzerland (2). It recommended caution in relying on a comparative review in this context. Given the lack of precise definitions in domestic laws and the great diversity of national traditions, there was likely to be confusion as to the meaning to be attributed to "political", a notion that could include matters as diverse as party political broadcasting during electoral periods as well as public interest expression by a non-governmental organisation.

66. In response to the question "Is paid political advertising in broadcasting prohibited in your country?", the Survey noted:

> **"Countries with a ban on paid political advertising**
>
> Paid political advertising is statutorily forbidden in the vast majority of Western European countries such as Belgium, Denmark, France, Germany, Ireland, Malta, Norway, Portugal, Sweden, Switzerland, and the UK. Several countries from central and Eastern Europe, such as the Czech Republic and Romania, also have a prohibition of paid political advertising.
>
> The most traditional justification for this prohibition is that rich or well-established parties would be able to afford significantly more advertising time than new or minority parties – thus amounting to a discriminatory practice. Another rationale invoked for the restriction or the ban is that it may lead to divisiveness in society and give rise to public concern. It has also been suggested, albeit less frequently, that a prohibition would preserve the quality of political debate.
>
> **Countries allowing paid political advertising**
>
> Paid political advertising is allowed in many central and Eastern countries such as Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, [the former Yugoslav Republic of Macedonia], Poland, and the Baltic States: Estonia, Latvia and Lithuania. In a few countries such as in Bosnia-Herzegovina (60 days prior to Election Day), and Croatia, political advertising is only permitted during the election period.
>
> It is often overlooked that several countries in Western Europe, such as in Austria, Finland, Luxembourg (for the moment, this will change shortly) and the Netherlands also allow paid political advertising.
>
> In Italy, until 2003 paid political advertising, i.e. self-managed spaces, was allowed also for national broadcasters, provided that they also transmitted "political

communications spaces" ... i.e. discussion programmes with the participation of political representatives; now it is allowed only for local broadcasters and has to cost no more than 70% of the price applied to commercial advertisements, whereas national broadcasters may only broadcast them for free.

In Greece, while there is a permanent and wide-ranging ban on the political advertisement of persons, paid political advertising of political parties is not prohibited.

In Spain, while the ban of political advertising applies permanently for television broadcasters, the Spanish Electoral Code permits paid electoral advertising on commercial radio stations, only during the election period.

The main rationale for paid political advertising is that it may enable new candidates to obtain recognition and a profile. It is also often argued that the right to political advertising is an integral part of the right to freedom of expression and information."

67. As to the scope of the ban of political advertising, the Survey stated:

"As a rule, political advertising does not exclusively relate to election time, or political parties or candidates. Advertising on other issues, which reflect important societal debates, such as animal rights, environmental issues, abortion etc. (often referred to as political propaganda or issue advertising) may be considered to pursue a political end or to be political in nature and may therefore be construed as political advertising.

Countries with a wide-reaching ban

This is for instance the case in France, Ireland, the Isle of Man, Israel, Malta, Spain and the UK. In Ireland, the ban is applied to all advertising which can be said to be political in nature and to all groups which are political by design. In this sense it is applied in the broadest sense and not limited to election campaigns or voting for referenda exclusively. In Israel, the ban applies permanently and to political parties as well as other interest and societal groups.

On the Isle of Man, the term "political" is used in a wider sense than "party political". The prohibition precludes, for example, issue campaigning for the purposes of influencing legislation or executive action by government or by local authorities.

In France, the ban applies to political parties and candidates, but also to any organization whose advertising messages would be directed towards a political end. Associations (most interests and societal groups are constituted as such) are not allowed to broadcast advertising spots. Associations with charitable aims may broadcast so-called "*messages d'intérêt general*" which should not include any political message.

In Spain, the ban applies permanently and does not specify the groups.

In Malta, the ban applies permanently except for such approved schemes of political broadcasts. Paragraph 1(f) of the Third Schedule bans advertising of a political nature and this has always been taken to apply in its strict interpretation to the political parties. However, the Authority has also taken a wider interpretation and applied such

a ban on advertising to other organisations such as trade unions etc. which pursue aims which could be qualified as political in the broad sense.

Countries with a more restricted scope of the ban

In Switzerland, as a consequence of the [*VgT* judgment] ... certain forms of "political" advertising are now allowed. NGOs or societal groups may place advertising with a certain political content, but not before elections or in campaigns before plebiscites. However, the prohibition on advertising by political parties and candidates remains.

Similarly, in Denmark - as a consequence to the above-mentioned ruling - the permanent ban on political advertising on television concerns advertising for political parties, political movements and political candidates as well as advertising for trade unions and religious movements. The ban is not considered to include political movements in a broader sense such as environmental and societal groups except when such groups are nominated for political bodies or assemblies.

In addition, Danish legislation does not allow advertisements with political messages to be broadcast during the time of election campaigns where a total ban is considered necessary to protect voters from inappropriate influencing and to ensure equal democratic rights of candidates regardless of economic means or funding. Political advertising and campaigning is not prohibited in other media such as radio broadcasting.

In Norway, the ban applies permanently and to all groups and parties that promote political ends. However, the ban will be interpreted in the light of Article 10 of The European Convention on Human Rights and the case law from The European Court of Human Rights derived from said article.

In Sweden, only broadcasts which are subject to conditions of impartiality cannot include political advertising. DTT-licences, for the commercial channels, have as a rule not included such a condition and have therefore been free to broadcast political advertising. Until 1 March 2006 this did however not apply to TV4 DTT-licences for their niche channels. The new licences for TV4's niche channels however, do not include a condition of impartiality, which means that they can broadcast political advertising.

In Italy, the term "political" is used in a very narrow sense; other interest groups would fall under what are called "social" messages. All broadcasters may transmit messages with a social utility content (this is not defined) and can also be paid for, provided that the price does not exceed the 50% of the cost of commercial advertisements. These messages (paid for or not) are not considered for the calculation of the hourly/daily time limits and cannot, altogether, last for more than 4 minutes per day.

In some countries, the focus of the ban is on election and election time (e.g. Czech Republic) or political parties and candidates (e.g. Belgium ...). Issue advertising is not mentioned."

68. Certain States allowed political advertising subject to restrictions and some States had no such restrictions at all:

"**Countries with restrictions on paid political advertising**

Most of the countries which allow political advertising also foresee certain legal restrictions to avoid the discriminatory character of the practice. This includes limits on the duration and frequency (e.g. [the former Yugoslav Republic of Macedonia], Bosnia and Herzegovina), scheduling (e.g. [the former Yugoslav Republic of Macedonia]: not during news, children programmes) limits on the charges for such ads (e.g. Bosnia and Herzegovina where the price lists must be submitted to the regulator for review 15 days prior to the elections period), or on maximum election expenditure that is permitted by the law (Greece, Latvia where during Saeima (Parliament) and European Parliament elections, a party may spend no more than 0,20 LVL (0,284 EUR) x the number of voters in the previous elections), labelling/identification requirements (e.g. Cyprus, [the former Yugoslav Republic of Macedonia]: paid political advertising should be properly and visibly labelled, from the commencement to the end of the programme, as "paid political advertising"). In Hungary, broadcasters must provide all parties with equal conditions (same price, same programme period etc.) but there are no specific restrictions concerning the amount of political advertising.

Worth noting is that in several countries, such as in [the former Yugoslav Republic of Macedonia], public service broadcasting is not allowed to broadcast paid political advertising, only private broadcasters may do so.

Countries with no restrictions on paid political advertising

This is the case for instance in Austria, Estonia, Finland and Poland. In Poland, the issue of restrictions to political advertising is regulated by each broadcaster by means of internal advertising codes.

Analysis & Comments:

• The often mentioned East-West divide with regard to the ban of political advertising, even if it reflects a real trend, may be somewhat misleading. The West-European Countries which allow this practice are often forgotten in comparative overviews.

• In view of the different positions on this matter, the Council of Europe does not take a stance on whether paid political advertising should be accepted or not, and simply limits itself to stating in its Recommendation "that if paid advertising is allowed it should be subject to some minimum rules (...)".

• Most countries which allow paid political advertising have introduced some limits so that this practice is not necessarily always discriminatory. All parties may be offered the same opportunities. However, this "equality of opportunity" is only real when all parties have the necessary funds at their disposal to buy the same amount of time. ..."

69. The Survey summed up the issues as follows:

"The lack of explicit definitions and the great diversity of national traditions are likely to create confusion between European counterparts when referring to political advertising. Generally, the term "advertising" as in political advertising is used in the broadest sense as political propaganda. As a rule, national advertising provisions are

> not applicable as they require payment or similar consideration. However, in some countries, political advertising is subject to the general legal provisions on advertising. ...
>
> Rather surprisingly, a few countries do not impose any restrictions at all on paid political advertising. However, it does not seem to raise any specific problem or to cause any concern. ...
>
> In the vast majority of countries, parties and/or candidates are usually granted free airtime, often but not exclusively on public service broadcasters to present their programmes. It is interesting to note that such a system does not exist in a few countries, where there is no official electoral campaign scheme on television. ...
>
> It is sometimes argued that if candidates and parties have fair access to free airtime during election campaigns, there is less (or no) need for paid political advertising. This cannot be systematically verified in practice as the existence of a scheme for allocating a free airtime does not prevent some countries to allow paid political advertising. ...
>
> In many (Western) European countries, the most burning topic at present seems to be "issue advertising", i.e. messages with a political end emanating from organizations which are not political parties, such as interest or societal groups. Further to the ECHR ruling, a few countries have restricted the scope of the ban of political advertising and now allow such spots - outside election periods. ..."

The summary ended with the following question:

> "Are the current total bans (including issue advertising) justified in a "relevant and sufficient manner" so that they would survive scrutiny under the ECHR? Do they constitute a disproportionate restriction on the freedom of expression?"

2. EPRA: Paper for Working Group 1 on "Political Advertising", 30th EPRA Meeting, October 2009

70. This paper commented upon recent Convention case-law. It noted that the *VgT* case had opened an original perspective since Article 10 now appeared to require a positive intervention by the State to implement a form of right to broadcast through advertising space. The paper compared *Appleby and Others v. the United Kingdom* judgment (no. 44306/98, ECHR 2003-VI), which emphasised the value of access to other media, and the above-cited *Murphy* case which did not accept arguments based on *VgT*.

3. Further comparative work

71. While the EPRA study of 2006 included certain non-Contracting States, the Court has reviewed 34 Contracting States including 7 (Monaco, Russia, San Marino, Serbia, Slovenia, Turkey and Ukraine) which were not covered in the EPRA study. Since the 2006 report of the EPRA, there have been relevant changes to the regulatory regimes in 25 Contracting States, most of which have been relatively significant.

72. Of 34 States examined, 19 States prohibited paid political advertising in some form. In this latter respect, the scope of the prohibition in 7 States (Czech Republic, France, Germany, Ireland, Portugal, Spain and Sweden) as well as the United Kingdom could be considered wide either because of the wide definition of "political", because of its application outside of electoral periods or for both reasons. However, even for these 7 States, the definition and interpretation of "political" varies so that the prohibition could arguably be (Ireland) or has been (Czech Republic, France, German, Portugal and Spain) applied to allocate airtime to certain NGOs (such as the Red Cross, Greenpeace) to certain governmental organisations (such as UNHCR) and to some national charities. The trend in the vast majority of the Contracting States reviewed is to allow the broadcasting of advertisements of a certain social interest nature from certain bodies.

E. Council of Europe texts

73. Recommendation R(1999)15 of the Committee of Ministers on measures concerning media coverage of election campaigns provided:

> **"5. Paid political advertising**
>
> In member States where political parties and candidates are permitted to buy advertising space for electoral purposes, regulatory frameworks should ensure that:
>
> - the possibility of buying advertising space should be available to all contending parties, and on equal conditions and rates of payment;
>
> - the public is aware that the message is a paid political advertisement.
>
> Member States may consider introducing a provision in their regulatory frameworks to limit the amount of political advertising space which a given party or candidate can purchase."

74. The Explanatory Memorandum to that Recommendation noted:

> **"Paid political advertising**
>
> Paid political advertising in the broadcast media has traditionally been prohibited in many Council of Europe member States, whilst it has been accepted in others. One of its major advantages is the opportunity which it provides for all political forces to widely disseminate their messages/programmes. On the other hand, it may give an unfair advantage to those parties or candidates who can purchase important amounts of airtime.
>
> In view of the different positions on this matter, the Recommendation does not take a stance on whether this practice should be accepted or not, and simply limits itself to saying that if paid advertising is allowed it should be subject to some minimum rules: one, that equal treatment (in terms of access and rates) is given to all parties

requesting airtime, and two, that the public is aware that the message has been paid for.

It may also be considered important to set limits on the amount of paid advertising that can be purchased by a single party. Nevertheless, the Recommendation does not specify whether it is desirable to do so nor does it set any precise limits on the amount of paid advertising, as it is considered that the decision on this matter should be taken at the national level."

75. On 7 November 2007 Recommendation Rec(2007)15 revised R(1999)15. The Draft Explanatory Memorandum noted:

"78. In view of the different positions on this matter, Recommendation CM/Rec(2007) ... does not take a stance on whether this practice should be accepted or not, and simply limits itself to saying that if paid advertising is allowed it should be subject to some minimum rules, in particular that equal treatment (in terms of access and rates) is given to all parties requesting airtime."

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; and *TV Vest AS and Rogaland Pensjonistparti v. Norway,* no. 21132/05, § 78, ECHR 2008 (extracts)). 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)) 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 process 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) 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 construed 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, *Reports of Decisions and Judgments* 1996-V, § 58). Such questions include the protection of animals (*Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, §§ 61-64 ECHR 1999-III; 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): 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).

(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) 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); 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 *V*gT 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; 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.

FOR THESE REASONS, THE COURT:

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by nine votes to eight, that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a hearing on 22 April 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle	Dean Spielmann
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- concurring opinion of Judge Bratza;
- joint dissenting opinion of Judges Ziemele, Sajo, Kalaydjiyeva, Vučininć and De Gaetano;
- dissenting opinion of Judge Tulkens, joined by Judges Spielmann and Laffranque

D.S.
M.O.B.

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; and *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, 11 December 2008), 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 *Jersild v. 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.

JOINT DISSENTING OPINION OF JUDGES ZIEMELE, SAJÓ, KALAYDJIEVA, VUČINIĆ AND DE GAETANO

1. We regret that we cannot share the view of the majority that there has been no violation of Article 10 in this case. We are particularly struck by the fact that when one compares the outcome in this case with the outcome in the case of *VgT Verein gegen Tierfabriken v. Switzerland* (no. 24699/94, ECHR 2001-VI) the almost inescapable conclusion must be that an essentially identical "general prohibition" on "political advertising" – sections 321(2) and (3) of the 2003 Act in this case and sections 18 and 15 of the Federal Radio and Television Act and the Radio and Television Ordinance respectively in *VgT* – is not necessary in Swiss democratic society, but is proportionate and *a fortiori* necessary in the democratic society of the United Kingdom. We find it extremely difficult to understand this double standard within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it.

2. In the instant case the prohibition was an almost blanket restriction. It prohibits, regardless of content, all paid advertising on "political" matters. This includes the prohibition of paid advertisements on any subject whatsoever by any body whose objectives are "wholly or mainly political", regardless of the identity or function of the advertiser. The term "political" is so widely defined that it covers most issues of public interest. The extent of the ban was highlighted both by Mr Justice Ousley in the High Court (see paragraph 13 of the majority judgment) and by Lord Scott in the House of Lords (paragraph 27). Both, however, defer to the will of Parliament[1]. In the instant case all television and radio broadcasters – whether national or local, and whether public service or independent – fall within the scope of the prohibition: in this sense the prohibition is wider than that which was considered excessive in *VgT*. Moreover the prohibition in this case applied without the possibility of any exception. In sum, the prohibition applied to the most protected form of expression (public interest speech), by one of the most important actors in the democratic process (an NGO) and on one of the most influential media (broadcasting).

3. We are concerned about the Court's approach in the instant case to the issue of "general measures" and the application of the proportionality principle to the facts of the case. The majority judgment recalls that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest. Reference to that standard is made in the context of the examination of the extent of the margin of appreciation to be afforded,

[1] See Griffith, J. A. G., *The Politics of the Judiciary* Fontana Press (Hammersmith, London), 1997, 5th ed., p. 342.

where the type of the expression at issue is treated merely as one of a number of "factors" and not as a specific right that can be restricted only where a *pressing social need* for its limitation is *clearly and convincingly demonstrated*. Since, as observed in paragraph 104 of the majority judgment, "the margin of appreciation to be accorded to the State in the present context is, in principle, a narrow one", it should follow, at least in our view, that nothing justifies a departure from the well-established methodology of proportionality analysis where one *starts* with the analysis of the nature of the right, which analysis is decisive for effective human rights protection. In our understanding of the principles established in earlier case-law, an assumption of existing public interest is neither to be equated with, nor to be necessarily seen as sufficient to establish, the pressing social need justifying restrictions to freedom of expression as guaranteed by Article 10.

I

4. Is a limitation of political speech or public interest speech in some way more "justifiable" because the restrictive measure is a general one? In the instant case the respondent Government argued in their Memorial that "[t]he Court should be particularly slow to conclude that the judgment of Parliament as to what was appropriate was outside its discretionary area of judgment for the United Kingdom when the approach it adopted has received the support of expert and independent bodies which have assessed the issue...". They refer, among others, to the fact that "[t]he matter was debated in Parliament...and there was agreement in Parliament that in practice the ban could not be reduced in scope..." (paragraph 28 of the Memorial). This implies that general measures of Parliament should be treated with special respect, even in the context of Article 10 (or, for that matter, in the context of Articles 9 to 11). We beg to differ in light of our jurisprudence.

5. General measures have been considered in the context of three distinct areas. In the context of Article 1 of Protocol No. 1, in regard to economic and social policy, this Court is, in principle, deferential to legislation (regarding the purpose of the legislation). But it is in the context of the finding of the purpose of the applicable law (i.e. that it served a public interest, e.g. related to housing) that deference was paid to the "general measure" nature of the interference. Needless to say, there is a fundamental difference between the protection granted to possession of property and rights that are protected in Articles 9 to11: in regard to these rights, and to freedom of expression in particular, "general interest" or "public interest" as such are not recognized grounds for interference in the text of the Convention.

6. Outside of Article 1 Protocol 1, a degree of deference to general measures can be observed in the electoral context, where the Convention is clearly less categorical than in the Article 10 context and, consequently, because of the nature of the right at stake, a wider margin of appreciation was to be allowed to contracting States in determining the conditions under which the right to vote was exercised (see *passim Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX, and in particular §§ 60 and 62; see also *Doyle v. the United Kingdom* (dec.) no. 30158/06, 6 February 2007). But even here, general restrictive measures were accepted conditionally (*Ždanoka v. Latvia* [GC], no. 58278/00, § 134-135, ECHR 2006-IV), if at all (*Hirst (no. 2)*): decisive weight was attached to the existence of a time-limit and the possibility of reviewing the measure in question (*Paksas v. Lithuania* [GC], no. 34932/04, § 109, ECHR 2011 (extracts)). A general ban was held to be in violation in *Hirst (no. 2)* precisely because it did not allow individual consideration, which is exactly the situation in the present case (the fact that in *Hirst (no. 2)* there was no genuine parliamentary debate since the general measure was first enacted in 1870 was *an additional reason* for finding a violation).

7. There is also deferential reference to general measures in a few rather specific Article 8 cases. Thus, for instance, in *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I) the Court examined whether a regulation on *in vitro* fertilization struck a fair balance *between individuals*, not primarily because of the need to eliminate uncertainty, but because of the special challenge the legislature faced in weighing "entirely incommensurable interests" between two citizens (at § 89). The present case is not one of balancing between the incommensurable Convention rights of two individuals. As to *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III) the case concerned a right – the right to die – whose existence was contested, and it was in this context that the Court held that it was "primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created" (at § 74).

8. A general measure, especially if amounting to a total ban (but nonetheless limited in time and to a particular locality) was held legitimate where it was intended to ensure an even application of the law in that it aimed at the exclusion of any possibility for the taking of arbitrary measures against a particular exercise of the right to demonstrate (see *Christians against Racism and Fascism v. the United Kingdom*, Commission decision of 16 July 1980, DR 21). Nevertheless the then Commission made it clear that "[a] general ban of demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less

stringent measures." The acceptability of the measure in that case was unrelated to its source (legislative or administrative). Likewise, in *Société de Conception de Presse et d'Édition and Ponson v. France* (no. 26935/05, 5 March 2009) the restriction – a general legislative ban – was found proportionate to the purpose, but again the legislative origins of the ban were not a relevant consideration; what *was* relevant was the uncontested European consensus on a general ban in respect of tobacco advertisements (a matter, in any case, involving *ab initio* a lower level of scrutiny and a wider margin of appreciation because of the nature of the right involved). In other words the Court has repeatedly, expressly or implicitly, held that the fact that a restriction originated in a "general measure" was not *per se* a reason to depart from the application of the usual standards applicable to the expressions in question. In *Murphy v. Ireland* (no. 44179/98, ECHR 2003-IX (extracts)) the general ban (on advertisements directed to a religious end) was held to be justified because of past experience of unrest in the context of a highly divisive issue in Irish society, namely religious beliefs (§ 73).

9. In the instant case, as already adverted to in paragraph 2 above, the Court was confronted with a general ban on "political" advertisements in broadcasting. The fact that a general measure was enacted in a fair and careful manner by Parliament does not alter the duty incumbent upon the Court to apply the established standards that serve for the protection of fundamental human rights. Nor does the fact that a particular topic is debated (possibly repeatedly) by the legislature *necessarily* mean that the conclusion reached by that legislature is Convention compliant; and nor does such (repeated) debate alter the margin of appreciation accorded to the State. Of course, a thorough parliamentary debate may help the Court to understand the pressing social need for the interference in a given society. In the spirit of subsidiarity, such explanation is a matter for honest consideration. In the present judgment, however, excessive importance has been attributed to the process generating the general measure, which has resulted in the overruling, at least in substance, of *VgT*, a judgment which inspired a number of member States to repeal their general ban -- a change that was effected without major difficulties. As Judge Martens stated (dissenting): "A court should... overrule only if it is convinced 'that the new doctrine is clearly the better law'. This condition is, of course based on the idea that in principle legal certainty and consistency require that a court follows its own established case-law; it should therefore overrule only when the new doctrine is clearly better than the old one..."[1].

[1] See *Cossey v. the United Kingdom* (Plenary), 27 September 1990, para. 5.2, Series A no. 184. See also *Bayatyan v. Armenia* [GC], no. 23459/03, § 98, ECHR 2011.

10. To conclude on this point, the fact that a ban originates in a general measure does not exempt that measure from a full analysis as to its compatibility with the requirements of Article 10 § 2. In the context of general prohibitive measures which border upon prior restraint (see Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 60, Series A no. 216), the standards established in the context of freedom of demonstration apply also to the instant case: "Only if the disadvantage of such processions being caught by the ban is clearly outweighed by the security considerations justifying the issue of the ban, and if there is no possibility of avoiding such undesirable side effects of the ban by a narrow circumscription of its scope in terms of territorial application and duration, can the ban be regarded as being necessary within the meaning of Article 11(2) of the Convention" (see *Christians against Racism and Fascism*, already cited). As has already been adverted, there can be no double standards of human rights protection on grounds of the "origin" of the interference. It is immaterial for a fundamental human right, and for that reason for the Court, whether an interference with that right originates in legislation or in a judicial or administrative act or omission. Taken to its extreme such an approach risks limiting the commitment of State authorities to secure to everyone within their jurisdiction the rights and freedoms guaranteed by the Convention. Where the determination of the public interest and its best pursuit are left solely and exclusively to the national legislator, this may have the effect of sweeping away the commitments of High Contracting Parties under Article 1 of the Convention read in conjunction with Article 19, and of re-asserting the absolute sovereignty of Parliament in the best pre-Convention traditions of Bagehot and Dicey. The doctrine of the margin of appreciation, which was developed to facilitate the proportionality analysis, should not be used for such purpose.

II

11. The majority judgment seems to find, albeit indirectly, that the present ban serves a legitimate purpose, namely, the protection of the right of others (see paragraph 117 of the judgment). These rights of others are promoted through the institution of impartial and integral broadcasting, in the service of democracy. 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, which the public is moreover entitled to receive (see *VgT* (cited above), §§ 73 and 75, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 133, ECHR 2012). However, in the

present case no single group was identified as posing such a threat, and the applicant is an NGO whose potential for dominance has in no way been demonstrated.

12. The general ban on "political" advertisements is problematic not only because, as already indicated, it borders upon prior restraint, but in view of the very doubt as to the usefulness for its purpose – there seems to be an inherent contradiction in a viable democracy safeguarded by broadcasting *restrictions*. Indeed, in our view, the general ban on "political" advertisements appears to be an inappropriately assumed positive duty of the State to enable people to impart and receive information. It is based on the view that powerful groups will invariably hamper the receipt of information by a one-sided information overload. Promoting a right where it cannot be effective without additional State action is, according to our jurisprudence, appropriate, but is not a generally accepted primary ground for rights restriction. There is a risk that by developing the notion of positive obligations to protect the rights under Articles 8 to11, and especially in the context of Articles 9 to11, one can lose sight of the fundamental negative obligation of the State to abstain from interfering. The very initiative to legislate on the exercise of freedom in the name of broadcasting freedom, and in order to promote democracy in general terms, and for aims which may not necessarily fully conform to one or more of the legitimate aims of Article 10 § 2, remains problematic. The ban itself creates the condition it is supposedly trying to avert – out of fear that small organisations could not win a broadcast competition of ideas, it prevents them from competing at all. It is one thing to level a pitch; it is another to lock the gates to the cricket field.

13. Not every issue is a head-to-head competition between wealthy actors and poor ones. The ban's extent is such that it includes social interest advertising, even to the extent of preventing the airing of an advertisement calling attention to the genocide in Rwanda and Burundi (see *R. v. Radio Authority Ex p. Bull and Another* [1998] Q.B. 294). Entirely and permanently closing off the most important medium of communication to any and all advertised messages about the conduct of public affairs is a harsher constriction of freedom than is necessary in a democratic society. Freedom of expression is based on the assumption that the speakers, not the Government, know best what they want to say and how to say it. Ideas can compete only where the speaker is in a position to determine, within the limits recognized by the Convention, which form of imparting ideas serves best the message. The assumption that a range of alternative media were available to the applicant NGO in this case is "illusory" given that radio and television are still the most influential (even if also the most expensive) media. The hope that Animal Defenders International will be able to make

their views known thanks to "programming" disregards the reality that broadcasting, and television in particular, is driven by commercial advertising. Programming is a matter of editorial choice and is subject to the need to maximize viewership. Even in the context of public broadcasting, with all its obligations of fairness, there is a strong tendency to avoid divisive or offensive topics. Programming choices are not likely to stand on the side of NGOs which may represent minority or controversial views, or are critical of the Government of the day which has considerable control over public broadcasting, even in the presence of important safeguards as to daily programming.

14. There can be no robust democracy through benevolent silencing of all voices (except those of the political parties) and providing access only through programming. A robust democracy is not helped by well-intentioned paternalism. Where there is little scope for restriction of a right, the proportionality analysis requires consideration of the existence of less restrictive alternatives. An individualised consideration of the proposed advertisement, for example like the one that operates for commercial advertisements, is one such possibility. A narrower definition of political advertisement could be another. Moreover, the respondent Government did not consider the difference between public and private broadcasting, which have different standards of impartiality. The disregard of less restrictive alternatives is surprising, given relevant European experience to the contrary.

15. The majority judgment invokes the lack of European consensus on how to regulate paid political advertising as an additional ground for considering that in this case the margin of appreciation of the respondent State should be broader than the norm (see paragraph 123 and contrast with paragraph 104). However, it is quite clear that there is a considerable problem as to what State practice should be taken into consideration, if at all, as relevant for the assessment of the existence of a European trend or even binding practice. The material cited in Part D of the chapter dealing with Relevant Domestic Law and Practice (in effect paragraphs 68 to 72) provides examples concerning mostly the regulation of advertising of and by political parties politicians and within the context of electoral legislation. Practically the only observation that is strictly relevant to our case is the comment in the ERPA study which states: "In many (Western) European countries, the most burning topic at present seems to be 'issue advertising', i.e. messages with a political end emanating from organisations which are not political parties, such as interest or societal groups" (see paragraph 69). We consider that this comparative law material, which deals primarily with the regulation of political party advertising, cannot serve as an appropriate basis to accord the respondent State a wide margin of appreciation in what

is essentially a freedom of expression case in which a public interest group proposes an issue of public interest for general discussion. We are perplexed with an approach which attempts to justify for the purposes of the Convention a severe restriction on freedom of expression by reference to a variety of regulatory frameworks which do not specifically address the issue under examination. Even if – which we do not for a moment believe should be the case – one were to give some weight to the alleged *lack of* consensus, in the presence of an uncontested Convention right (and unlike in those Article 8 cases where the *scope* or *extent* of privacy rights is the issue) the lack of European consensus cannot justify a departure from established standards of what is a pressing need in a democratic society. Nothing has been shown in this case to suggest that the state of democracy in the United Kingdom requires, by way of a "pressing need", the wide ban on paid "political" advertisements that is in issue here; or that the said democracy is less robust than in other States parties to the Convention and cannot afford risk-taking with "issue-advertising". On the contrary, tradition and history force one to assert the very opposite.

DISSENTING OPINION OF JUDGE TULKENS, JOINED BY JUDGES SPIELMANN AND LAFFRANQUE

(Translation)

1. I do not share the majority's position that there has not been a violation of Article 10 of the Convention in this case. On the contrary, numerous factual and legal elements lead me to conclude that there has been a breach of this provision.

2. The applicant NGO challenged the legal prohibition on radio and television broadcasting of paid political advertising. In the present case, it was refused authorisation, pursuant to section 321(2) of the Communications Act of July 2003, to screen a television advertisement concerning animal protection on account of its "political" status.

3. For the purposes of determining whether the uncontested interference in the right to freedom of expression was necessary in a democratic society, the central issue is the *proportionality* of the disputed ban.

4. The backdrop to this case is the sensitive issue of the scope of the margin of appreciation. While Article 10 does not prohibit prior restrictions on freedom of expression as such, the dangers posed by restrictions of that kind for a democratic society are such that they call for the most careful scrutiny on the part of the Court (see *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV). For those reasons, the margin of appreciation to be granted to the State in the present context is a narrow one.

The scope of the review

5. As the judgment notes (paragraph 106), the parties to this case accepted that political advertising could be regulated by a general measure and they disagreed only on the breadth of the measure chosen. Indeed, the Court has accepted 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 (see *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 112-115, ECHR 2006-IV).

6. In exercising its supervisory jurisdiction, the Court must confine its attention, as far as possible, to the concrete case before it. However, in determining the proportionality of a general measure, it may be useful to assess the legislative choices underlying it (see, *mutatis mutandis*, *James and Others v. the United Kingdom*, 21 February 1986, § 36, Series A

no. 98). The quality of the parliamentary and judicial review conducted at national level is also of importance, including to the application of the relevant margin of appreciation (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 128, ECHR 2003-VIII; *Murphy v. Ireland*, no. 44179/98, § 73, ECHR 2003-IX (extracts); *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, §§ 78-80, ECHR 2005-IX; *Evans v. the United Kingdom* [GC], no. 6339/05, § 86, ECHR 2007-I; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 83, ECHR 2007-V). That being so, it is also clear from the Court's case-law that the manner in which the general measure is applied to the facts of the case remains illustrative of its impact in practice and is thus material to its proportionality (see *James and Others*, cited above, § 36).

7. It follows, as the judgment points out (paragraph 109), 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 under examination (see, for example, *Murphy*, cited above, and *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, ECHR 2008 (extracts)).

8. In the instant case, the Government justified the contested measure by, in particular, the need to protect the electoral process as part of the democratic order, and they relied in this respect on *Bowman v. the United Kingdom* (19 February 1998, *Reports of Judgments and Decisions* 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. For its part, the applicant NGO contested the relevance of that argument as it concerned a restriction which only operated prior to and during elections. In so far as the prohibition in question is not limited to electoral periods, I find that the *Bowman* judgment and reasoning based on the State's concern to protect the electoral process are of little bearing in this case (see *TV Vest*, cited above, § 66).

9. I can agree that the Government and the applicant NGO both 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 (paragraph 112 of the judgment). In assessing the measure, it is therefore necessary to take into account, on the one hand, the applicant's fundamental right to impart information and ideas of general interest which the public is entitled to receive, and 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. Such groups could indeed 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. Some regulation of the

public-interest debate broadcast on radio and television 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, the Court concluded in both of those cases that the operation of the prohibitions on advertising at issue was disproportionate. In the case before us, was the contested prohibition *necessary*, having regard to its objective? I do not believe so.

Assessment of proportionality

10. The prohibition in question was specifically circumscribed to address the precise risk of distortion the State sought to avoid. Accordingly, it only applies to advertising, given its inherently partial nature (*Murphy*, cited above, § 42), to paid advertising given the danger of unequal access based on wealth, and to political advertising (as the term is defined in paragraph 99 of the judgment). In addition, it is confined to certain media (radio and television), the legislature's choice in this matter being based on the understanding that they constitute a cornerstone of the regulatory system at issue and are the most influential and expensive media.

11. Referring to paragraph 77 of the *VgT* judgment, the applicant NGO rightly submits that limiting the prohibition to radio and television was illogical, given the comparative potency of newer media such as the Internet and that a distinction based on the particular influence of the broadcast media was not relevant. I share this perspective. Information obtained through the use of the Internet and social networks is gradually having the same impact, if not more, as broadcasted information. Their development in recent years undoubtedly signals a sufficiently serious shift in the influence of traditional broadcasting media to undermine the need to apply special measures to the latter.

12. Although the ban was drawn up in such a way as to correspond strictly to the aim pursued, the fact remains that it has an exceptionally wide scope. Any paid advertising is prohibited if it concerns "political" subjects or is issued by a body whose objects are "wholly or mainly of a political nature", irrespective of the identity or function of that body, and whatever the subject matter in question. The term "political" is construed so widely that it applies to the majority of matters of public interest (section 321(2)3 of the 2003 Act). Before the High Court, Judge Ousley found that it covered "a continuum of political activity and intensity from party political activity at election time to the pursuit by non-political bodies at any time of particular interests of public concern", while, before the House of Lords, Lord Scott emphasised the "remarkable" width of the ban (paragraphs 13 and 27 of the judgment). Furthermore, the measure applies to all television

and radio broadcasters - whether national or local, whether public-service or independent. *In this sense the prohibition is wider than that which was considered excessive in* VgT (cited above), so that the present judgment is, in my opinion, incompatible with that previous case-law.

13. Further, the ban is applied indiscriminately. In practice, this is a ban which concerns the most protected form of expression (discussion on matters of public interest) by one of the most important categories of actors in the democratic process (an NGO) and a form of media which remains influential (radio and/or television), without the least exception.

14. Admittedly, the fact of allowing political parties free broadcasting time for disseminating political and electoral messages and messages related to referenda campaigns eases the prohibition in a controlled way in respect of such parties, which are clearly essential in a democratic society. However, this relaxing of the ban does not in any way affect other important actors in public debate and the democratic process, including, in particular, NGOs, the category to which the applicant in this case belongs.

15. . In addition, this wide-ranging prohibition flies in the face of the trend observed in other Contracting States. While prudence is clearly necessary in comparing the rules governing advertising, given the lack of a precise definition of the term "political" in the various legal systems and the diversity of national traditions, what is important is that it is clear that regulations in Europe have developed to a point where the respondent State is now one of the few which still apply such a comprehensive ban, combining the three factors of a wide definition of the term "political" (applied to both the message and the advertiser), no temporal limitations and no room for exceptions.

16. Moreover, neither the legislative bodies which defined the prohibition nor – in particular – the domestic courts which examined it provided sufficient reasons to justify interference of such an unusual scope. More specifically, they did not put forward convincing arguments for rejecting the *less restrictive* solutions which exist in the majority of other Contracting States, which is, in my opinion, the key issue. This is merely a reminder of the principle, now well established in the Court's case-law, by which "in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned" (see *Glor v. Switzerland*, no. 13444/04, § 94, ECHR 2009).

17. The references to other systems in the context of that examination were brief and selective. The system most frequently referred to, as an example to be avoided, was that of the United States (paragraphs 37-54 of the judgment), but the latter country's regulatory system is so different to that in issue here that the comparison strikes me as barely relevant. The less restrictive options envisaged were dismissed in general terms on the ground that they would be potentially "difficult" to apply without arbitrariness (paragraphs 43-54 of the judgment). In spite of the adoption in 2001 of the *VgT* judgment, which the relevant Minister and the majority of the parliamentary bodies recognised as indicating that the prohibition was likely at a subsequent date to be considered incompatible with the Convention, and in spite of the increasing exceptional nature of the contested prohibition in comparison to the rules applied in other Contracting States, the Government were not able to refer to any expert report which examined whether there existed other practical solutions enabling both the scope of the prohibition to be reduced and its objectives to be conserved (see *Hatton and Others*, cited above, § 128), which consisted, in particular, of guaranteeing genuine pluralism (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 129-134, ECHR 2012).

18. Finally, the seriousness of the consequences for the applicant of enforcement of the contested prohibition is, in my opinion, of greater weight than the justifications put forward in support of this general measure (see paragraph 8 above). Specifically, the applicant is an NGO which campaigns against the use of animals for commercial, scientific or leisure purposes. It seeks to influence public opinion in order to obtain a change in legislation and public policy in this area, its ultimate goal being to prevent animal suffering. The advertisement which it wished to have broadcast was intended to raise awareness of the issue of animal ill-treatment. It was on account of those aims, held to be "wholly or mainly of a political nature" (section 321(2) of the 2003 Act), that the BACC (Broadcast Advertising Clearance Centre) refused it authorisation to have the advertisement screened, in direct application of the contested ban.

19. The ban was thus applied independently of the content of the message: no matter that the latter drew the public's attention to a matter of public interest (the ill-treatment of animals) and that no one had suggested that it was in any way shocking or reprehensible. The ban was also applied independently of the advertiser's identity: no one had claimed that the applicant NGO was a financially powerful body with the aim or possibility of endangering the broadcaster's impartiality or unduly distorting the public debate, or that it served as a smokescreen for such a group. All that it wished to do was to take part in a general debate on animal protection. To illustrate the scale of the ban's effect in the applicant NGO's case, one need

only compare its situation to that of a commercial firm: the latter would have had full freedom, limited only by its financial resources, to screen advertisements using animals to promote its products, an approach directly contrary to the values of the applicant NGO.

20. In consequence, the reasons put forward by the domestic authorities to justify the ban on the applicant NGO from screening its advertisement are, in my opinion, insufficient. It follows that this prohibition amounted to a disproportionate infringement of the applicant's right to freedom of expression, and I conclude that there has been a violation of Article 10 of the Convention.